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**(2018) 12 J&K CK 0022**

**In the Jammu And Kashmir High Court**

**Case No : Habeas Corpus Petition (HCP) No. 262 Of 2018**

**Shamim Ahmad Dar @APPELLANT@Hash State Of Jammu & Kashmir And Others**

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**Date of Decision : 06-12-2018**

**Acts Referred:**

Unlawful Activities (Prevention) Act, 1967 — Section 13(2), 18, 19, 38, 39  
Arms Act, 1959 — Section 7, 25  
Police Act, 1861 — Section 30  
Constitution Of India, 1950 — Article 22(5), 22(6)

**Citation : (2018) 12 J&K CK 0022**

**Hon'ble Judges : Rashid Ali Dar, J**

**Bench : Single Bench**

**Advocate : Ahmad Javaid, Mir Suhail**

**Final Decision : Allowed**

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## **Judgement**

1. Pursuant to order No.10/DMK/PSA/2018 dated 01.08.2018, Shamim Ahmad Dar(hereinafter referred to as the detainee), has been taken into preventive custody by invoking powers under Clause (a) of Section 8 of the J&K Public Safety Act so has been lodged in District Jail, Kathua (Jammu). By the instant petition quashment of the said order is sought on the grounds enumerated in the petition.

2. Learned counsel for the petitioner firstly contended that the detainee has been disabled from making an effective representation against the detention as the material, which formed base of the grounds of detention and consequent order of detention, has not been furnished to the detainee.

3. Perusal of the Annexure-R2 annexed with the counter affidavit, which is execution report, reveals that only copy of detention warrant and copy of grounds of detention (04 leaves) have been provided to the detainee while executing the detention warrant. Furnishing the copy of grounds of detention would not absolve the detaining authority from furnishing the material forming base of the grounds of detention as it is the material which would enable the

detenue to make an effective representation against the detention. Non-supply of the material would amount to violation of Article 22(5) of the Constitution of India, so deprivation of a valuable right.

4. In paras 27 and 28 of the judgment captioned Thahira Haris etc. etc. Vs. Government of Karnataka &Ors, reported in AIR 2009 Supreme Court 2184, Hon'ble Apex Court has held as under:

"27. There were several grounds on which the detention of the detenue was challenged in these appeals but it is not necessary to refer to all the grounds since on the ground of not supplying the relied upon document, continued detention of the detenue becomes illegal and detention order has to be quashed on that ground alone.

28. Our Constitution provides adequate safeguards under clauses (5) and (6) of Article 22 to the detenue who has been detained in pursuance of the order made under any law providing for preventive detention. He has right to be supplied copies of all documents, statements and other materials relied upon in the grounds of detention without any delay. The predominant object of communicating the grounds of detention is to enable the detenue at the earliest opportunity to make effective and meaningful representation against his detention.

5. Next it is contended by the learned counsel for the petitioner that the detenue has also been disabled from making an effective representation by not supplying him the translated copies of the ground of detention which are in English language besides being in a hyper technical language which the detenue is not in a position to understand being illiterate.

6. The records, as annexed with the counter affidavit, do not suggest that the translated copies of grounds of detention have been supplied to the detenue, therefore, infringement of right guaranteed under Article 22(5) of the Constitution. The service of the grounds of detention on the detenue is a very precious constitutional right and the object behind the same is to enable the detenue to file an effective representation. It will be an empty formality to supply the grounds of detention to the detenue unless he is in a position to understand the same. In my view I am fortified by the judgment rendered by the Hon'ble Apex Court in the case "Chaju Ram Vs. The State of Jammu & Kashmir" reported in AIR 1971 SC 263. Following portion from para 9 of the judgment shall be quite apposite to be quoted:

"..... The detenu is an illiterate person and it is absolutely necessary that when we are dealing with a detenu who cannot read or understand English language or any language at all that the grounds of detention should be explained to him as early as possible in the language he understands so that he can avail himself of the statutory right of making a representation. To hand over to him the document written in English and to obtain his thumb impression on it in token of his having received the same does not comply with the requirements of the law

which gives a very valuable right to the detainee to make a representation which right is frustrated by handing over to him the grounds of detention in an alien language. We are therefore compelled to hold in this case that the requirement of explaining the grounds to the detenu in his own language was not complied with."

