

(2019) 09 J&K CK 0091
In the Jammu And Kashmir High Court
Case No : Writ Petition (Crl) No. 167 Of 2019

Suraj Manzoor Malik

APPELLANT

Vs

State Of Jammu & Kashmir And Ors

RESPONDENT

Date of Decision : 06-09-2019

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8, 13
Unlawful Activities (Prevention) Act, 1967 — Section 3, 18, 20, 38, 39
Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 —
Section 3(3)
Constitution Of India, 1950 — Article 21, 22, 22(3)(b), 22(5), 22(6)

Citation : (2019) 09 J&K CK 0091

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : G. N. Shaheen, Mir Suhail

Final Decision : Disposed Of

Judgement

Rashid Ali Dar, J

1. By virtue of order bearing No. 28/DMP/PSA/2019 dated 19.04.2019, (for short impugned order) passed by respondent No. 2 - District Magistrate, Pulwama, the detainee namely Suraj Manzoor Malik S/o Manzoor Ahmad Malik R/o Shah Mohalla Midoora , Tehsil Awantipora District Pulwama, has been taken into preventive custody by invoking powers under Section 8 of the Jammu and Kashmir Public Safety Act 1978 (for short the Act), as his activities were found to be prejudicial to the 'Security of the State'. Quashment of the said order is sought on the following grounds in terms of the petition:

i) That the allegations/grounds of detention are vague and mere assertions of the detaining authority and no prudent man can make an effective representation against these allegations and can only be defended in a Court of law. The cases mentioned in the grounds of detention have no nexus with the detainee and has been fabricated by the police in order to justify its illegal action of detaining the

detenue.

ii) That the detenue was arrested on 20.02.2019 and was booked in case FIR No. 49/2019 U/S 18, 20, 38 and 39 ULA (P) Act and in view of offences alleged therein there was no likelihood of him getting out of custody on bail in near future as the offence alleged against the detenue was non bailable offence and there is no cogent reason given by the detaining authority on the basis of which it can be presumed that there was likelihood of bail when admittedly offences alleged with the detenue are non bailable and the detenue has not applied for bail. Thus non application of mind by the detaining authority has rendered the detention order bad in law.

iii) That the allegations made in the grounds of detention are vague and non-existent and no prudent man can make a representation against such allegations and passing of detention on such grounds is unjustified and unreasonable.

iv) The detaining authority has not given any reasonable justification to pass the detention order and as such, the impugned order of detention suffers from complete non application of mind.

v) That the detaining authority has not prepared the grounds of detention by itself, which is a pre requisite for him before passing any detention order. The grounds of detention are replica of the police dossier and depicts the non application of mind by the detaining authority.

vi) That one amongst the grounds mentioned in the grounds of detention is that the normal law has not been sufficient to detain the detenue, however, normal law was never invoked nor it is mentioned anywhere in the grounds of detention that the normal law was ever invoked and the detaining authority has made this assumption without any basis.

vii) That the detaining authority - respondent no. 2 has not furnished the relevant material such as dossier, copy of FIR and statement under 161 Cr. PC to the detenue to enable him to make an effective representation, therefore, the Constitutional rights guaranteed to the detenue under Article 22 (5) stands infringed.

viii) That the detenue was not informed that he has a right to make representation against his detention order nor the respondents disclosed to him before whom authority of Government he can make representation, which is in total violation of the rights of detenue as guaranteed under Article 22 of the Constitution and Section 13 of Public Safety Act.

ix) That the detenue understands only Kashmiri and Urdu language but the order of detention is in English that too in hyper technical works and no translated Script in Kashmiri or Urdu was furnished to the detenue nor was the grounds read over and explained to him in the language he understands so that he can make effective representation. Non-supply of the translated scripted as well as non- explanations of the grounds of detention has prevented the detenue

from making an effective representation and has violated his fundamental rights under Article 22 of the Constitution of India.

2. Respondents have filed the counter affidavit wherein it is submitted that the detainee is a member of Unlawful Organization and the detainee being a local and well acquainted with the topography of the area, have been providing information to the terrorists regarding the stationing and movement of the security force and police thereby ensuring their prolonged sustenance. Besides, the detainee have been provoking the people to carry out attacks on the security forces deployed for law and order duties thereby posing severe threat to the peace and tranquility in the area. The detainee has been named in case FIR No. 49/2019 U/S 18, 20, 38 and 39 ULA (P) Act registered in P/S Awantipora for trying to carry out unlawful activities in the jurisdiction of the said Police Station. The material on the basis of which the grounds of detention were framed by respondent no. 2 was supplied to the detainee and there is proper application of mind and the respondent no. 2 was fully satisfied for detaining the detainee on the grounds explained to him. There is no other purpose behind the detention of the detainee than the one to prevent him from acting in any manner harmful to the maintenance of 'Security of the State'.

