

(2018) 11 J&K CK 0113

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 224 Of 2018

Shahid Muneeb Mir @APPELLANT@Hash State Of Jammu & Kashmir And Others

Date of Decision : 30-11-2018

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161
Constitution Of India, 1950 — Article 21, 22(1), 22(3), 22(3)(b)

Citation : (2018) 11 J&K CK 0113

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Wajid Hasib, Mir Shafqat Hussain, Asif A. Bhat

Final Decision : Disposed Off

Judgement

1. Impugned in this petition is Order no.46/DMA/PSA/2018 dated 03.08.2017, passed by District Magistrate, Anantnag - respondent no.2 herein, whereby Shahid Muneeb Mir adopted son of Mohammad Akber resident of Sumbruna Achabal A/P Shangus, District, Anantnag (for brevity "detenu"), has been placed under preventive detention, on the grounds set out in petition in hand.
2. Counter affidavit has been filed by respondents, vehemently resisting the petition.
3. Heard learned counsel for parties and considered the matter.
4. Learned counsel for petitioner states that detenu was arrested by police station Achabal from his home on 17.07.2018 and was implicated in case FIR no.49/2018. Bail was granted in favour of detenu on 23.07.2018, by learned Judicial Magistrate 1st Class, Shangus. However, detenu was not released and was implicated in another case, bearing FIR no.142/2017. The detenu applied for bail, which was granted on 03.08.2018, but he was not released and was kept in custody for several days. While being in custody, detenu was shifted to District Jail Kathua on 07.08.2018, to be detained under preventive detention in terms of impugned detention order. Learned counsel further states that detenu was

already admitted to bail in case FIR no.49/2018 on 23.07.2018, but this important fact has not been reflected by detaining authority in grounds of detention, which vitiates impugned detention order. The alleged activity, made mention of in grounds of detention, which is said to have been the basis for passing detention order, had occurred on 05.04.2018 whereas impugned detention order has been passed on 03.08.2018, i.e. after a delay of about four months. According to learned counsel, the unexplained delay between alleged activity and order of detention has snapped proximity of order of detention with the time of its necessity. He also asserts that detenu was not furnished copy of dossier and other connected material, copies of FIR(s), statement(s) under Section 161 Cr.P.C., seizure memos of cases mentioned in grounds of detention, so as to make him enable to make an effective representation to government as well as detaining authority. He has also vehemently stated that allegation reflected in grounds of detention are vague and do not justify passing of detention order inasmuch as detaining authority has not given any reasonable justification to pass detention order and therefore impugned order is pregnant with complete non-application of mind on part of detaining authority. To buttress his arguments, learned counsel for petitioner has relied upon *Razia Umar Bakshi v. Union of India and others* AIR 1980 SC 1751; *Anant Sakharam Raut v. State of Maharashtra* and another AIR 1987 SC 137; *Sophia Gulam Mohd. Bham v. State of Maharashtra* AIR 1999 SC 3051; *Mohammad Ashraf Khan v. State & ors* 2010 (I) SLJ 365; *State of Maharashtra and others v. Santosh Shankar Acharya*, (2000) 7 SCC 463; and *Tariq Ahmad Dar v. State of J&K & ors.*, 2017 Legal Eagle 131.

5. Per contra, learned counsel for respondents has insisted that all the technical requirements had been complied with, more particularly as required under J&K PSA, which provide that earliest opportunity of making a representation be provided to detenu.

6. Reverence of life is irrefragably concomitant with the dignity of a human being, who is basically divine, not obsequious. A human personality is indued with potential infinitude and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, "a brief candle", or "a hollow bubble". The spark of life gets more splendiferous when a man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence". When a dent is created in the reputation, humanism is paralysed. Reverence for the nobility of a human being has to be the cornerstone of a body polity that believes in orderly progress. But, some, the incurable ones, become totally oblivious of the fact that living with dignity has been enshrined in our Constitutional philosophy and it has its ubiquitous presence and the majesty and sacrosanct dignity cannot be allowed to be crucified in the name of precautionary incarceration. Albert Schweitzer, highlighting on Glory of Life, pronounced with conviction and humility, "the reverence of life offers me my

fundamental principle on morality". The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands. Personal liberty is of the widest amplitude covering a variety of rights. Its deprivation shall only be in accordance with procedure prescribed by law conformable to mandate of the Supreme Law, the Constitution, more particularly to Article 21 thereof. Of all fundamental rights, conceded to citizens under the Constitution, right of personal liberty is most cherished. A person is not to be deprived of this right except in accordance with the procedure laid down by law, even if he be a man of the most desperate character.

7. Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided, against improper exercise of power, must be jealously watched and enforced by the Court. Article 22(3)(b) of the Constitution of India, which permits preventive detention, is an exception to Article 21 of the Constitution. An exception cannot, ordinarily, nullify full force of the main rule, which is the right to liberty guaranteed under Article 21 of the Constitution. An exception can apply only in rare cases. The imposition of what is, in effect, a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with the ordinary concepts of the rule of law. The law of preventive detention can only be justified by striking the right balance between individual liberty on the one hand and the needs of an orderly society on the other. The power of preventive detention is a frightful and awesome power with drastic consequences affecting personal liberty which is the most cherished and prized possession of man in a civilized society. The said power has to be exercised with the greatest care and caution, and it is the duty of the Courts to ensure that this power is not abused or misused. The power of preventive detention must be confined to very narrow limits, otherwise the right to liberty would be rendered nugatory. To prevent misuse of this potentially dangerous power, the law of preventive detention has to be strictly construed and meticulous compliance with procedural safeguards, however technical, is mandatory and vital. When it comes to fundamental rights under the Constitution, the Court, irrespective of the enormity and gravity of allegations made against the detenu, must intervene. The gravity of the evil to the community, resulting from anti-social activities, cannot furnish sufficient reason for invading personal liberty of a citizen, except in accordance with procedure established by law, particularly as normal penal laws would still be available for being invoked instead of keeping a person in detention without trial. The law relating to preventive detention has always been strictly interpreted so as to uphold the concept of individual freedom. Courts have always acted to safeguard the purity of such right which is available to be interfered with only under the most stringent and rigorous conditions. What difference is it to detenu whether his immurement is called preventive or punitive? Besides, in cases of preventive detention no offence is proved and justification of such detention is suspicion or

reasonable probability, and there is no conviction that can only be warranted by legal evidence. Preventive detention is every so often described as a 'jurisdiction of suspicion', Detaining authority passes detention order on subjective satisfaction. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to rule of law.

8. Preventive detention law makes room for detention of a person without a formal charge and without trial. The person detained is not required to be produced before the Magistrate within 24 hours, so as to give an opportunity to the Magistrate to peruse the record and decide whether detenu is to be remanded to police or judicial custody or allowed to go with or without bail. The detenu cannot engage a lawyer to represent him before detaining authority. In the said backdrop, it is of utmost importance that whatever procedural safeguards guaranteed to detenu by the Constitution and preventive detention law, should be strictly followed. Right to liberty guaranteed by Article 21 implies that before a person is imprisoned, a trial must ordinarily be held giving him full opportunity of hearing, and that too through a lawyer, because a layman would not be able to properly defend himself except through a lawyer. The importance of a lawyer to enable a person to properly defend himself has been elaborately explained by the Supreme Court in *A.S. Mohd. Rafi v. State of Tamilnadu* AIR 2011 SC 308 and *Md. Sukur Ali v. State of Assam*, JT 2011 (2) SC 527. As observed by Mr Justice Sutherland of the U.S. Supreme Court in *Powell v. Alabama*, 287 U.S. 45 (1932) "Even the intelligent and educated layman has small and sometimes no skill in the science of law", and hence, without a lawyer he may be convicted though he is innocent. Article 22(1) of the Constitution makes it a fundamental right of a person detained to consult and be defended by a lawyer of his choice. But Article 22(3) specifically excludes the applicability of clause (1) of Article 22 to cases of preventive detention. Therefore, we must confine the power of preventive detention to very narrow limits, otherwise the great right to liberty won by our Founding Fathers, who were also freedom fighters, after long, arduous, historical struggles, will become nugatory. In *State of Maharashtra & Ors. Vs. Bhaurao Punjabrao Gawande*, (2008) 3 SCC 613 this Supreme Court observed:

