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(2019) 08 J&K CK 0028

Jammu & Kashmir High Court (Srinagar Bench)

Case No: Habeas Corpus Petition (HCP) No. 69 Of 2019

Irshad Ahmad Bhat		APPELLANT
	Vs	
State Of Jammu & Kashmir And Ors		RESPONDENT

Date of Decision: Aug. 28, 2019

Acts Referred:

- Arms Act, 1959 - Section 7, 25
- Jammu And Kashmir Public Safety Act, 1978 - Section 8(a)
- Constitution Of India, 1950 - Article 22(5)

Hon'ble Judges: Rashid Ali Dar, J

Bench: Single Bench

Advocate: B. A. Tak, Asif Maqbool

Judgement

Rashid Ali Dar, J

1) Challenge in this petition is to the Order No. 128/DMB/PSA/2019 dated 21.02.2019 passed by the District Magistrate, Baramulla- respondent No. 2

(for short detaining authority) in exercise of powers conferred by clause (a) of Section 8 of the J&K Public Safety Act1978 (for short the Act)

whereby Irshad Ahmad Bhat alias â€œShayaâ€ son of Bashir Ahmad Bhat resident of Kaw Mohalla Tantraypora Palhallan (for brevity

â€œdetenuâ€), has been placed under preventive detention.

2) Learned counsel for the petitioner submits that the detenue was already in custody in connection with the case FIR No. 18/2019 for the commission

of offence punishable under Section 7/25 Arms Act, therefore, there was no requirement of passing detention order. No compelling reasons have been

detailed out by the detaining authority while passing the impugned order which shows non application of mind on the part of the detaining authority.

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 detenue of his Constitutional and Statutory rights. Grounds of detention are stated to be vague, baseless, non-existent and

unfounded and there is non-application of mind on the part of detaining authority while passing the impugned detention order. It is further submitted

that the detenue 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 detenue is not in a position to understand.

3) Learned Dy. AG submits that the detaining authority was right in booking detenue under preventive custody as his activities were prejudicial to the

Security of the state. He further submits that requisite material has been provided to the detenue so as to enable him to make effective representation.

In order to substantiate his argument, reliance has been placed on the judgment of Honâ€™ble Supreme Court in case titled Honâ€™ble Supreme

Court in case titled â€œHardhan Saha and Ors. Vs. State of West Bengal and Ors.â€ reported in (1975) 3 SCC 19 8and â€œThe Secretary to

Government Vs. Nabilaâ€ 2015 Cr. L. J 1364.

4) Considered the rival argument and perused the record.

5) Perusal of the detention record reveals that the detenue has been booked under various criminal cases which include case FIR No. 18/2019 for

commission of offence punishable under Section 7/25 Arms Act and so was in police custody at the time of passing of detention order. Therefore the

detaining authority was under obligation to spell out the compelling reasons for issuing detention order.

6) Law is well settled that when a person is in custody of the police, the detaining authority is required to spell out the reasons as to why a person who

was already in substantive custody was being detained in preventive custody. Absence of such reasons in the grounds of detention renders the

detention illegal and such an order would clearly demonstrate non-application of mind of the detaining authority. In this view, I am fortified by the

judgment of this in â€œMohammad Hussain Dar v. State and othersâ€ reported in 2007(2) JKJ HC-231.

7) In this connection, it may also be quite apt to quote following Para from the judgment â€œT. P. Moideen Koya vs. Government of Kerala and

Ors.â€ reported in 2004 (8) SCC 106:

â€œâ€¦â€¦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 detenue was likely to be released on bailâ€

8) In â€œSama Aruna v. State of Telangana & Anrâ€ (AIR 2017 SC 2662), their lordship observed:

â€œ24. 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 detenue 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:

â€œ6. 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 detenue 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.â€

9) The same view has been repeated and reiterated by the Honâ€™ble Supreme Court in the judgment delivered in the case of â€œV. Shantha v.

State of Telangana & Othersâ€ (AIR 2017 SC 2625). In this regard, Para 13 of the said judgment is relevant to be quoted as under:

â€œThe 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 â€œgoondaâ€ or â€œprejudicial to maintenance of public orderâ€ cannot be sufficient justification to invoke the

draconian powers of preventive detention. To classify the detenue as a â€œgoondaâ€ 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.â€

10. The records, as produced by the learned counsel for the respondents, do not suggest that the translated copies of grounds of detention have been

supplied to the detenue, therefore, infringement of right guaranteed under Article 22(5) of the Constitution. In grounds it is being stated that the

detenue has read only up to 9th class. How the material was explained to the detenue is not being explained by any credible proof. The service of the

grounds of detention on the detenue is a very precious constitutional right and the object behind the same is to enable the detenue to file an effective

representation. It will be an empty formality to supply the grounds of detention to the detenue unless he is in a position to understand the same. In my

view I am fortified by the judgment rendered by the Honâ€™ble Apex Court in the case â€œChaju Ram Vs. The State of Jammu & Kashmirâ€

reported in AIR 1971 SC 263. Following portion from para 9 of the judgment shall be quite apposite to be quoted:

â€œâ€¦â€¦. The detenu is an illiterate person and it is absolutely necessary that when we are dealing with a detenu who cannot read or understand

English language or any language at all that the grounds of detention should be explained to him as early as possible in the language he understands so

that he can avail himself of the statutory right of making a representation. To hand over to him the document written in English and to obtain his thumb

impression on it in token of his having received the same does not comply with the requirements of the law which gives a very valuable right to the

detenue to make a representation which right is frustrated by handling over to him the grounds of detention in an alien language. We are therefore

compelled to hold in this case that the requirement of explaining the grounds to the detenu in his own language was not complied with.â€

11. For what has been stated above, the order of detention impugned bearing No. 128/DMB/PSA/2019 dated 21.02.2019, passed by District

Magistrate, Baramulla, is not valid, as such, is quashed. The detenu is directed to be released from the preventive custody provided he is not required

in connection with any other case.

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