

(2019) 07 J&K CK 0018

Jammu & Kashmir High Court (Srinagar Bench)

Case No: Habeas Corpus Petition (HCP) No. 04 Of 2019

Mohammad Shafi Lone

APPELLANT

Vs

State Of Jammu &
Kashmir And Another

RESPONDENT

Date of Decision: July 12, 2019

Acts Referred:

Constitution Of India, 1950 – Article 21, 22(1), 22(2), 22(3), 22(3)(b), 22(5)

Citation: (2019) 07 J&K CK 0018

Hon'ble Judges: Tashi Rabstan, J

Bench: Single Bench

Advocate: Syed Abid Hussain, Mir Shafaqat Husain, N. H. Shah

Final Decision: Disposed Off

Judgement

Tashi Rabstan, J

1. Deputy Commissioner, Anantnag, by Order no.72/DMA/PSA/DET/2018 dated 28.12.2018, has placed one Mohammad Shafi Lone son of

Mohammad Khalil Lone resident of K-Kalan Tehsil Srigufwara District Anantnag (for brevity – “detenu”) under preventive detention, with a view

to prevent him from acting in any manner prejudicial to the maintenance of public order. It is this order of which petitioner is aggrieved and beseeches

quashment thereof on the grounds adumbrated in present petition.

2. Albeit reasonable opportunities had been granted to respondents, they have opted not to file counter affidavit in opposition to petition.

3. I have heard learned counsel for parties and considered the matter.

4. Learned counsel for petitioner has stated that detenu was arrested by police without any justification in the month of October 2018 and was taken

to police station Srigufwara in connection with case FIR no.60/2016. An interim bail is stated to have been granted by the court of competent

jurisdiction on 29.11.2018, which was later on made absolute vide order dated 07.12.2018. However, on 28.12.2018 impugned detention order came to

be passed and detenu shifted to Sub Jail Hira Nagar to be detained under preventive detention. It is contended that petitioner approached office of

respondent no.2 and unofficially obtained Xerox copies of impugned order of detention, communication and grounds of detention. His next submission

is that detenu was required to be supplied all documents, statements and other material relied upon in the grounds of detention, so as to enable him to

make an effective and meaningful representation against his detention and failure to supply such material/documents, amounts to violation of Article

22(5) of the Constitution of India. Vague allegations are said to have been levelled against detenu.

5. Per contra, learned counsel for respondents has insisted that all the technical requirements had been complied with, more particularly of J&K Public

Safety Act, 1978, which required that earliest opportunity of making a representation be provided to detenu.

6. It is pertinent to mention here that reverence of life is inseparably concomitant with the dignity of a human being, who is basically divine, not

obsequious. A human personality is indued with potential infinitude and it blossoms when dignity is sustained. Sustenance of such dignity has to be the

superlative concern of every sensitive soul. Essence of dignity can never be treated as a momentary spark of light or, for that matter, "a brief

candle", or "a hollow bubble". The spark of life gets more splendid when man is treated with dignity sans humiliation, for every man is

expected to lead an honourable life which is a splendid gift of "creative intelligence". When a dent is created in the reputation, humanism is

paralysed. Reverence for the nobility of a human being has to be the cornerstone of a body polity that believes in orderly progress. But, some, the

incurable ones, become totally oblivious of the fact that living with dignity has been enshrined in our Constitutional philosophy and it has its ubiquitous

presence and the majesty and sacrosanctity dignity cannot be allowed to be crucified in the name of precautionary incarceration. Albert Schweitzer,

highlighting on Glory of Life, pronounced with conviction and humility, "the reverence of life offers me my fundamental principle on morality".

The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it

really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life

commands.