7. In para 3 of the counter affidavit it is projected that the grounds of detention were read over, explained and served to the detainee. On perusal of the records, it is found that the grounds of detention are shown to have been read over and explained to the detainee by one ASI Nazir Ahmad but no affidavit in support thereof has been filed which was required to be sworn by the said officer. Looking at the said ground from yet another angle, what can be said is that to eradicate all the doubts, it was incumbent on the part of the person, who did the exercise of handing over the documents and conveying the contents thereof to the detainee, to file an affidavit in order to attach a semblance of fairness to his actions. Resort can, in this behalf, be had to the law laid down by the Apex Court of the country in the case of "State Legal Aid Committee, J&K versus State of J&K & others, reported in AIR 2005 SC 1270, wherein it has been held as under:

"Though several questions have been raised in this petition, it is not necessary to deal with them in detail as we find that there is no definite material to show that the requirements of Section 13 of the Jammu & Kashmir Public Safety Act, 1978, (in short the Act), requiring the grounds of order of detention to be disclosed/communicated to the person affected by the order has been complied with. Though in the affidavit filed by the State, it has been stated that the contents of the warrants and grounds of detention were served, read over and explained to the assessee and he was informed about his right to make a representation against the detention, if he so desired, there is no material placed on record to substantiate this stand. It is stated in the affidavit that the detainee refused to receive copy of the detention order and also refused to put his signatures on the documents.

The least the State could have done is to file an affidavit of the person who wanted to serve the relevant documents and an endorsement LPA (HC) 107/2017 10 of 16 to the effect that there was refusal. Even the name of the official has not been indicated in the affidavit. That would have been sufficient to comply with the requirements of Section 13 of the Act."

8. The main plank of the argument of the learned counsel for the petitioner contended that the detainee had been admitted to bail in FIR No.175/2017 registered at Police Station, Kulgam, for commission of offences punishable under Section 13(2), 18, 19, 38, 39 ULA(P) Act, 7/25 Arms Act, 30 Police Act which fact has not been made mention of in the grounds of detention though reference to said FIR has been made therein. 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 analyse 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 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 judgement of the Bombay High Court under appeal, quash the order of detention and direct that the petitioner be released forthwith....."

9. It is further projected that when the detainee was already in custody, there was no need to direct his preventive detention. It has been stated in the counter affidavit that the detainee is involved in FIR No. 175/2017 and his arrest in the said FIR, at the time of passing of the order of detention, has not been disputed.

10. 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."

11. Learned counsel for the petitioner next contended that there has been a non-application of mind on the part of detaining authority while passing the impugned order as the detaining authority has not derived subjective satisfaction before

passing the impugned order.

1) The submission appears to have force. One of the requirements for deriving subjective satisfaction is to formulate the grounds of detention which shall form basis for passing the order of detention. In the order impugned as passed by District Magistrate, it is recorded; "Whereas on the basis of dossier placed before me by the Superintendent of Police, Kulgam, vide his No.Legal/PSA-14/2018/4693-96 dated 26.07.2018, am satisfied....." which shows that detaining authority has not scanned and sifted the material itself for preparation of the grounds of detention, which clearly shows that there has been non-application of mind on the part of detaining authority which passing the impugned detention order, which renders the impugned order bad.

12. Taking conspectus of the above discussion, the petition is allowed and the impugned detention order bearing No. 10/DMK/PSA/2018 dated 01.08.2018, passed by District Magistrate, Kulgam, being unsustainable, is quashed. Detenue is directed to be set free from the preventive custody forthwith provided he is not required in connection with any other case.