

(2018) 11 J&K CK 0090

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 236 Of 2018

**Showkat Ahmad Lone @APPELLANT@Hash State Of Jammu & Kashmir
And Anr**

Date of Decision : 20-11-2018

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8(a)
Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 —
Section 3(3)
Constitution Of India, 1950 — Article 21, 22(3), 22(5)

Citation : (2018) 11 J&K CK 0090

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Wajid Haseeb, Mir Suhail

Judgement

1) By the instant petition, quashment of the order of detention bearing No.19/DMP/PSA/18 dated 14.08.2018 is sought. In terms of said order, Showkat Ahmad Lone (hereinafter referred to as the detainee), has been taken into preventive custody while invoking powers under Clause (a) of Section 8 of the J&K Public Safety Act and so has been lodged in District Jail, Kathua.

2) The petitioner's case, as set out in the petition, is that the detainee, without any justification and cause was arrested sometime back and while in custody, detention order impugned was slapped upon him. The respondents are stated to have violated the procedural safeguards and have ignored to provide material relied upon by the detaining authority while passing the impugned order of detention and thus deprived the detainee of his Constitutional and Statutory rights. Grounds of detention are stated to be vague, baseless, non-existent and unfounded and there is non-application of mind on the part of detaining authority while passing the impugned detention order.

3) The respondents, in their counter affidavit, have disputed the averments made in the petition and insisted that the activities of detainee are highly prejudicial to the security of the State. It is pleaded that the detention order and grounds of detention were handed over to the detainee and same were read over and

explained to him. The grounds taken by the petitioner are legally misconceived, factually untenable and without any merit. The learned counsel for the respondents has made available detention records to lend support to the case set up in the counter affidavit.

4) Firstly, learned counsel for the petitioner would contend that the order of detention has been passed on the basis of the material produced by Senior Superintendent of Police, Awantipora, before the District Magistrate, such as dossier and other connected documents as reflected in the order of detention. Neither copy of the letter dated 04.08.2018 addressed by SSP to the District Magistrate, referred in the impugned order, nor the material/connected documents accompanying said letter has been supplied to the detainee, therefore, detainee has been deprived from making an effective representation against his detention.

5) In opposition learned counsel for the respondents would contend that the material/documents, based on which detaining authority has derived satisfaction for passing the order of detention, have been supplied to the detainee.

6) The records, as produced, carries copy of execution report dated 16.08.2018 which suggests that only copy of detention warrant and grounds of detention (04) leaves have been supplied to the detainee, which means entire material forming base of the grounds of detention has not been supplied to the detainee. When it is so, detainee has been disabled from making an effective representation which, in fact, is an infraction of valuable right guaranteed under Article 22(5) of the Constitution.

The Hon'ble Apex Court in the judgment rendered in the case of "Sophia Gulam Mohd. Bham v. State of Maharashtra &ors" (AIR 1999 SC 3051), has held as under

"The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the grounds are based flows from the right given to the detainee to make a representation against the order of detention. A representation can be made and the order of detention can be assailed only when all the grounds on which the order is based are communicated to the detainee and the material on which those grounds are based are also disclosed and copies thereof are supplied to the person detained, in his own language."

7) It is also quite apposite to quote para 10 of the judgment of the Hon'ble Apex Court in "Ibrahim Ahmad Bhatti alias Mohd. Akhtar Hussain alias Kandar Ahmad Wagher alias Iqbal alias Gulam Vs. State of Gujarat and others", (1982) 3 SCC 440:

"10. Two propositions having a bearing on the points at issue in the case before us, clearly merge from the aforesaid resume of decided cases : (a) all documents, statements and other materials incorporated in the grounds by

reference and which have influenced the mind of the detaining authority in arriving at the requisite subjective satisfaction must be furnished to the detenu along with the grounds or in any event not later than five days ordinarily and in the exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of his detention and (b) all such material must be furnished to him in a script or language which he understands and failure to do either of the two things would amount to a breach of the two duties cast on the detaining authority under Article 22 (5) of the Constitution. Relying upon this legal position counsel for the petitioner urged before us that in the instant case a breach of the mandate contained in Article 22 (5) read with Section 3 (3) of the COFEPOSA is clearly involved because of three things that have happened, namely, (i) supply of Urdu translations of the bulk of documents and statements incorporated in the grounds and relied upon by the detaining authority was delayed beyond the normal period of 5 days without any exceptional circumstances obtaining in the matter, (ii) the alleged exceptional circumstances purporting to justify the delay and the fact that the reasons had been recorded in writing were not communicated to the detenu which has prevented him from making effective representation against his continued detention and (iii) Urdu translations of quite a few documents and statements incorporated in the grounds and relied upon by the detaining authority have not been supplied to him at all. As regards the first two aspects counsel relied upon two decisions of the Patna High Court, namely, *Bishwa Mohan Kumar Sinha v. State of Bihar and Ors.*(1) and *Bishwanath Prasad Keshari v. State of Bihar & Ors.*(2) where the Patna High Court has taken the view that not merely should the exceptional circumstances exist justifying the delayed supply of the grounds of detention but these should be communicated to the detenu to enable him to make an effective representation. Counsel urged that because of the aforesaid failure the continued detention of the petitioner must be held to be illegal. We find considerable force in these submissions made by the counsel for the petitioner."

8) Next it is contended by the learned counsel for the petitioner that there has been non-application of mind on the part of detaining authority as the grounds of detention appear not to have been formulated by the detaining authority itself.

9) The submission appears to have substance. 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, Awantipora, vide his No.Conf/PSA/2018/6144- 47 dated 04.08.2018, I 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.

10) Right to liberty as guaranteed under Article 21 of the Constitution can be

negated in view of Article 22(3) (b) of the Constitution which is an exception to Article 21 of the Constitution. The said exception authorizes the concerned authorities to pass preventive detention but while passing such orders, the authority concerned is required to be alive to the personal liberty of a person and such power shall be exercised in a manner which may not have the trappings of depriving a person of the guaranteed liberty. In short an exceptional case has to be made out for passing the order of preventing a person from acting in any manner which shall be prejudicial, in the instant case, to the security of the State but while doing so procedural safeguards are to be respected. Breach in observing the procedural safeguards gives right to the detenu to claim that he has been prejudiced as his liberty has been curtailed de hors the law. 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".

11) In view of the facts of the present case and the law laid down by the Hon'ble Apex Court as quoted hereinabove, the order of detention impugned does not sustain on above referred grounds alone, therefore, other grounds projected in the petition are not required to be dealt with.

12) Having regard to the above discussion, the impugned order of detention impugned is unsustainable, as such, quashed. Respondents are directed to release the detenu from the preventive custody forthwith, provided he is not required in connected with any other case.

13) Detention record be returned to be learned counsel for the respondents.