

(2018) 12 J&K CK 0076

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 327 Of 2018

Sahil Ahsan Tramboo @APPELLANT@Hash State Of Jammu & Kashmir & Ors

Date of Decision : 18-12-2018

Acts Referred:

Jammu & Kashmir Public Safety Act, 1978, — Section 8, 13

Citation : (2018) 12 J&K CK 0076

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : M. A. Qayoom, Mir Suhail,

Judgement

1) By the medium of instant petition, petitioner seeks quashment of detention order No.32/DMP/PSA/18 dated 17.09.2018. In terms of the said order passed by respondent No.2-District Magistrate, Pulwama, in exercise of powers under clause (a) of Section 8 of the J&K Public Safety Act, 1978, Sahil Ahmad Tramboo has been directed to be taken into preventive custody and lodged in Kot Bhalwal Jail, Jammu.

2) The petitioner's case, as set out in the petition, is that the detainee was arrested more than a month ago and after keeping him in different police stations, he was falsely booked in case FIR No.17/2017 P/S Rajpora. The detainee had applied for bail which was granted by the Court of Chief Judicial Magistrate, Pulwama, on 24.06.2017 but was not released and instead was detained in terms of impugned order. The respondents are stated to have ignored to provide material relied upon by the detaining authority while passing the impugned order of detention and thus deprived the detainee of his Constitutional and Statutory rights. Grounds of detention are stated to be vague, baseless, non-existent and unfounded.

3) The respondents, in their counter affidavit, have disputed the averments made in the petition and insisted that the activities of detainee are highly prejudicial to the maintenance of public order. It is pleaded that the detention order and grounds of detention were handed over to the detainee and same were read over

and explained to him. The grounds taken by the petitioner are legally misconceived, factually untenable and without any merit. The learned counsel for the respondents has made available detention records to lend support to the case set up in the counter affidavit.

4) Heard learned counsel for the parties and also perused the record.

5) Learned counsel for the petitioner contended that, in the grounds of detention, detinue has been shown involved in FIR Nos.349/2016, 35/2016, 383/2016, 399/2016, 203/2016, 149/2017 and 194/2017 but despite that he has been detained under the provisions of Public Safety Act without assigning any compelling reasons. When it is so, the order of detention is invalid. Further added, that the detinue, in the aforesaid cases, has not applied for bail but the detaining authority, in the grounds of detention, has mentioned that "there is every likelihood of his getting bailed out", which shows non-application of mind on the part of detaining authority.

6) It is trite that when a person is involved in criminal case/cases, it has to be recorded that there are compelling reasons for passing the order of detention. No such reason has been recorded. It shall be apposite to quote Para 5 of the judgment of the Hon'ble Apex Court in "Surya Prakash Sharma v. State of U. P. and others, 1994 SCC (Cri) 1691, has held as under:

"5. The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in custody has had been engaging the attention of this court since it state first came up for consideration before a Constitution Bench in Rameshwar Shaw vs District Magistrate Burdwan to eschew prolixity we refrain from detailing all those cases accept that of Dharmendra Sugan Chand Chelawat v. Union of India wherein a three judge Bench after considering all the earlier relevant decisions including Rameshwar Shaw answered the question in the following words

The decisions referred to above lead to the conclusion that an order for detection can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detailing authority was aware of the fact that the detinue is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detinue is already in detention. The expression compelling reasons in the context of making an order for detention of a person already in in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detinue is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detinue, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

7) In the grounds of detention, it is nowhere mentioned as to whether detinue in connection with criminal cases registered against him he had applied for bail. On

the contrary, it is positive assertion of the counsel for the petitioner that the detainee had neither applied for bail nor was released on bail in the said criminal case. The Detaining Authority too has not given any cogent reason so as to derive satisfaction or to record compelling reasons for passing the order of detention.

8) Learned counsel for the petitioner also contended that the detainee had been admitted to bail in FIR No. 17/2017 P/S Rajpora but this fact has not been made mention of in the grounds of detention. The contention raised, on perusal of the grounds of detention as well as the detention record, is found to be correct. Either detaining authority has been kept in dark or otherwise detaining authority has not applied its mind properly. While detaining a person under Public Safety Act, detaining authority is under a legal obligation to analyze all the circumstances and material and then to gather conclusion about the requirement of depriving a person of his personal liberty. Non-mention about the grant of bail is serious lapse which in turn gives rise to the inference that there is non-application of mind. Similar situation has been dealt with by the Apex Court. It is quite relevant to quote following portion from para 8 of the judgment rendered by the Hon'ble Apex Court in the case of "Anant Sakharam Raut v. State of Maharashtra and another" reported in AIR 1987 SC 137:-

"We hold that there was clear non-application of mind on the part of the detaining authority about the fact that the petitioner was granted bail when the order of detention was passed. In the result we set aside the judgment of the Bombay High Court under appeal, quash the order of detention and direct that the petitioner be released forthwith.

9) Since the detainee was in the custody of the police at the time of passing of the order of detention, therefore, question arises for consideration whether an order of detention could be passed on the face of such an eventuality? The answer to this question is emphatically "No", taking into consideration the law laid down by the Hon'ble Apex Court in "Sama Aruna v. State of Telangana & Anr" (AIR 2017 SC 2662). Para 24 of the said judgment is apposite to be quoted herein below:

"24. There is another reason why the detention order is unjustified. It was passed when the accused was in jail in Crime No.221 of 2016. His custody in jail for the said offence was converted into custody under the impugned detention order. The incident involved in this offence is sometime in the year 2002-03. The detainee could not have been detained preventively by taking this stale incident into account, more so when he was in jail. In Ramesh Yadav v. District Magistrate, Etah and ors, this Court observed as follows:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detainee was released on bail he would again carry on his criminal activities in the area. If the

apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed."

10) In the backdrop of what has been stated above, the petition is allowed, as consequence of which, the order of detention bearing No.32/DMP/PSA/18 dated 17.09.2018 is quashed. Further custody of the detenu shall be governed by the orders as shall be passed by the court of competent jurisdiction in the criminal cases registered against him

11) Registry to return the detention record to the learned counsel for the respondents.