

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

HC(W) No.8/2012

Date of Order: 28.12.2012

Munawar Hussain Shah

Versus

State of J&K and ors.

Coram:

Hon'ble Mr. Justice Hasnain Massodi, Judge.

Appearing Counsel:

For Petitioner(s) : Mr. S.A.Malik, Advocate.
For Respondent(s) : Mr. Gagan Basotra, AAG.

- i) Whether approved for reporting in Law Journals ? **Yes**
ii) Whether approved for publishing in press media ? **Optional**
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1. Challenge in petition on hand, is to order No. 07/PSA of 2011 dated 4th of November, 2011 of District Magistrate Poonch (hereinafter “Detaining Authority”) whereby Sh. Manawar Hussain Shah alias Babu Shah S/o Habib Hussain Shah R/o Village Panag Sharief District Kotli, Pak-Occupied Kashmir, (hereinafter referred to as “detenu” for short), has been detained under Section 8(1)(b)(ii) J&K Public Safety Act, 1978 for a period of three months and he was directed to be lodged in district jail, Poonch.

2. The detention order is questioned on the grounds that it has been passed in a mechanical manner without application of mind and that the detenu has not been provided the documents relied upon by the detaining authority so as to enable him to make an effective representation against his detention. It is further pleaded that the grounds of detention made use of by the detaining authority to slap detention order were not available to the detenu in as much as the detenu is a permanent resident of state and a citizen of India and in view of the law laid down in Mohsim Shah versus Union of India and others 1975 KLJ 69, he is not liable to be deported or pushed back.
3. The chargesheet/challan presented in Sessions Court Poonch against the petitioner and one Tuffail Hussain Shah under Section 18 of Unlawful Activities Act, according to the petitioner, has been dismissed by the trial court on 20th of October, 2011 and the state has decided not to file any appeal against the judgment of the acquittal recorded by the trial court. The earlier detention order No. 02/PSA of 2010 dated 8th of January, 2010 passed by the detaining authority placing detenu under preventive detention, is said to have been challenged in HCP No.2/2010 and quashed by the

learned Single Judge on 5th of June, 2010, leaving no room for placing the detenu second time under the preventive detention.

4. The respondents have not filed any reply/counter. However Mr. Gagan Basotra, learned Senior Additional Advocate General, has made detention record available for perusal.
5. I have gone through the petition and have heard the learned counsel for the parties.
6. The detenu is a resident of Pak Occupied Kashmir and has entered India on a valid visa through Attory Check Post, Punjab on 6th of August, 2009. He married one Safeena Malik alias Sobia D/o Abdul Hamid Malik R/o Fazalabad, Poonch on 22nd of August, 2009. The detenu was arrested on 1st of December, 2009 in connection with case FIR No. 168 of 2009 under Section 18 of Unlawful Activities (Prevention) Act. The investigation was concluded as proved and a chargesheet presented in the Sessions Court, Poonch. The petitioner and his co-accused were acquitted of the charge by the Sessions Court. In the meantime detenu was placed under preventive detention vide order No. 2/PSA of 2010 dated 8th of January, 2010. This detention order was challenged before this Hon'ble

Court and the same was quashed on 5th of June, 2010. The detenu-accused has remained at large till the second detention order was passed by the detaining authority on 4th of November, 2011. It is pertinent to point out that while the earlier detention order No. 2/PSA of 2010 dated 8th of January, 2010 was passed under Section 8(a)(b) of the Act, while second detention order No.07/PSA of 2011 dated 4th of January, 2011 assailed herein has been passed under Section 8(1)(b)(ii) of the Act.

7. The power to make orders detaining a person in terms of Section 8(1) of the Act lies with the Government. However Section 8(2) carves out an exception to the general rule and empowers Divisional Commissioner and District Magistrate to exercise powers conferred by Section 8(1) clause (a) and (a)(i) of the Act otherwise available to the Government. It follows that the Divisional Commissioner or District Magistrate may order preventive detention of a person to prevent him from acting in any manner prejudicial to the security of the state or the maintenance of the public orders or to prevent him from smuggling timber or liquor, its smuggling, transportation, concealment or harbour a person engaged in smuggling of timber or liquor or

abetting such activities. The power available to the government under Section 8(1)(b) is retained by the Government and neither Divisional Commissioner nor District Magistrate is given authority to exercise such powers. Therefore, where a foreigner within the meaning of foreigners Act or a person residing in the area of the State under the occupation of Pakistan is proposed to be put under preventive detention so as to regulate his continuous presence in the state or to make arrangement for his expulsion, the power to make an order of preventive detention lies with the Government and not with the Divisional Commissioner or District Magistrate. In the present case the detention order is made by the District Magistrate and not by the Government. The detention order, is therefore liable to be quashed for having been made by an incompetent authority.