3. Heard learned counsel for the petitioner and learned AAG.

4. According to the learned counsel for the petitioner, the detainee had been in custody in connection with cases FIR No. 49/2019 U/S 18, 20, 38 and 39 ULA (P) Act and had neither applied for bail nor was bail granted to him. While in custody has been ordered to be detained under Public Safety Act. No compelling reason has been recorded for passing the impugned order which was a requirement. Further, the material forming base of the detention has not been supplied to the detainee like copies of FIR and statement of witnesses recorded by the investigating agency disabling him from making an effective and purposeful representation against his detention

5. Learned counsel for the petitioner further contended that there is non-application of mind on the part of detaining authority while passing the impugned detention order as detailed out in the petition.

6. Learned AAG herein submits that the detaining authority was right in passing the detention order against the detainee as he was affiliated with an organization which has been declared as unlawful Association pursuant to Section 3 of Unlawful Activities (Prevention) Act, 1967. Finding the activities of the detainee prejudicial to the maintenance of the 'Security of the State', District Magistrate Pulwama ordered for his preventive detention under J&K Public Safety Act, 1978. The material forming base of the detention has been supplied to the detainee. The grounds of detention have been read over and explained to the detainee in the language which he is conversant to. The order of detention does not suffer from any illegality and it has been passed with due diligence and in accordance with provisions of applicable law and rules.

7. It is notable that the detainee has not been furnished all the material forming the subjective satisfaction of the detaining authority. Record shows only 4 leaves having been furnished to him. Copy of dossier and letter of Sr. Superintendent of Police referred in impugned order of detention have not been furnished. Same has termed to be violative of the constitutional and statutory rights of the detainee as an effective representation could not be accepted can be presented by him against the detention order. Reliance in this regard is placed on the judgment of Hon'ble Apex court in "Sophia Ghulam Mohd. Bham v. State of Maharashtra and others" (AIR 1999 SC 3051). The pertinent observation in the regard:

".....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."

8. 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 detainee 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

"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 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.

9. 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: 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."

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. Such power has to 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 preventive order, still then procedural safeguards are to be respected. Breach in observing the procedural safeguards gives right to the detenue 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. It is important to note that the translated copies of the grounds of detention have not been supplied to the detenu as can be gathered from the record. The detenu has read only upto 12th class. This vividly can be inferred to have prejudiced the detenu in exercising his right to make an effective representation against his detention. It shall be quite advantageous to quote following para from the judgment rendered in case captioned Powanammal vs. State of T. N. and another reported in 1999 (2) SCC 413:

"The amplitude of the safeguard embodied in Article 22(5) extends not merely to oral explanation of the grounds of detention and the material in support thereof in the language understood by the detenu but also to supplying their translation in script or language which is understandable to the detenu. Failure to do so would amount to denial of the rights of being communicated the grounds and of being afforded the opportunity of making a representation against the order."

12. It may also be relevant to state herein that the detenu herein has been shown to be involved in FIR 49/2019 registered by Police Station Awantipora for commission of offence punishable under Section 18, 20, 38 & 39 ULA (P) Act. Admittedly, there was no likelihood of immediate release of the detenu due to the bar for admission to bail in the offences indicated therein, recourse to preventive detention in such circumstances was improper. Normal law was sufficient to prevent the detenu from indulging in fresh activities, likelihood of which is stated in the grounds of detention was extant. This aspect of the matter has not at all been considered while passing the impugned order. The impugned order as such suffers from non application of mind.

13. It is settled position at law that a person in custody in connection with criminal cases can be detained under the provisions of preventive laws provided there are compelling circumstances for so doing otherwise the order of detention

shall be bad. In this connection, it is quite apt to quote following para from the judgment T. P. Moideen Koya vs. Government of Kerala and ors. reported in 2004 (8) SCC 106:

".....in law there is no bar in passing a detention order even against a person who is already in custody in respect of a criminal offence if the detaining authority is subjectively satisfied that detention order should be passed and that there must be cogent material before the authority passing the detention order for inferring that the detenu was likely to be released on bail"

14. For what has been stated above, the order of detention impugned bearing No. 28/DMP/PSA/2019 dated 19.04.2019, passed by District Magistrate, Pulwama is not found valid, as such, is quashed. The detenu namely Suraj Manzoor Malik S/o Manzoor Ahmad Malik R/o Shah Mohalla Midoora, Tehsil Awantipora District Pulwama, is directed to be released from the preventive custody provided he is not required in connection with any other case.

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

Disposed of.