"...Personal liberty is a precious right. So did the Founding Fathers believe because, while their first object was to give unto the people a Constitution whereby a government was established, their second object, equally important, was to protect the people against the government. That is why, while conferring extensive powers on the government like the power to declare an emergency, the power to suspend the enforcement of fundamental rights or the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights which they regarded as fundamental. The imperative necessity to protect these rights is a lesson taught by all history and all human experience. Our Constitution makers had lived through bitter years and seen an alien Government trample upon human rights which the country had fought hard to

preserve. They believed like Jefferson that "an elective despotism was not the Government we fought for". And, therefore, while arming the Government with large powers to prevent anarchy from within and conquest from without, they took care to ensure that those powers were not abused to mutilate the liberties of the people. (vide A.K. Roy Vs. Union of India (1982) 1 SCC 271, and Attorney General for India Vs. Amratlal Prajivandas, (1994) 5 SCC 54."

9. The Constitution Bench of the Supreme Court in M. Nagaraj & ors. Vs. Union of India & ors. (2006) 8 SCC 212, observed:

"It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race."

10. The Nine Judge Constitution Bench of the Supreme Court in I.R. Coelho (dead) By LRs. Vs. State of T.N., (2007) 2 SCC 1, observed:

"It is necessary to always bear in mind that fundamental rights have been considered to be the heart and soul of the Constitution..... Fundamental rights occupy a unique place in the lives of civilized societies and have been described in judgments as & "transcendental", & inalienable, and primordial".

11. In the present case, averment of learned counsel for respondents is that there are very serious allegations against detenu as he has always been in the lead role in stone pelting incidents and has been creating law and order problem in the area of Achabal, Anantnag, and its adjacent areas and in order to accomplish antisocial agency, he resorted to stone pelting. And in this connection, various criminal cases are already going on against detenu under various provisions of Ranbir Penal Code and if he is found guilty, he will be convicted and given appropriate sentence. Maybe, offences allegedly committed by detenu attract punishment under prevailing laws but that has to be done under prevalent laws and taking recourse to preventive detention laws would not be warranted. Detention cannot be made a substitute for ordinary law and absolve investigating authorities of their normal functions of investigating crimes, which detenu may have committed. After all, preventive detention cannot be used as an instrument to keep a person in perpetual custody without trial. The Supreme Court in Rekha v. State of Tamil Nadu AIR 2011 SCW 2262, while emphasising need to adhere to procedural safeguards, observed:

"It must be remembered that in case of preventive detention no offence is proved and the justification of such detention case is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as "jurisdiction of suspicion", The Detaining Authority passes the order of detention on subjective satisfaction. Since Clause (3) of Article 22 specifically excludes the applicability of Clauses (1) and (2), the detenu is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse of this

potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however, technical, is, in our opinion, mandatory and vital."

12. It is apt to mention that preventive detention is not a quick alternative to normal legal process, is the saying of 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 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 normal legal procedure would be time consuming and would not be an effective deterrent to prevent detenu from indulging in further prejudicial activities, affecting maintenance of public order, and that there was no other option except invoking provisions of preventive detention Act as an extreme measure to insulate. No doubt, offences alleged to have been committed by detenu are such as to attract punishment under prevailing laws but that has to be done under the said prevalent laws and taking recourse to preventive detention laws would not be warranted. Preventive detention involves detaining of a person without trial aiming at to prevent him from committing certain types of offences. But such detention cannot be made a substitute for ordinary law and absolve investigating authorities of their normal functions of investigating crimes, which detenu may have committed. After all, 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 the cases of *Rekha's* and *V. Shantha* (supra), and *Sama Aruna v. State of Telangana* AIR 2017 SC 2662.

13. For the foregoing reasons, petition is disposed of and detention Order no.46/DMA/PSA/2018 dated 03.08.2017, passed by District Magistrate, Anantnag, is quashed. Respondents are directed to release the detenu, namely, Shahid Muneeb Mir adopted son of Mohammad Akber resident of Sumbruna Achabal A/P Shangus, District, Anantnag, forthwith, provided he is not required in any other case. Disposed of.