

(2018) 12 J&K CK 0025

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 248 Of 2018

Ubaid Rashid Mir @APPELLANT@Hash State Of Jammu & Kashmir And Others

Date of Decision : 04-12-2018

Acts Referred:

Citation : (2018) 12 J&K CK 0025

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Junaid Rashid, Asif Maqbool

Judgement

1) Pursuant to order No.127/DMS/PSA/2018 dated 25.08.2018, issued by respondent No.2-District Magistrate, Shopian, Ubaid Rashid Mir (hereinafter for short referred to as the detainee) has been taken into preventive custody and lodged in Central Jail, Kot-bhalwal, Jammu. By the instant petition, quashment of the said order is sought on the grounds enumerated therein.

5. Learned counsel for the petitioner projected host of grounds while seeking quashment of the impugned order but the star ground is that the detainee was already in custody in connection with certain criminal cases for commission of substantive offences and there was no likelihood of the detainee being released on bail but despite that has been detained under Public Safety Act. For so doing, no compelling reasons have been recorded for passing the order of detention.

6. The object of passing the order of detention is to deter a person from acting in any manner prejudicial to the security of the State or public order. When the movement of the person is already under curtailment i.e. is in custody in connection with a criminal case, then there can be no requirement of preventive detention, unless, of course, circumstances exist for passing order of detention. Preventive laws have the effect of depriving a person of liberty which is precious, deprivation thereof at times may be unavoidable, for justifying such deprivation, safeguards as are provided by law are required to be respected. A person who dares to cause any type of insecurity or threatens security of the State has to be dealt with iron hand but for so doing the Constitutional safeguards as are

available are also to be respected.

7. It is settled that a person involved in a criminal case 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 detainee was likely to be released on bail"

8. It shall also 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 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 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 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 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 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."

2) 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."

3) 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). 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 sold 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."

4) Testing the instant case on the touchstone of the law laid down above, the detainee 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 detainee 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 the bottom out of the contention raised by the State that the detinue 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.

5) Life and liberty of the citizens are of paramount importance. A duty is cast on the shoulders of the Court to enquire that the decision of the Executive is made upon the matters laid down by the Statute and that these are relevant for arriving at such a decision. A citizen cannot be deprived of personal liberty guaranteed to him/her by the Constitution and of which, he/she cannot be deprived except in due course of law.

6) 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 the above referred ground alone, therefore, other grounds projected in the petition are not required to be dealt with.

7) Having regard to the above discussion, the impugned order of detention orders of detention bearing No. 127/DMS/PSA/2018 dated 25.08.2018 being unsustainable, as such, quashed. Further custody of the detinue shall be regulated in accordance with the orders as shall be passed by the court of competent jurisdiction relatable to the criminal cases registered against him.

8) Registry to return the detention records to the learned counsel for the respondents.