

## MOHD. RAFIQ Vs STATE & ORS

**Court:** Jammu & Kashmir High Court

**Date of Decision:** March 12, 2018

**Acts Referred:** Constitution of India, 1950 " Article 21, 22(5)

Jammu and Kashmir Public Safety Act, 1978 " Section 8

Jammu and Kashmir State Ranbir Penal Code, 1989 " Section 188

**Hon'ble Judges:** MOHAMMAD YAQOOB MIR

**Bench:** Single Bench

**Final Decision:** Disposed Of

### Judgement

1. Pursuant to Order No.02 of 2017 dated 17.04.2017 passed by District Magistrate, Jammu, detenue has been taken into preventive custody so as to

deter him from acting in any manner prejudicial to the maintenance of public order.Ã,

2. The period of detention in such cases is maximum for one year and it has to be in piece-meals i.e. initially for a period of three months then

extendable upto one year. The detenue has been taken into custody on 17.04.2017 so he has been in the preventive custody for last more than 10

months.Ã,

3. Cursory glance on the grounds of detention suggests that the District Magistrate has not been certain for deriving subjective satisfaction about

activities of the detenue. In the grounds of detention different types of words have been employed i.e. Ã¢,Ã¼activities of the detenue are hurting the

sentimentsÃ, ofÃ, particularÃ, community which may lead to communal clashes/disturbance of peace and tranquility in the area; then in Para 7 it has

been recorded that Ã¢,Ã¼the activities of the detenue are highly prejudicial to the security of the society/public peace/tranquility and public order.Ã,

4. Section-8 of the J&K Public Safety Act, 1978 provides the procedure, manner and method as to how a personÃ¢,Ã¼s liberty can be curtailed.

Preventive custody normally is for preventing a person from any such activities prejudicial to the maintenance of public order; it is not a penal in its

operation.Ã, Ã, Ã,

5. While exercising such jurisdiction, personal liberty of a person which is guaranteed under Article 21 of the Constitution has to be respected.

Curtailment of liberty is exception which is permissible but after deriving subjective satisfaction; procedural safeguards are to be adhered to so that the

act of the detaining authority may not have trappings of negating the personal liberty as guaranteed.Ã,

6. The order of detention on the face of it shows non-application of mind. District Magistrate has simply said that dossier has been brought to his

notice, based on which he has proceeded and passed the order of detention which means he has not applied his own mind to the facts and the

circumstances so as to derive subjective satisfaction.Ã,

7. No-doubt District Magistrate has recorded that he has derived subjective satisfaction, but in effect that has not happened otherwise he would not

have recorded the words prejudicial to the security of the society/public peace/tranquility and public order, which means he himself was not certain

what were the activities of the detainee.Ã,

8. Another important flaw is that the detaining authority i.e. District Magistrate has not informed the detainee that he has a right to make

representation even before him, instead it has been recorded that he can represent against his detention before the Government.Ã,

9. Said issue has been dealt with by the HonÃ¢â€ble Division Bench of this Court in case Tariq Ahmad Dar vs. State of J&K and others, LPAHC

No.43/2017 decided on 09.06.2017, wherein it has been held that there is serious violation of constitutional guaranteed right of the detainee, Para 16 &

17 of the said judgment are relevant to be quoted:-

Ã¢â€16. The plea of the learned counsel for the respondents, that the detainee could make a representation to the State Government and that such an

opportunity had been provided, would be of no consequence for the simple reason that the Governments approval of the detention order came later i.e.

on 28.12.2016 whereas, the detention order was executed upon the detainee on 24.12.2016 and between that date and 28.12.2016 he had a right to

make a representation to the detaining authority i.e. the District Magistrate, Baramulla, to revoke the detention order. That opportunity not having been

given, vitiated the detention order. In other words, the detention order stood vitiated and invalidated on 22.12.2016 itself.Ã,

17. In view of the foregoing, we need not to consider any of the other pleas sought to be raised by the learned counsel for the appellant, inasmuch as

the detention order has been invalidated because of noncommunication of the fact that the detainee could make a representation to the detaining

authority. The detention order having become invalid, the detainee is liable to be released forthwith insofar as this detention order is concerned.Ã¢â€

10. As against the detainee, four cases have been registered, one in the year 2010 another in 2015, then in 2016 and thereafter in 2017, for commission

of offences punishable under Section 188 RPC and 3 PCA Act, but it has been nowhere shown as to whether he has been arrested in connection with

those cases and as to whether he had applied for grant of bail.Ã,

11. It is now well settled law that in connection with criminal cases order of detention can be passed provided compelling reasons are recorded for so

doing. District Magistrate has not even formulated the grounds of detention which would form base for ordering preventive detention.Ã,

12. The contention of learned counsel for the petitioner that the material forming base for passing the order of detention has not been supplied to the

detenue is repelled by learned Sr.AAG by alleging that as per the records material has been supplied to the detenue and he has also acknowledge the

receipt of the same. In addition thereto grounds of detention have been read over to him and explained by one Inspector Rajesh Sharma but affidavit

of the said Inspector has not been filed in support thereto; when a requirement of law is that a person who explains the grounds of detention to the

detenue has to file an affidavit. Only copies of detention warrant and grounds of detention have been handed over to the jail authority; it is not made

clear as to whether supporting material has been supplied to the detenue. When it is so detenue has been deprived by violating the valuable

constitutional guaranteed right of filing effective representation as is a mandate of Article 22(5) of the Constitution. When there is infraction of

guaranteed right, order of detention becomes unsustainable.Ã,

13. For the reasons stated hereinabove and keeping in view the position of the detenue having been in the preventive custody for more than 10

months,Ã, thereÃ, Ã, isÃ, Ã, noÃ, Ã, scopeÃ, forÃ, Ã, continuing with detention. The order of detention bearing No. 02 of 2017 dated 17.04.2017,

viewed from any angle, is not sustainable, accordingly quashed. Detenue be released forthwith provided he is not required in any other case.Ã,

14. Detention records as produced be returned to learned Sr.AAG.

15. Disposed of as above.