7. Article 22(3)(b) of the Constitution of India, which vouchsafes preventive detention, is only an exception to Article 21 of the Constitution. An

exception is an exception and cannot ordinarily nullify the full force of main rule, which is right to liberty in Article 21 of the Constitution. Fundamental

rights are meant for protecting civil liberties of people and not to put them in immurement for a long period shorn of recourse to a lawyer and without a

trial. It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is that in essence a detention order of

three months, or any other period(s), is a punishment of that particular period, is incarceration. What difference is it to detenu whether his

immurement is called preventive or punitive? Besides, in cases of preventive detention no offence is proved and justification of such detention is

suspicion or reasonable probability, and there is no conviction that can only be warranted by legal evidence. Preventive detention is every so often

described as a "jurisdiction of suspicion". Detaining authority passes detention order on subjective satisfaction. Preventive detention is, by nature,

repugnant to democratic ideas and an anathema to rule of law.

8. Preventive detention law makes room for detention of a person without a formal charge and without trial. The person detained is not required to be

produced before the Magistrate within 24 hours, so as to give an opportunity to the Magistrate to peruse the record and decide whether the detenu is

to be remanded to police or judicial custody or allowed to go with or without bail. The detenu cannot engage a lawyer to represent him before the

detaining authority. In the said milieu, it is of utmost importance that whatever procedural safeguards are guaranteed to detenu by the Constitution,

preventive detention law should be strictly followed. Right to liberty guaranteed by Article 21 implies that before a person is imprisoned, a trial must

ordinarily be held giving him full opportunity of hearing, and that too through a lawyer, because a layman would not be able to properly defend himself

except through a lawyer. Significance of a lawyer to enable a person to appropriately defend himself has been sumptuously explicated by the Supreme

Court in A.S. Mohd. Rafi v. State of Tamilnadu AIR 2011 SC 308 and Md. Sukur Ali v. State of Assam, JT 2011 (2) SC 527. As observed by Mr

Justice Sutherland of the U.S. Supreme Court in Powell v. Alabama, 287 U.S. 45 (1932) “Even the intelligent and educated layman has small and

sometimes no skill in the science of law, and hence, without a lawyer he may be convicted though he is innocent. Article 22(1) of the Constitution

makes it a fundamental right of a person detained to consult and be defended by a lawyer of his choice. But Article 22(3) specifically excludes the

applicability of clause (1) of Article 22 to cases of preventive detention. Therefore, we must confine the power of preventive detention to very narrow

limits, otherwise the great right to liberty won by our Founding Fathers, who were also freedom fighters, after long, arduous, historical struggles, will

become nugatory. In State of Maharashtra & Ors. v. Bhaurao Punjabrao Gawande, (2008) 3 SCC 613 this Supreme Court observed:

“...Personal liberty is a precious right. So did the Founding Fathers believe because, while their first object was to give unto the people a

Constitution whereby a government was established, their second object, equally important, was to protect the people against the government. That is

why, while conferring extensive powers on the government like the power to declare an emergency, the power to suspend the enforcement of

fundamental rights or the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against

executive and legislative despotism those human rights which they regarded as fundamental. The imperative necessity to protect these rights is a

lesson taught by all history and all human experience. Our Constitution makers had lived through bitter years and seen an alien Government trample

upon human rights which the country had fought hard to preserve. They believed like Jefferson that “an elective despotism was not the

Government we fought for”. And, therefore, while arming the Government with large powers to prevent anarchy from within and conquest from

without, they took care to ensure that those powers were not abused to mutilate the liberties of the people. (vide A.K. Roy Vs. Union of India (1982)

1 SCC 271, and Attorney General for India Vs. Amratlal Prajivandas, (1994) 5 SCC 54.

9. The Constitution Bench of the Supreme Court in M. Nagaraj and others v. Union of India and others (2006) 8 SCC 212, observed:

“It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any

Constitution by reason of the basic fact that they are members of the human race.

10. The Nine Judge Constitution Bench of the Supreme Court in I.R. Coelho (dead) By LRs. v. State of T.N., (2007) 2 SCC 1, observed:

“It is necessary to always bear in mind that fundamental rights have been considered to be the heart and soul of the Constitution..... Fundamental

rights occupy a unique place in the lives of civilized societies and have been described in judgments as “transcendental, & inalienable, and

primordial”.

11. In the present case, averment of learned counsel for respondents is that there are very serious allegations against detenu as he has always been in

the lead role in nefarious activities, which are hazardous to the sovereignty and integrity of the country and has been creating law and order problem in

the area of Anantnag and its adjacent areas and in order to accomplish antisocial agency. And in this connection, various criminal cases are already

going on against detenu under various provisions of Ranbir Penal Code and if he is found guilty, he will be convicted and given appropriate sentence.

Maybe, offences allegedly committed by detenu attract punishment under prevailing laws but that has to be done under prevalent laws and taking

recourse to preventive detention laws would not be warranted. Detention cannot be made a substitute for ordinary law and absolve investigating

authorities of their normal functions of investigating crimes, which detenu may have committed. After all, preventive detention cannot be used as an

instrument to keep a person in perpetual custody without trial. The Supreme Court in *Rekha v. State of Tamil Nadu* AIR 2011 SCW 2262, while

emphasising need to adhere to procedural safeguards, observed:

“It must be remembered that in case of preventive detention no offence is proved and the justification of such detention case is suspicion or

reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as

“jurisdiction of suspicion”, The Detaining Authority passes the order of detention on subjective satisfaction. Since Clause (3) of Article 22

specifically excludes the applicability of Clauses (1) and (2), the detenue is not entitled to a lawyer or the right to be produced before a Magistrate

within 24 hours of arrest. To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and

meticulous compliance with the procedural safeguards, however, technical, is, in our opinion, mandatory and vital.

12. The history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of

the right to move the Court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right

is of great importance. Personal liberty protected under Article 21, is so sacrosanct and so high in the scale of constitutional values that it is the

obligation of detaining authority to show that impugned detention meticulously accords with the procedure established by law. However, the

constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of State's security, public order, disruption of

national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions. In a case of preventive

detention, no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal

conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable

activities. But at the same time, when a person's greatest of human freedoms, i.e. personal liberty, is deprived, the laws of preventive detention are

required to be strictly construed, and a meticulous compliance with the procedural safeguards, howsoever technical, has to be mandatorily made.

Reference in this regard is made to *Haradhan Saha v. State of West Bengal & ors*, (1975) 3 SCC 198; *Union of India v. Paul Manickam & anr*,

(2003) 8 SCC 342; *Rajinder Arora v. Union of India* (2006) 4 SCC 796; *Powanammal v. State of Tamil Nadu and anr.*, AIR 1999 SC 618; *G. M.*

Shah v. State of J&K, (1980) 1 SCC 132; *Talib Hussain v. State of J&K & ors*, 2009 (II) SLJ 849; *Nissar Ahmad Bhat v. State & ors*, 2014 (III) SLJ

1047; *Shahmali v. State & ors*, 2010 (1) SLJ 56; *Dilawar Magray v. State of J&K & ors*, 2010 (II) SLJ 696; and *Sajad Ahmad Khan v. State & ors*,

2010 (II) SLJ 743.

13. It is worthwhile to mention here that preventive detention is not a quick alternative to normal legal process, is the dictum of the Supreme Court in

V. Shantha v. State of Telangana and others, 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 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

normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detenu 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. No doubt the offences alleged to have been committed by detenu are such as to

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. Preventive detention involves 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 crimes which the detenu may have committed. After all, 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 the cases of Rekha's and V. Shantha (supra) as also in

Sama Aruna v. State of Telengana AIR 2017 SC 2662.

14. Based on the above discussion, the petition is disposed of and detention Order no.72/DMA/PSA/DET/2018 dated 28.12.2018, issued by Deputy

Commissioner, Anantnag, is quashed. As a corollary, respondents are directed to set the detenu at liberty forthwith provided he is not required in any

other case. Disposed of.