

Basit Ahmad Malik Vs State Of Jammu & Kashmir And Anr

Court: Jammu & Kashmir High Court (Srinagar Bench)

Date of Decision: Feb. 5, 2019

Acts Referred: Jammu & Kashmir Public Safety Act, 1978 " Section 8
Jammu And Kashmir State Ranbir Penal Code, 1989 " Section 307, 427
Constitution Of India, 1950 " Article 21, 22(3)(b)

Hon'ble Judges: Rashid Ali Dar, J

Bench: Single Bench

Advocate: Wajid Haseeb, Mir Shafaqat Hussain, Asif Maqbool

Judgement

1) Noticing the activities of Shri Basit Malik (hereinafter referred to as the detenue) prejudicial to the security of the State, he, pursuant to order

No.DMS/ PSA/08/2018, dated 19.06.2018, passed by District Magistrate, Srinagar, has been taken into preventive custody by invoking powers under

Section 8 of the J&K Public Safety Act. By the instant petition, validity of the said order is assailed on the grounds referred therein.

2) Learned counsel for the petitioner projected various grounds while seeking quashment of the impugned order but the star ground is that the detenue

was already in custody in connection with case FIR No.55/2018 and FIR No.59/2018 registered by Police Station Safakadal for commission of

offences punishable under Section 307 RPC, " Explosive Substance Act, 427 RPC and so was in custody of said Police Station when the order of

detention has been passed. There was no requirement of passing the order of detention but despite that impugned order has been passed without

detailing out the compelling reasons in this regard, which shows as to how the detaining authority has applied its mind.

3) Respondents despite repeated opportunities neither filed counter affidavit nor produced the detention records.

4) It is evident that the detaining authority has not applied its mind properly while passing the impugned order. While detaining a person under Public

Safety Act, detaining authority is under a legal obligation to analyze all the circumstances and material and then to gather conclusion about the

requirement of depriving a person of his personal liberty.

5) 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 "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.

6) Right to liberty as guaranteed under Article 21 of the Constitution can be negated in view of Article 22(3) (b) of the Constitution which is an

exception to Article 21 of the Constitution. The said exception authorizes the concerned authorities to pass preventive detention but while passing such

orders, the authority concerned is required to be alive to the personal liberty of a person and such power shall be exercised in a manner which may not

have the trappings of depriving a person of the guaranteed liberty. In short an exceptional case has to be made out for passing the order of preventing

a person from acting in any manner which shall be prejudicial, in the instant case, to the security of the State but while doing so procedural safeguards

are to be respected. Breach in observing the procedural safeguards gives right to the detainee to claim that he has been prejudiced as his liberty has

been curtailed de hors the law. In this connection it shall be quite relevant to quote paras 37 and 38 of the judgment rendered by a Bench of three

Hon'ble Judges of the Hon'ble Apex Court in case captioned "Rekha Vs. State of Tamil Nadu and anr", reported in (2011) 5 SCC 244:

"37. As observed in Abdul Latif Abdul Wahab Sheikh v. B. K. Jha vide SCC para 5:(SCC p.27)

"5....The procedural requirements are the only safeguards available to a detainee since the court is not expected to go behind the subjective

satisfaction of the detaining authority. The procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the

liberty of the subject and the constitutional rights guaranteed to him in that regard.

As observed by Mr. Justice Douglas of the United States Supreme Court in *Joint Anti-Fascist Refugee Committee v. McGrath*: (US p. 179)

“...It is procedure that spells much of the difference between rule of law and rule of whim or caprice. Steadfast adherence to strict procedural

safeguards are the main assurances that there will be equal justice under law.”

38. Procedural rights are not based on sentimental concerns for the detenu. The procedural safeguards are not devised to coddle criminals or provide

technical loopholes through which dangerous persons escape the consequences of their acts. They are basically society’s assurances that the

authorities will behave properly within rules distilled from long centuries of concrete experience.”

7) 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, therefore, other grounds projected in the petition are not required to be dealt with.

8) Having regard to the above discussion, the impugned order of detention impugned is unsustainable, as such, quashed. Further custody of the

detenue shall be governed by the orders as shall be passed by the court of competent jurisdiction in the criminal case registered against.