8. The detaining authority has determined the period of detention at the threshold. It is pertinent to point out that even if the District Magistrate Poonch is taken to have power to pass a detention order under Section 8(1)(b)(ii). His order in terms of Section 8(4) of the Act is to remain in force for a period of 12 days and cease to have effect thereafter unless it is approved by the

Government. The detaining authority therefore had to leave the question of period of detention to be decided by the Government. Though the government has subsequently on 5th of January, 2012 decided the period of detention yet it does not wash off the illegality committed in fixing period of detention before approval of the Government under Section 8(4) of the Act. The District Magistrate by fixing the period of detention has led the detenu to believe that representation if any filed by him shall not be accorded any consideration, in as much as, the detaining authority has already made up its mind as regards period of detention. The detaining authority by determining the period of detention at the initial stage even before it was executed, has violated the mandate of Article 22(5) Constitution of India and Section 13 of the Act.

9. The detaining authority as is evident from a bare look at the detention order has not recorded the satisfaction that the detenu was required to be placed under preventive detention so as to regulate his continued presence in the state or to make arrangement for his expulsion from the state. The detention order on the other hand refers to alleged unlawful activities of the detenu of which he stands acquitted by the trial court on 20th of October, 2011 and signifies the intention of

the state to file an appeal against the trial court verdict. It is important to note that the State Government, as is evident from communication addressed by the Public Information Officer, Department of Law, Justice and Parliamentary Affairs to Sh. Mohammad Azim Khan has decided not to file an appeal against the trial court judgment as in the opinion of the Law Department the case is not fit for filing of appeal. The detention order, in the circumstances suffers from non application of mind on part of the detaining authority.

10. The detaining authority while passing detention order has been influenced by involvement of detenu in case FIR No. 168 of 2009 under Section 18 of Unlawful Activities (Prevention) Act. The detention record does not indicate that copy of the FIR or copies of any other documents connected therewith were supplied to the detenu at the time of the execution of detention order. The non supply of material documents must have prevented the detenu from making an effective and meaningful use of constitutional and statutory safeguards guaranteed under Article 22(5) of the Constitution of India and Section 13 of J&K Public Safety Act. It is pertinent to point out that the detenu has been acquitted of the charge in case FIR No. 168 of

2009 and State Government already decided not to file any appeal against the trial court judgement. The detenu therefore is held in custody without any charge.

11. The detenu insists that being a permanent resident of Jammu and Kashmir state and a citizen of India he has a right to stay in the state and neither his stay is to be regulated nor he is liable to be deported or pushed back. The detenu in the circumstances would make such a representation only after he was handed over all the material that weighed with the detaining authority while passing the detention order. Once material was not provided, the detenu is prevented from making an effective use of rights constitutional and statutory safeguards available to him.
12. The detaining authority did not inform the detenu through detention order or otherwise that he could make representation to detaining authority during the intervening period of 12 days, the detention order was to remain in force pending approval of the State Government. It needs to be emphasized that once the detaining authority issued a detention order under Section 8(2) of the Act, it was expected to realize that the detention order in terms of Section 8(4) of the Act was to remain in force for a period of 12 days and that during

such period the detenu could not be deprived of his right to represent against his detention. The detaining authority because of his failure to inform the detenu that of his right to represent against the detention violated the constitutional and statutory rights available to the detenu.

13. For the reasons discussed, the petition succeeds and is accordingly, allowed. The detention order No.7/PSA of 2011 dated 4th of November, 2011 is set-aside. Resultantly, the detenu be let off preventive detention in accordance with the law. Detention record be returned.

14. Disposed of.

(Hasnain Massodi)
Judge

Jammu:

28.12.2012

Surinder