

(2018) 07 J&K CK 0057

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition Nono.09 Of 2018

Shakoor Ahmed @APPELLANT@Hash State Of Jammu & Kashmir And Others

Date of Decision : 16-07-2018

Acts Referred:

Constitution of India — Article 21, 22(1), 23(3), 22(3)(d)
Jammu and Kashmir Public Safety Act, 1978 — Section 8(1)(a), 13
Jammu and Kashmir State Ranbir Penal Code, 1989 — Section 32, 282, 307, 323, 341, 506
Arms Act, 1959 — Section 3, 25

Citation : (2018) 07 J&K CK 0057

Hon'ble Judges : Tashi Rabstan, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

1. Order impugned bearing No.01/PSA 2018 dated 27th of January, 2018, passed by District Magistrate, Reasi (respondent No.2), has been

questioned by the petitioner, namely, Shakoor Ahmed @ Shoki S/o Abdul Hamid R/o Gran Morh, Tehsil and District Reasi, by virtue of which he has

been placed under preventive detention, on the grounds set out in the petition.

2. Counter-affidavit has not been filed by respondents, however in terms of order dated 06.07.2018 passed by this Court, detention record has been

produced by Mr. Harbans Lal, Assistant Commissioner (Reasi). Mr. Ahtsham Bhat, learned GA, representing the respondents advanced his

arguments and has resisted the petition.

3. I have heard learned counsel for parties and considered the matter.

4. Detenu has been placed under detention vide detention order No. 01/PSA 2018 dated 27th of January, 2018, passed by District Magistrate, Reasi,

in exercise of powers conferred by Section 8 (1) (a) of Jammu and Kashmir Public Safety Act, 1978 (for short "Act of 1978") on the ground of

his being allegedly involved in three criminal cases viz. FIR Nos.143/2015, 230/2017 and 08/2018 registered with Police Station, Reasi. In terms of the

detention order passed on 27th of January, 2018, the detenu was detained and lodged in Central Jail Kote Bhalwal, Jammu for a period of three

months. On the recommendation of the Advisory Board, the order and period of detention of the detenu was confirmed/approved by the Government

vide Order No. Home/PBV/206 of 2018 dated 26.02.2018.Â

5. Mr. Ahtsham Bhat, learned GA has submits that all the technical requirements had been complied with, more particularly Section 13 of J&K PSA,

which required that earliest opportunity of making a representation, be provided to the detenu.Â

6. It is pertinent to mention here, apart from what has been discoursed herein before, that reverence of life is inseparably concomitant with the

dignity of a human being who is basically divine, not obsequious. A human personality is endued 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 splendid when 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 paralyzed. 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 sacro-sanctity 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.

7. Article 22(3)(b) of the Constitution of India, which vouchsafes preventive detention, is only an exception to Article 21 of the Constitution. An

exception is an exception and cannot ordinarily nullify the full force of main rule, which is right to liberty in Article 21 of the Constitution. Fundamental

rights are meant for protecting civil liberties of people and not to put them in immurement for a long period shorn of recourse to a lawyer and without

a trial. It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is that in essence a detention order

of three months, or any other period(s), is a punishment of that particular period? s incarceration. 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.Â

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 the 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 the

detaining authority. In the said background it is of utmost importance that whatever procedural safeguards are guaranteed to the detenu by the

Constitution and the 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. Mr. Satinder Gupta, learned counsel appearing for the petitioner submits that the petitioner has filed a representation after one month of issuance

of detention order i.e., on 26.02.2018 before Principal Secretary, Ministry of Home Affairs, Civil Secretariat, Jammu and Kashmir, Jammu but it is

petitioner's dismay that the said representation filed by the petitioner has not been decided till today.

