

(2019) 06 J&K CK 0005

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 409 Of 2019

Younis Ahmad Bhat

APPELLANT

Vs

State Of Jammu & Kashmir & Anr

RESPONDENT

Date of Decision : 03-06-2019

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8(a), 13<Constitution Of India, 1950 — Article 22(5)

Citation : (2019) 06 J&K CK 0005

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Mir Shafqat Hussain, Mir Suhail

Judgement

1) In terms instant petition, detention order bearing No.53/DMP/PSA/18 dated 08.10.2018, passed by respondent No.2-District Magistrate, Pulwama, in exercise of powers under clause (a) of Section 8 of the J&K Public Safety Act, 1978, has been called in question. In terms of said order, Younis Ahmad Bhat son of Ghulam Mohi-ud-din Bhat resident of Aripal Tehsil Aripal District Pulwama, has been directed to be taken into preventive custody.

2) In the petition, the impugned order has been assailed on the ground that the the grounds of detention are vague and mere assertions of the detaining authority and no prudent man can make an effective representation against these allegations. Compelling reason have not been given for passing the impugned order when it is being admitted that detenu was already in custody at the time of passing of detention order. The respondent No.2 has not furnished the copy of dossier relied upon for passing the detention order nor the relevant material have been supplied to the detenu to enable him to make an effective representation.

3) In the counter affidavit filed by the respondents, the contentions raised in the petition have been refuted by stating that the material relied upon by the detaining authority was furnished to the detenu so as to enable him to file a

representation against his detention but it was his own lapse that he did not submit representation as required in terms of section 13 of the Act. The procedural safeguards have been strictly followed while passing the detention order.

4) Heard learned counsel for the parties and also perused the record.

5) Learned counsel for the petitioner while being heard placed reliance on the judgment in "Amritlal and others v. Union Government through Secretary, Ministry of Finance and others" (AIR 2000 SC 3675) to canvass the order of detention being bad for non disclosure of the compelling reasons necessitating the detention of the detenu. It is also being contended that the plea taken in terms of petition regarding omission on part of the detaining authority to furnish the relevant documents gets substantiated by the detention record wherein it is being stated that only 04 leaves have been furnished to the detenu. Thus according to him the order impugned is to be quashed.

6) In rebuttal learned counsel for the respondents while justifying the impugned order, placed reliance on the judgment of the Hon'ble Apex Court in "The Secretary to Government Public (Law and Order-F) and anr. V. Nabila & anr" (2015 CRI. L. J. 1364) and submitted that the detaining authority after satisfying itself as to the detention of the detenu, passed the impugned order in accordance with law. He also submitted that the detention of the detenu has been ordered strictly in accordance with the provisions of J&K Public Safety Act and the procedural safeguards prescribed under the Act and the rights guaranteed to the detenu under the Constitution have strictly been followed. The learned AAG also submitted that the material/documents which were required to be furnished have been received.

7) Considered the rival arguments.

8) From the perusal of the detention record, as produced, it is evident that copy of the dossier and the communication dated 05.10.2018, as referred to in the impugned detention order, have not been furnished to the detenu. Copies of the statements recorded u/s 161 Cr PC, 164-A in connection with criminal cases in which detenu has been shown involved, too have not been furnished. This omission on the part of detaining authority is in violation of the right of Article 22(5) and 13(2) of the Public Safety Act.

9) There is also force in the contention raised on behalf of the petitioner that when detenu was already in custody at the time of passing of detention order and no bail application has been filed on behalf of the petitioner, how the detaining authority in the grounds of detention has mentioned that the detenu presently in police custody and there is likelihood that Court may grant him bail. When the detenu was already in custody, there was no requirement of directing preventive detention of the detenu and for so doing, the detaining authority had to spell out clearly as to what were the compelling reasons which necessitated preventive detention of the detenu.

10) In "Amritlal and others v. Union Government through Secretary, Ministry of Finance and others" (AIR 2000 SC 3675), It has been held that there must be cogent material before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. Likelihood of detenu's moving an application for bail is not a cogent material and detention order based on such material is liable to be quashed. The reasoning that there is "likelihood to be released on bail" is different from "likelihood of his moving an application for bail". It would be proper herein to refer to paras 4 to 7 of the judgment in Amritlal's case:

"4. In Agustin's decision (1994 Supp (1) SCC 597) (supra) this Court also placed strong reliance on an earlier but oft-cited decision of this Court in Binod Singh v. District Magistrate, Dhanbad (1986) 4 SCC 416, wherein it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. This Court held that there must be cogent materials before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. It is in this perspective as above, that the recording of the officer concerned in the matter under reference ought to be noticed and the same reads as below:

"Even though prosecution proceedings under the Narcotic Drugs and Psychotropic Substances Act, 1985 have been initiated against Shri Amritlal I am satisfied that there is compelling necessity in view of the likelihood of his moving an application for bail and in the event of his being granted bail, the likelihood of his indulging in illicit traffic in narcotic drugs as is evident from the trend of his activities, to detain him under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988."

5. It is this reasoning which the learned advocate contended that the High Court should have held to be completely erroneous in the matter of being the basis of an order of detention.

6. The requirement as noticed above in Binod Singh case that there is "likelihood of the petitioners being released on bail" however is not available in the reasoning as provided by the officer concerned. The reasoning available is the "likelihood of his moving an application for bail" which is different from "likelihood to be released on bail". This reasoning, in our view, is not sufficient compliance with the requirements as laid down.

7. The emphasis however, in Binod Singh case that before passing the detention order the authority concerned must satisfy himself of the likelihood of the petitioner being released on bail and that satisfaction ought to be reached on cogent material. Available cogent material is the likelihood of having a bail application moved in the matter but not obtaining a bail order.

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".

12) Since the detenue 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 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 detenue 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 detenue 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 detenue as a "goonda" affecting public order because of inadequately yield from the chilli seed sol 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."

13) For what has been stated above, the order of detention impugned bearing No. .53/DMP/PSA/18 dated 08.10.2018, passed by respondent No.2-District Magistrate, Pulwama, 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

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