

(2019) 11 J&K CK 0046

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 23 Of 2019

Tawseef Ahmad Lone

APPELLANT

Vs

State Of Jammu And Kashmir And Others

RESPONDENT

Date of Decision : 21-11-2019

Acts Referred:

Constitution Of India, 1950 — Article 22(5)
Jammu And Kashmir Public Safety Act, 1978 — Section 13
Code Of Criminal Procedure, 1973 — Section 161

Citation : (2019) 11 J&K CK 0046

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Mohammad Rafiq Bhat, Sheikh Feroz

Final Decision : Disposed Of

Judgement

Sanjeev Kumar, J

1. Challenge in this petition is thrown the Order no.30/DMB/PSA of 2018-19 dated 03.01.2019, passed by the District Magistrate, Bandipora (for short "detaining authority"), placing one Tawseef Ahmad Lone son of Wali Mohammad Lone resident of Gundpora Tehsil and District Bandipora (for brevity "detenu") under the preventive detention to prevent him from acting in any manner prejudicial to the security of the State.

2. Counter affidavit has been filed by respondents, vehemently resisting the petition. The detention record has also been produced by the learned counsel for the respondents to substantiate the statements made in the reply affidavit.

3. Having heard learned counsel for parties and perused the file, it would be appropriate to first scan through the detention record, produced by the learned counsel for respondents, so as to ascertain as to whether the material, relied upon by detaining authority while issuing impugned detention order, has been furnished to detenu or not. The detention record, inter alia, contains "Receipt of

Grounds of Detention", acknowledged by detenu, and "Execution Report" of the detention. A perusal of "Execution Report", of detention order signed by Executing Officer, ASI Gh Rasool no.85/Bpr Exk. No.872372 of P/S Bandipora, as also by the Taken-over Officer, viz. Dy. Superintendent, Central Jail, Jammu, Kotbhalwal, reveals that only 12 leaves have been given to detenu. From the perusal of Receipt of Grounds of Detention, it comes to fore that detenu has not been furnished the copy of Dossier, copy of site plan(s), copy of arrest memo, statement(s) of witnesses and other related documents, at the time of execution of detention order or immediately thereafter. Same is true about Execution Report.

Bare reading of impugned detention order divulges that Senior Superintendent of Police, Bandipora, vide his letter no.Lgl/PSA-41/2018/57095-99 dated 21.12.2018, produced material record, such as dossier and other connected documents in respect of detenu and it was only after perusal thereof that impugned detention order has been issued by detaining authority. Grounds of detention make reference of cases, FIR nos.26/2016; 27/2016; and 131/2018, to have been registered against detenu. The involvement of the detenu in the aforesaid cases appears to have weighed with the detaining authority, while making the detention order. The record, as noted above, does not indicate that the copies of the Dossier, the statements recorded under Section 161 Cr.P.C. and other material collected during investigation of the aforesaid cases, were ever supplied to the detenu. The abovementioned material, thus, assumes significance in the facts and circumstances of the case. It needs no emphasis, that the detenu cannot be expected to make a meaningful exercise of his Constitutional and Statutory rights guaranteed under Article 22(5) of the Constitution of India and Section 13 of the J&K Public Safety Act, 1978, unless and until the material on which the detention order is based, is supplied to the detenu. It is only after the detenu has all the said material available that he can make an effort to convince the detaining authority and thereafter the Government that their apprehensions concerning the activities of the detenu are baseless and misplaced. If the detenu is not supplied the material, on which the detention order is based, he will not be in a position to make an effective representation against his detention order. The failure on the part of the detaining authority to supply the material relied at the time of making the detention order to the detenu, renders the detention order illegal and unsustainable. While saying so, I draw the support from the law laid down in *Thahira Haris Etc. Etc. v. Government of Karnataka*, AIR 2009 SC 2184; *Union of India v. Ranu Bhandari*, 2008, Cr. L. J. 4567; *Dhannajoy Dass v. District Magistrate*, AIR, 1982 SC 1315; *Sofia Gulam Mohd Bham v. State of Maharashtra and others*, (supra); and *Syed Aasiya Indrabi v. State of J&K & ors*, 2009 (I) S.L.J 219.

4. It may not be out of place to mention here that whether a person, who is in jail, can be detained under preventive detention law has been a subject matter of consideration before the Supreme Court very often. In *Dharmendra Suganchand Chelawat & anr v. Union of India*, AIR 1990 SC 1196, the Supreme Court while

considering the same issue has reconsidered its earlier judgments on the point in *Rameshwar Shaw v. District Magistrate, Burdwan*, AIR 1964 SC 334; *Masood Alam v. Union of India*, AIR 1973 SC 897; *Dulal Roy v. District Magistrate, Burdwan*, AIR 1975 SC 1508; *Alijan Mian v. District Magistrate, Dhanbad*, AIR 1983 SC 1130; *Ramesh Yadav v. District Magistrate, Etah*, AIR 1986 SC 315; *Suraj Pal Sahu v. State of Maharashtra*, AIR 1986 SC 2177; *Binod Singh v. District Magistrate, Dhanbad*, AIR 1986 SC 2090; *Smt Shashi Aggarwal v. State of U.P.*, AIR 1988 SC 596, and came 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 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 custody implies that there must be cogent material before the detaining authority on the basis whereof it may be satisfied that (a) the detenu is likely to be released from the 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.

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. The grounds of detention do not mention that the detaining authority is aware of the fact that the detenu was already in custody at the time of making the order of detention. I find that in the present case the detaining authority has not drawn subjective satisfaction about the detention of the detenu. There is no mention of the fact that the detenu has applied for bail in the criminal case against him nor is there any satisfaction that there is likelihood of his release on bail. In that view of matter, the impugned detention order is vitiated.

5. It is pertinent to mention here that the preventive detention is not a quick alternative to normal legal process, is what is said by the Supreme Court in *V. Shantha v. State of Telangana & ors*, AIR 2017 SC 2625. The Supreme Court has held that preventive detention of a person by a State after branding him a 'goonda' merely because the normal legal process is ineffective and time-consuming in 'curbing the evil he spreads', is illegal and that the detention of a person is a serious matter affecting the liberty of the citizen. Preventive detention cannot be resorted to when sufficient remedies are available under general laws of the land for any omission or commission under such laws, the Supreme Court observed. Recourse to the normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detenu from indulging in further prejudicial activities, affecting security of the State, and that there was no other option except invoking the provisions of the preventive detention Act as an extreme measure to insulate. No doubt the offences alleged to have been committed by detenu are such as would attract punishment under

the prevailing laws but that has to be done under the said prevalent laws and taking recourse to preventive detention laws would not be warranted. The preventive detention involves the detaining of a person without trial in order to prevent him from committing certain types of offences. But such detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating the crimes which the detenu may have committed. After all, the preventive detention cannot be used as an instrument to keep a person in perpetual custody without trial. My views are fortified by the judgements rendered in *Rekha v. State of Tamil Nadu & another*, (2011) 5 SCC 244 and *V. Shantha v. State of Telangana* (supra) and *Sama Aruna v. State of Telangana* AIR 2017 SC 2662.

6. For the foregoing reasons, petition is disposed of and detention Order no.30/DMB/PSA of 2018-19 dated 03.01.2019, passed by District Magistrate, Bandipora, is quashed. Respondents are directed to release the detenu forthwith, provided he is not required in any other case. Disposed of.

7. Detention record be returned to learned counsel for respondents.