

(2019) 05 J&K CK 0024

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 419 Of 2018

**Shahid Ahmad Tantray @APPELLANT@Hash State Of Jammu & Kashmir
And Anr**

Date of Decision : 08-05-2019

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8
Constitution Of India, 1950 — Article 21

Citation : (2019) 05 J&K CK 0024

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Mir Shafaqat Hussain, Asif Maqbool

Judgement

1) By virtue of order bearing No.86/DMB/PSA/2018 dated 06.11.2018, passed by respondent No.2-District Magistrate, Baramulla, in exercise of powers under Section 8 of the J&K Public Safety Act, 1978, Shahid Ahmad Tantray son of Abdul Rehman Tantray resident of Tantray Mohalla Fatehpura Baramulla, has been taken into preventive custody. Veracity of the said order is assailed in the instant petition on the grounds detailed out therein.

2) The respondents have filed the counter affidavit wherein they have resisted the petition by pleading that the detention order has been passed validly after going through the relevant record and evaluating the conduct of the detenu. The procedure provided under law has been followed strictly. The learned counsel for the respondents has produced the detention record to lend support to the stand taken in the counter affidavit.

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

4) Learned counsel for the petitioner projected various grounds while seeking quashment of the impugned detention order. However, the star ground is that the detenu has been shown involved in various FIRs which include FIR Nos. 283/2016, 78/2012, 171/2016, 161/2016, 165/2016 and FIR No.303/2016 but the detenu had already been admitted to bail in these FIRs but this important fact has not been made mention of in the grounds of detention though reference

to said FIR has been made. 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 also being submitted that the detenu was granted bail in FIR No.303/2016 on 22.10.2018 but he has been shown to be in custody, in this case, in terms of impugned order passed on 06.11.2018, which vividly is a manifest non-application of mind. 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 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....."

5) Next, it is further projected that when the detenu was already in custody, there was no need to direct his preventive detention. It has been stated in the grounds of detention that the detenu is involved in various criminal cases but MOHAMMAD ALTAF BHAT despite that he has detained under preventives laws. The arrest of the detenu in connection with said FIR(s), at the time of passing of the order of detention, has not been disputed.

6) The object of passing the order of detention is to deter a person from acting in any manner prejudicial to the security of the State or public order. When the movement of the person is already under curtailment i.e. is in custody in connection with a criminal case, then there can be no requirement of preventive detention, unless, of course, circumstances exist for passing order of detention. Preventive laws have the effect of depriving a person of liberty which is precious, deprivation thereof at times may be unavoidable, for justifying such deprivation, safeguards as are provided by law are required to be respected. A person who dares to cause any type of insecurity or threatens security of the State has to be dealt with iron hand but for so doing the Constitutional safeguards as are available are also to be respected.

7) It is settled position of law that a person in involved in a criminal case can be detained under the provisions of preventive laws provided there are compelling circumstances for so doing otherwise the order of detention shall be bad. In this connection, it is quite apt to quote following Para from the judgment "T. P. Moideen Koya vs. Government of Kerala and ors." reported in 2004 (8) SCC 106:

".....in law there is no bar in passing a detention order even against a person

who is already in custody in respect of a criminal offence if the detaining authority is subjectively satisfied that detention order should be passed and that there must be cogent material before the authority passing the detention order for inferring that the detenu was likely to be released on bail"

8) Since the detenu 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 detenu 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 detenu 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."

9) 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 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 of which it may be satisfied that (a) the detenu is likely to be released from 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."

10) Preventive laws have the effect of depriving a person of his liberty which is precious, however, deprivation thereof at times becomes indispensable. For justifying such deprivation, the safeguards as are provided by law are also required to be respected. A person who dares to threaten maintenance of public order has to be dealt with iron hand but the Constitutional safeguards as are available are also to be followed. The Article 21 of the constitution of India has protected the life and personal liberty of people by providing that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The word established is used in Article 21 in order to denote and ensure that the procedure prescribed by law must be defined with certainty in order that those who are deprived of their fundamental right to life or liberty must know the precise extent of such deprivation. If a person is to be deprived of his life or liberty, the authority concerned is under a constitutional mandate to follow the procedure established by law, the procedure prescribed for depriving a person of his life or liberty has to be reasonable, fair and just. The protection contained in the article does not extend to only citizens but to all persons. The law providing for preventive detention has to be strictly construed keeping in view the delicate balance between social security and citizen freedom. Thus if the preventive detention has not been ordered in strict conformity with law authorizing detention, the detenu is entitled to be released.

11) Preventive detention, in effect, is an invasion to personal liberty which infringes the right to liberty guaranteed by Article 21 of the Constitution of India. Preventive detention, in view of exception to Article 21, has to be reasonable, shall not be on the ipse dixit of the detaining authority. Preventive detention wherever permissible shall adhere to the procedural safeguards. Infraction of safeguards renders the order of detention unsustainable. The Hon'ble Supreme Court in catena of judgments has made it clear as to what is the value of the 'constitutional safeguard' and as to what is the value of right to liberty guaranteed under Article 21 of the Constitution of India. In this connection, it shall be quite relevant to quote paras 37 and 38 of the judgment rendered by a Bench of three Hon'ble Judges of the Hon'ble Apex Court in case captioned "Rekha Vs. State of Tamil Nadu and anr", reported in (2011) 5 SCC 244:

"37. As observed in Abdul Latif Abdul Wahab Sheikh v. B. K. Jha vide SCC para 5: (SCC p.27)

"5....The procedural requirements are the only safeguards available to a detenu

since the court is not expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard."

As observed by Mr. Justice Douglas of the United States Supreme Court in *Joint Anti-Fascist Refugee Committee v. McGrath*: (US p. 179)

"...It is procedure that spells much of the difference between rule of law and rule of whim or caprice. Steadfast adherence to strict procedural safeguards are the main assurances that there will be equal justice under law".

38. Procedural rights are not based on sentimental concerns for the detenu. The procedural safeguards are not devised to coddle criminals or provide technical loopholes through which dangerous persons escape the consequences of their acts. They are basically society's assurances that the authorities will behave properly within rules distilled from long centuries of concrete experience".

12) Keeping in view the hallmark of the cherished right to liberty in keeping with the object of Article 21 of the Constitution of India, while exercising power to order preventive detention, various procedural and other safeguards available have to be respected and adhered to. It is the bounden duty of the detaining authority to derive subjective satisfaction before passing the order of detention. If record suggests that there is non-application of mind, that ipso facto means that subjective satisfaction is missing.

13) The cumulative effect of the aforesaid discussion leads to the only conclusion i.e. the order of detention impugned bearing No. 86/DMB/PSA/2018 dated 06.11.2018, passed by respondent No.2-District Magistrate, Baramulla, is not valid, as such, quashed. The detenu is directed to be released from the preventive custody, unless, of course he is not required in connection with any other case.

14) The record, as produced, be returned to the learned counsel for the respondents.