

(2019) 12 J&K CK 0008
In the Jammu And Kashmir High Court
Case No : Writ Petition (Crl) No. 222 Of 2019

Sajad Ahmad Tantray

APPELLANT

Vs

State Of Jammu And Kashmir And Others

RESPONDENT

Date of Decision : 06-12-2019

Acts Referred:

Constitution Of India, 1950 — Article 22(5)
Jammu And Kashmir Public Safety Act, 1978 — Section 13

Citation : (2019) 12 J&K CK 0008

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : M. A. Makroo, Akhil Pharde, S. H. Naqashbandi

Final Decision : Disposed Of

Judgement

Sanjeev Kumar, J

1. Challenge in this petition is thrown to the Order no.22/DMK/PSA/2019 dated 27.05.2019, passed by the District Magistrate, Kulgam - respondent no.2 herein, whereby Sajad Ahmad Tantray son of Late Mohd Maqbool Tantray resident of Shirpora Frisal Yaripora District Kulgam (hereinafter referred to as the "detenu"), has been placed under preventive detention, on the grounds set out in petition in hand.
2. Counter affidavit has been filed by the respondents, vehemently resisting the petition.
3. Heard learned counsel for parties and considered the matter.
4. Learned counsel for petitioner states that the allegations made in the grounds of detention are vague, non-existent and no prudent man can make a representation against such allegations and passing of detention on such grounds is unjustified and unreasonable. The next submission of the learned counsel for the petitioner is that the detenu was arrested on 12.09.2018 from his shop and

was in custody in connection with case FIR no.72/2018 police station Yaripora. The bail was granted in favour of detenu by the Additional District and Sessions Judge (Special Judge TADA/POTA) Srinagar, in the aforesaid FIR. However, detenu was not released and was placed under preventive detention in terms of impugned order of detention. The detaining authority is said to have spelled out no compelling reason to pass the order of preventive detention against detenu. Learned counsel for petitioner also states that detenu was not provided the material, both for and against him, placed before the detaining authority for arriving at subjective satisfaction and as a result whereof, detenu was prevented to make an effective representation and that this in itself amounts to infraction of provisions of Section 13 of J&K Public Safety Act, 1978, read with Article 22(5) of the Constitution of India. To buttress his arguments, learned counsel for petitioner has placed reliance on *anant Sakharam Raut v. State of Maharashtra and another*, AIR 1987 SC 137.

5. Per contra, learned counsel appearing for respondents has stated that in view of activities mentioned in the grounds of detention, detaining authority had no option but to order the detention of detenu. Learned counsel also submits that requisite material has been supplied to the detenu but he has not filed representation against his detention, so none of his constitutional rights stand violated. Learned counsel further submitted that detenu's activities in fact warrant for his detention.

6. In the backdrop of the case set up coupled with the submissions made by the learned counsel for the parties, it is to say that whether a person, who is in jail, can be detained under preventive detention law has been a subject matter of consideration before the Supreme Court very often. In *Dharmendra Suganchand Chelawat & anr v. Union of India*, AIR 1990 SC 1196, the Supreme Court while considering the same issue has reconsidered its earlier judgments on the point in *Rameshwar Shaw v. District Magistrate, Burdwan*, AIR 1964 SC 334; *Masood Alam v. Union of India*, AIR 1973 SC 897; *Dulal Roy v. District Magistrate, Burdwan*, AIR 1975 SC 1508; *Alijan Mian v. District Magistrate, Dhanbad*, AIR 1983 SC 1130; *Ramesh Yadav v. District Magistrate, Etah*, AIR 1986 SC 315; *Suraj Pal Sahu v. State of Maharashtra*, AIR 1986 SC 2177; *Binod Singh v. District Magistrate, Dhanbad*, AIR 1986 SC 2090; *Smt Shashi Aggarwal v. State of U.P.*, AIR 1988 SC 596, and came to the conclusion that an order for detention 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 detaining authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis whereof it may be satisfied that (a) the detenu is likely to be released from the custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, 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. When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be sustained. The grounds of detention do not mention that the detaining authority is aware of the fact that the detenu had already been released on bail by the court competent jurisdiction at the time of making the order of detention. I find that in the present case the detaining authority has not drawn subjective satisfaction about the detention of the detenu. There is no mention of the fact that the detenu has applied for bail in the criminal case against him nor is there any satisfaction that detenu has been enlarged on bail. This indicates a total absence of application of mind on the part of detaining authority while passing the order of detention. In that view of matter, the impugned detention order is vitiated.

8. It may not be out of place to mention here that the preventive detention is not a quick alternative to normal legal process, is what is said by the Supreme Court in *V. Shantha v. State of Telangana & ors*, AIR 2017 SC 2625. The Supreme Court has held that preventive detention of a person by a State after branding him a 'goonda' merely because the normal legal process is ineffective and time-consuming in 'curbing the evil he spreads', is illegal and that the detention of a person is a serious matter affecting the liberty of the citizen. Preventive detention cannot be resorted to when sufficient remedies are available under general laws of the land for any omission or commission under such laws, the Supreme Court observed.

Recourse to the normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detenu from indulging in further prejudicial activities, affecting security of the State, and that there was no other option except invoking the provisions of the preventive detention Act as an extreme measure to insulate. No doubt the offences alleged to have been committed by detenu are such as would attract punishment under the prevailing laws but that has to be done under the said prevalent laws and taking recourse to preventive detention laws would not be warranted. The preventive detention involves the detaining of a person without trial in order to prevent him from committing certain types of offences. But such detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating the crimes which the detenu may have committed. After all, the preventive detention cannot be used as an instrument to keep a person in perpetual custody without trial. My views are fortified by the judgements rendered in *Rekha v. State of Tamil Nadu & another*, (2011) 5 SCC 244 and *V. Shantha v. State of Telangana (supra)* and *Sama Aruna v. State of Telangana* AIR 2017 SC 2662.

9. For the foregoing reasons, petition is disposed of and detention Order no.22/DMK/PSA/2019 dated 27.05.2019, passed by District Magistrate, Kulgam, is quashed. Respondents are directed to release the detenu forthwith, provided he

is not required in any other case.