

Jammu & Kashmir High Court - Srinagar Bench

Wp (Crl) No. 437/2022 vs Ut Of Jammu And Kashmir & Another on 9 December, 2022

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

WP (Crl) No. 437/2022

Reserved on: 05.12.2022

Date of Decision:09.12.2022

Shabir Ahmad Malik

...Petitioner

Through: Mr. Syed Musaib, Advocate

Versus

UT of Jammu and Kashmir & another

.....Respondent(s)

Through: Mr. Faheem Nisar Shah, GA.

CORAM:

Hon'ble Mr. Justice Javed Iqbal Wani, Judge.

JUDGEMENT

1. The instant writ petition arises out of the detention order bearing No. 31/DMA/PSA/DET/2022 dated 25.06.2022, (hereinafter for short the impugned order) passed against the detenu, namely, Shabir Ahmad Malik, by Respondent no.2-District Magistrate, Anantnag (for brevity detaining authority), under and in terms of provisions of the Jammu & Kashmir Public Safety Act, 1978 (for short the 'Act').

2. The detention order dated 25.06.2022 is challenged by the petitioner through the medium of instant petition on the premise that the detenu is a law-abiding citizen and has never indulged in any subversive activity prejudicial to public order or security of the State. The detenu is stated to have been arrested and implicated in case FIRs dating back to 2013 and 2016, and came to be detained under preventive custody by the respondents in terms of impugned order and lodged at Central Jail, Kote Balwal, Jammu.

3. The impugned order is being challenged, inter alia, on the grounds that the detenu has not been provided copies of the relevant material, like copy of dossier, details of any incidence with regard to the WP (Crl) No.437/2022 alleged association of the detenu with the militant organizations or any particular incident regarding his links with secessionist organizations, date and year when the detenu has done that, not a single incident has been spelt out, referred to in the grounds of detention, material, if any, collected during the course of investigation, thus, depriving him to file an effective representation against his detention. The said failure is stated to have infringed the constitutional and statutory rights of the detenu guaranteed under Article 22(5) of the Constitution of India and Section 13 of Jammu & Kashmir Public Safety Act.

It is also urged that the two representations came to be submitted against the impugned detention order which were neither considered nor decided by the respondents.

Heard learned counsel for the parties, perused the record and considered the matter.

4. Learned appearing counsel for the parties while making the respective submissions reiterated the contentions raised and grounds urged in their respective pleadings.

5. Before advertng to the issue/s involved in the petition, it would be appropriate and advantageous to refer to the judgment of the Apex Court passed in case titled as "Rekha Vs. State of Tamil Nadu, reported in 2011 (5) SCC 244" being relevant and germane herein, wherein at paragraphs 29, 33 & 35 it has been observed and laid down as under:-

"29. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guarantee by Article 21 of the Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal."

"33. No doubt it has been held in the Constitution Bench decision in Haradhan Saha case that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the WP (Crl) No.437/2022 background of the constitutional scheme in Article 21 and 22 of the Constitution (which we have already explained). Article 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right. It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him an opportunity of placing his defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (the Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to"

"35. It must be remembered that in cases of preventive detention no offence is proved and the justification of such detention is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as a "jurisdiction of suspicion" (vide State of Maharashtra v. Bhaurao Punjabrao Gawande, SCC para 63). 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 detenu 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."

A further reference to the judgement of the Apex court passed in case titled as "Abdul Wahab Sheikh v. B. K. Jha, reported in 1987(2) SCC 22" would also be relevant wherein at paragraph 5, following has been noticed and observed as under:-

"... We only desire to add that in a Habeas corpus proceeding, it is not a sufficient answer to say that the procedural requirements of the constitution and the statute have been complied with before the date of hearing and therefore, the detention should be upheld. The procedural requirements are the only safeguard 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 right guaranteed to him in that regard."

6. Insofar as the ground urged that the representations have been made against the impugned detention order by detainee through his father, as spelt out in ground (i) of the writ petition is concerned, the respondents have not replied the same, therefore, it can be gathered that the same have not been considered. If that being the position, it results into drawing an adverse inference against the respondents as the failure of the respondents to consider the representations submitted by the detainee indisputably amounts to violation of the provisions of Article 22(5) of the Constitution. A reference in this WP (Crl) No.437/2022 behalf to the judgement of the Apex Court passed in case titled as Rahmatullah v. State of Bihar and others reported in 1979 (4) SCC 559, would be relevant and germane here wherein at paragraph 4, it is noticed and observed as under: -

"4. The normal rule of law is that when a person commits an offence or a number of offences, he should be prosecuted and punished in accordance with the normal appropriate criminal law; but if he is sought to be detained under any of the preventive detention laws as may often be necessary to prevent further commission of such offences, then the provisions of Article 22(5) must be complied with. Sub-Article (5) of Article 22 reads: When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

This Sub-Article provides, inter alia, that the detaining authority shall as soon as may be communicate the grounds of detention and shall afford him the earliest opportunity of making a representation against the order. The opportunity of making a representation is not for nothing. The representation, if any, submitted by the detainee is meant for consideration by the Appropriate Authority without any

unreasonable delay, as it involves the liberty of a citizen guaranteed by Article 19 of the Constitution. The non-consideration or an unreasonably belated consideration of the representation tantamount to non-compliance of Sub-Article (5) of Article 22 of the Constitution."

7. It is settled law that there should not be supine indifference, slackness or callous attitude in considering the representation submitted against the detention order and any unexplained delay in disposal of a representation would be breach of the Constitutional imperative and it would render the continued detention impermissible and illegal as has been held by the Apex Court in *K. M. Abdulla Kunhi v. Union of India* (1991) 1 SCC 476, followed in *Rajammal v. State of Tamil Nadu and others*, 1999(1) SCC 417 and iterated in *Ummu Sabeena v. State of Kerala*, (2011) 10 SCC 781.

A reference hereunder to the latest judgement of the Hon'ble Apex Court passed in case titled "*The State of Manipur & others v. Buyamayum Abdul Hanan*" reported as 2022 SCC Online SC 1455 WP (Crl) No.437/2022 delivered on 19 th of October, 2022 also becomes imperative wherein in paragraph 24 following has been held:

"24. In other words, the right of personal liberty and individual freedom which is probably the most cherished is not, in any manner, arbitrarily to be taken away from him even temporarily without following the procedure prescribed by law and once the detenu was able to satisfy while assailing the order of detention before the High Court in exercise of jurisdiction Article 226 of the Constitution holding that the grounds of detention did not satisfy the rigors of proof as a foundational effect which has enabled him in making effective representation in assailing the order of detention in view of the protection provided under Article 22(5) of the Constitution, the same renders the order of detention illegal and we find no error being committed by the High Court in setting aside the order of preventive detention under the impugned judgment."

In view of the aforesaid position obtaining in the matter the other grounds urged in the petition need not to be dealt with and as such pale into insignificance.

8. In the above milieu, the judgements referred to and relied upon by the counsel for the respondents and do not lend any support thereof to the case of the respondents.

9. Viewed thus, in the context of what has been observed, analyzed and considered in the preceding paragraphs, instant petition is allowed and consequent to which the impugned order of detention bearing No. 31/DMA/PSA/DET/2022 dated 25.06.2022, is quashed, with the direction to the respondents including the Jail authorities concerned to release the detenu forthwith from preventive custody unless required in any other case.

10. Disposed of.

11. No orders as to costs.

(Javed Iqbal Wani) Judge Srinagar 09.12.2022 TASADUQ SAB: