

(2018) 12 J&K CK 0065

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 325 Of 2018

Tariq Ahmad Hajam @APPELLANT@Hash State Of Jammu & Kashmir And Anr

Date of Decision : 21-12-2018

Acts Referred:

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

Citation : (2018) 12 J&K CK 0065

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Mir Shafaqat Hussain, Asif Bhat

Judgement

1) By the instant petition, petitioner has sought quashment of the order of detention bearing No.50/DMA/PSA/DET/2018 dated 24.09.2018. In terms of said order, Tariq Ahmad Hajam (hereinafter referred to as the detainee), has been taken into preventive custody by invoking powers under 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 on 05.09.2018 was taken in custody in connection with case FIR No.63/2018 P/S Srigufwara and while in custody, detention order impugned was slapped upon him. The respondents are stated to 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.

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) First 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, Anantnag, before the District Magistrate, such as dossier and other connected documents as reflected in the order of detention. Neither copy of the letter dated 20.09.2018 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) From the perusal of the records nothing comes to the fore to show that the material forming base of the grounds of detention has been supplied to the detainee which has prejudiced the detainee as he could not submit an effective representation against his detention in absence of such material. Infringement of such right guaranteed under Article 22(5) of the Constitution would render the order of detention as illegal.

7) It is 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) Learned counsel for the petitioner also submitted that that the detenu 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 detenu is not in a position to understand.

9) The submission appears to have substance. The records do not contain anything which would suggest that the translated copies of the grounds of detention have been supplied to the detenu which has prejudiced the detenu in the exercise of his right to make an effective representation against his detention. For this, Para 13 of the judgment in *Ibrahim Ahmad Batti's* case (supra) shall be quite apposite to be reproduced herein:

"Lastly, Urdu translations of quite a few documents and statements referred to in the grounds of detention and relied upon by the detaining authority were admittedly not supplied to the detenu at all and the only explanation given by the counsel for the respondents at the hearing has been that most of these documents (Urdu translations whereof were not supplied) comprised statements of accounts which had figures in English with some English words written in capital letters and some documents were in Hindi and Gujarati and the record (statements of Rekha, her sister Indi and one Jayantilal Soni, all co-conspirators of the detenu, recorded during the investigation) clearly shows that the petitioner knows English figures, understands English words written in capital letters and can also converse or talk in Hindi and Gujarati and as such the non-supply of Urdu translations of these documents cannot be said to have caused any prejudice to the petitioner in the matter of making a representation against his detention. In our view, the explanation is hardly satisfactory and cannot condone the non-supply of Urdu translations of these documents. Admittedly, the petitioner is a Pakistani national and Urdu seems to be his mother tongue and a little knowledge of English figures, ability to read English words written in capital

letters and a smattering knowledge of Hindi or Gujarati would not justify the denial of Urdu translations to him of the material documents and statements referred to as incriminating documents in the grounds and relied upon by the detaining authority in arriving at its subjective satisfaction. In fact, the claim made before us on behalf of the detenu that he only knows Urdu cannot be brushed aside as false especially in view of the fact that the same was accepted on the earlier occasion by the Advisory Board who had actually opined that failure to supply Urdu translations of grounds of detention and documents had vitiated the earlier order of detention and following this opinion respondent No. 1 had revoked the said order. Moreover, with the assistance of counsel on either side we have ourselves gone through many of these documents and statements and it is not possible to say that most of them are merely statements of account containing figures in English with English words written in capital letters. These documents recovered from three flats in three different societies, include, for instance, documents like bills and vouchers showing purchases made from some shops, while a large number of documents are in Hindi and Gujarati and relate to transactions in contraband articles like gold, silver, watches, etc., and comprise accounts of such transactions, the figures as well as recitals pertaining to which are entirely in Gujarati. All these, in our view, are material documents which have obviously influenced the mind of the detaining authority in arriving at its subjective satisfaction and these are all in a script or language not understood by detenu, and, therefore, the non-supply of Urdu translations of these documents has clearly prejudiced the petitioner in the exercise of his right to make an effective representation against his detention and hence the safeguard contained in Article 22(5) is clearly violated."

10) The next ground, as highlighted by the learned counsel for the petitioner, is that as per grounds of detention the detenu has been arrested on 06.09.2018 in connection with case FIR No.63/2018 P/S Srigufwara for commission of offence punishable under Section 13 ULA(P) Act and so was in custody of said Police Station when the order of detention has been passed. No application for grant of bail had been moved on behalf of the detenu before any court. There was no requirement of passing the order of detention. No compelling reasons have been mentioned for passing the order of detention.

11) The Hon'ble Apex Court in para 27 of the judgment *Rekha Vs. State of Tamil Nadu and anr*", (2011) 5 SCC 244 has held as under:-

"27. In our opinion, there is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of

his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed".

5. It shall also be quite apposite to quote Para 5, 6 and 7 of the judgment of the Hon'ble Apex Court in "Surya Prakash Sharma v. State of U. P. and others, 1994 SCC (Cri) 1691:

"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 state 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 Sukan 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 detection 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 detailing authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression compelling reasons in the context of making an order for detention of a person already in 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 detenu is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenu, 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."

6. When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be sustained. Though the grounds of detention indicate the detaining authority's awareness of the fact that the detenu was in judicial custody at the time of making the order of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of the averment made in the grounds of detention that if the aforesaid Surya Prakash Sharma is released on bail "he may again indulge in serious offences causing threat to public order". (emphasis supplied) To put it differently, the satisfaction of the detaining authority that the detenu might indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified.

7. On the conclusions as above we quash the order of detention."

12) 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".

13) The cumulative effect of the above discussion is that the impugned order of detention impugned is unsustainable, as such, quashed. Further custody of the detenu shall be governed by the orders as shall be passed by the court of competent jurisdiction in the criminal case registered against.

14) Registry to return the detention record to the learned counsel for the respondents.