12. Learned counsel for the petitioner has relied on the various decisions rendered by Apex Court of Country as well as this High Court reported as

AIR 1996 Supreme Court 2998, AIR 1952 Supreme Court 27, 2004 (3) JKC 288, 2006 (1) S.L.J 161, 2006 (1) S.L.J 249, 2007 (1) S.L.J 89, 1989

Legal Eagle 90, 2010 (1) S.L.J 57, 2011 (II) S.L.J 660, 2011 (II) S.L.J 762, 2010 (I) S.L.J 56 and 2011 (II) S.L.J 923.

13. It is the submission of Mr. Ahtsham Bhat, learned GA appearing for the respondents that the petitioner is a habitual offender and is involved in

multiple criminal cases, and in this regard various First Information Reports have been registered against him with Police Station, Reasi, for the

commission of offences punishable under Sections 341/323/506 RPC (in FIR No.143/2015), 307 RPC & 3/25 Arms Act (FIR No.230/2017) and 341,

323, 506, 282, 34 RPC (in FIR No.08/2018). He further submits that in view of serious involvement of detenu in several criminal activities, respondent

No.2 passed the impugned detention order against the petitioner and thereafter, the order and period of detention was approved by the

Government.

14. On perusal of the record, it transpires that on the report furnished by ADGP,

CID, the period of detention was further extended by the

Government vide order No. Home/PB-V/426 of 2018 dated 23.04.2018 detaining the detenu in Central Jail, Kot Bhalwal, Jammu.

15. Per contra, Mr. Satinder Gupta, learned counsel for the petitioner submits that in all the aforementioned criminal cases, the detenu is facing trial

before the competent court of jurisdiction. He submits that in FIR No.143/2015, the challan was produced and even he was acquitted by the Court of

Special Mobile Magistrate, Reasi. It is further submitted by him that in FIR Nos. 230/2017 and 08/2018 the petitioner has been enlarged on bail by the

Court of CJM, Reasi. His further contention is that the matter is subjudice before the trial court and the trial Court has yet to give its findings in the

criminal cases. Submission of learned counsel for the petitioner has substance. 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 emphasizing 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.”

16. It may not be out of place to mention here 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 2017SC 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 the detenu from indulging in further prejudicial

activities in the business of spurious seeds, affecting maintenance of public order, and that there was no other option except to invoke 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 to

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. Preventive detention involves 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 crimes which the 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 judgments rendered in *Rekha's case* and *V. Shantha v. State of Telangana case*

(*supra*) and *Sama Aruna v. State of Telangana* AIR 2017 SC 2662.

17. No doubt, neither possibility of launching of a criminal proceedings nor pendency of any criminal proceedings is an absolute bar to an order of

preventive detention. But, failure of detaining authority to consider possibility of either launching or pendency of criminal proceedings may, in the

circumstances of a case, lead to the conclusions that detaining authority has not applied its mind to vital question whether it was necessary to make an

order of preventive detention. Since there is allegation that the order of detention is issued in a mechanical manner without keeping in mind whether it

was necessary to make such an order when criminal proceedings could well serve the purpose. Detaining authority must satisfy the court that the

question too was borne in mind before the order of detention was made, therefore, the Court is justified in drawing the inference that there was non-application of mind by detaining authority to vital question whether it was necessary to preventively detain the petitioner.

18. For the foregoing reasons, this petition is, disposed of, and Order impugned bearing No. 01/PSA 2018 dated 27th of January, 2018, passed by

District Magistrate, Reasi, quashed. Consequently, Government Order No. Home/PB-V/426 of 2018 dated 23rd of April, 2018 is also quashed.

Respondents are directed to release the detenu, namely, Shakoor Ahmed @ Shoki S/o Abdul Hamid R/o Gran Morh, Tehsil and District Reasi, forth

with, provided he is not required in any other case.

19. Disposed of with the aforesaid observations.

20. Registry is directed to return the record produced by Mr. Harbans Lal, Assistant Commissioner (Revenue), Reasi, to Mr. Ahtsham Bhat, learned

GA.