
(2019) 06 J&K CK 0004

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 38 Of 2019

Suhail Ahmad

APPELLANT

Vs

State Of Jammu & Kashmir And Ors

RESPONDENT

Date of Decision : 03-06-2019

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8(a)
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 147, 148, 149, 307, 336, 427

Citation : (2019) 06 J&K CK 0004

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Sheikh Feroz

Judgement

1) By virtue of order bearing No.28/DMB/PSA of 2018-19 dated 03.01.2019, passed by respondent No.2-District Magistrate, Bandipora, in exercise of powers under clause (a) of Section 8 of the J&K Public Safety Act, 1978, Suhail Ahmad Parray son of Zahoor Ahmad Parray resident of Banger Mohalla Hajin Tehsil Hajin District Bandipora, has been directed to be taken into preventive custody. Veracity and legality 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) The detention order has been challenged, mainly, on the ground that the detaining authority has failed to apply its mind to the fact whether the preventive

detention of the detainee was imperative notwithstanding the fact that he was already in custody in connection with case FIR No.47/2017 registered at Police Station, Hajin under Section 147, 148, 149, 336, 307 and 427 RPC. To this, it has been added that the respondent No.2 has passed the order of detention on the dictates of the sponsoring agency i.e. the officer who has prepared the police dossier and no attempt has been made by respondent No.2 to scan and evaluate it before passing the order of detention. Further, it is added that the respondents have violated the procedural safeguards available to the detainee under the Constitution, thus, rendering the impugned order illegal and liable to be set aside.

5) Per contra, learned AAG, submitted that the impugned order does not suffer from any infirmity. The impugned order has been passed strictly in accordance with law and the procedure prescribed under law has been strictly followed.

6) Heard learned counsel for the parties and also perused the records.

7) The main plank of argument of the learned counsel for the petitioner is that since the detainee was in custody of the police in connection with case FIR No.47/2017 registered at Police Station, Hajin, therefore, there was no need to direct his preventive detention. The arrest of the detainee in the said criminal cases at the time of passing of the orders of detention has not been disputed.

8) The submission advanced on behalf of the petitioner appears to have force as in the grounds of detention it is stated that the detainee was arrested on 28.10.2018 in case FIR No.47/2017, when the impugned detention order has been passed on 03.01.2019. 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."

9) The same view has been repeated and reiterated by the Hon'ble Supreme Court in the judgment delivered in the case of "V. Shantha v. State of Telangana & Others" (AIR 2017 SC 2625). In this regard, Para 13 of the said judgment is relevant to be quoted as under:

"The order of preventive detention passed against the detainee states that his illegal activities were causing danger to poor and small farmers and their safety and financial well-being. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detainee 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 the society from his evil deeds. The rhetorical incantation of the words "goonda" or "prejudicial to maintenance of public order" cannot be sufficient justification to invoke the draconian powers of preventive detention. To classify the detainee as a "goonda" affecting public order because of inadequately yield from the chilli seed sown by him and prevent him from moving for bail even is a gross abuse of the statutory power of preventive detention. The grounds of detention are ex-facie extraneous to the Act."

10) 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 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 detention 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 detaining authority was aware of the fact that the detainee is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detainee 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 detainee is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detainee, 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."

11) Testing the instant case on the touchstone of the law laid down above, the detenu could not have been detained after taking recourse to the provisions of the Public Safety Act when he was already in the custody of the police authorities in the cases, the details whereof have been given in the grounds of detention. His custody in police for the offences referred in the grounds of detention, has been converted into the custody under the impugned detention order. May be the detaining authority might have been laboring under the belief that the detenu applies for bail, he may succeed in seeking his release but this apprehension of the detaining authority could have been guarded against by resisting and opposing the bail application. In the event of his release on bail, the State could have exercised its right to knock at the doors of higher forum. This single infraction knocks at the bottom of the contention raised by the State that the detenu can be detained preventatively when he is already in custody and has not applied for bail. It cuts the very root of the state act. The State could have taken recourse to the ordinary law of the land.

12) In the grounds of detention, it is nowhere mentioned as to whether detenu in connection with criminal case registered against him was released HCP No.38/2019 on bail or as to whether he had applied for bail. The Detaining Authority has not given any cogent reason so as to derive satisfaction or to record compelling reasons for passing the order of detention.

13) The contention raised, on perusal of the grounds of detention as well as the detention record, is found to be correct, so non-application of mind is explicit which renders the order of detention illegal. In my view I am fortified by the judgment rendered in the case captioned "Anant Sakharam Raut Vs. State of Maharashtra and others" reported in AIR 1987 SC 137. Para 8 of the judgment is apt to be quoted:

"We hold that there was clear non-application of mind on the part of the 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.

14) For what has been stated above, the order of detention impugned bearing No. 28/DMB/PSA of 2018-19 dated 03.01.2019, passed by respondent No.2-District Magistrate, Bandipora, is not valid, as such, is quashed. Further custody of the detenu shall be regulated in accordance with the orders as shall be passed by the court of competent jurisdiction in the criminal case registered against him

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