

HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

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HCP No.51/2013

Date of Order : 23 /09/ 2013

Zubair Ahmad Malik

Versus

State of J&K and others

Coram:

Hon'ble Mr. Justice Tashi Rabstan, Judge

Appearing Counsel:

For the petitioner(s): Mr.Tufail, Advocate vice Mr.M.A.Qayoom, Adv
For the respondent(s): Mr. T. A. Lone, Deputy Advocate General

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| i. | Whether approved for reporting
in Press/Media | : | Yes/No/Optional |
| ii. | Whether to be reported in
Digest/Journal | : | Yes/No/Optional |
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1. One *Shri Zubair Ahmad Malik @ Tipu son of Gh. Mohi-din Malik resident of Batpora Mumkak, Sopore District Baramulla* (hereinafter referred to as "*detenu*") has approached this Court seeking quashment of Order No.02/DMB/PSA/2013 dated 2nd May 2013, passed by District Magistrate, Baramulla (for short "*detaining authority*") whereby *detenu* was ordered to be detained under Section 8 of Jammu and Kashmir Public Safety Act, 1978, on various grounds.

2. The Detaining Authority and the State Government were given several opportunities to respond to the motion. They have, however, opted not to file any response to the petition.

3. Detention record, however, has been made available by learned Deputy Advocate General.

4. Heard learned counsel for the parties at length and considered their submissions and have gone through the record.

5. Preventive detention as held in ***A.K.Gopalan v. State of Madras*** [1950 SCR 88] and reiterated in ***Rekha v. State of Tamil Nadu*** [AIR 2011 SCW 2262] is by its very nature repugnant to democratic ideals and an anathema to the rule of law. The Supreme Court in *Rekha's* case (supra), while emphasising that Article 22(3)(b), Constitution of India, is to be read as an exception to Article 21, Constitution of India and not allowed to nullify the right to personal liberty guaranteed under the later, observed:

“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 to very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of Constitution of India, which was won after long arduous, historic struggle. It follows therefore that if law of land (Indian Penal Code and other penal statutes) can deal with the situation, recourse to the preventive detention law will be illegal.”

6. The Court further observed:

“It must be remembered that in case of preventive detention no offence is proved and the justification of such detention case is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as jurisdiction of suspicion. 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.”

7. In ***Kamleshwar Ishwar Prasad Patel Vs Union of India and Others*** [(1995) 2 SCC 51] the Supreme court observed:

“The history of liberty is the history of procedural safeguards. These procedural safeguards are required to be zealously watched and enforced by the Court and their rigour cannot be allowed to be diluted on the basis of the nature of alleged activities of the detenu.”

8. Law on the subject was succinctly laid down by the Apex Court in ***Abdul Latif Abdul Wahab Sheikh Vs B. K. Jha and another [(1987) 2 SCC 22]*** in following words:

“The procedural requirements are the only safeguards available to a detenu 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.”

9. The baseline, that emerges from the above overview of case law on the subject of preventive detention is that whenever preventive detention is called in question in a court of law, the first and foremost task before the Court is to see whether the procedural safeguards, guaranteed under Article 22(5) Constitution of India and Preventive Detention Law pressed into service to slap the detention, are adhered to.

10. The Constitutional and Statutory safeguards guaranteed to a person detained under preventive detention law are meaningless unless and until the detenu is made aware of and furnished all the material that weighed with the detaining authority while making detention order. In the present case the Detention order makes mention of the material record such as dossier and other connecting documents relied upon by the Detaining Authority while making detention order. The detention order makes mention of material record such as dossier and other connected documents, relied upon by Detaining Authority, while making the detention order. The detention order also

makes reference to a letter No.PROSS/PSA/2013/5362 dated 01.04.2013, received from Superintendent of Police, Sopore. The detention record, made available by learned Deputy Advocate General, does not convincingly establish that all the documents referred to in the detention order were supplied to detenu. The endorsement on the overleaf of detention order made by the Executing Officer – PSI Iftikhar Ahmad, No.115585/ARP P/S Sopore, at the time of execution of detention order, does not make a reference to the documents in question and does not record that such documents were supplied to detenu at the time of execution of detention order or immediately thereafter. The grounds of detention make reference to case - FIR No.172/2012 under Section 7/25 Arms Act P/S Sopore, to have been registered against the detenu. The involvement of detenu in the aforementioned case appears to have weighed with detaining authority, while making detention order. The record does not indicate that copies of aforementioned First Information Report, statements recorded under section 161 Cr.P.C. and other material collected in connection with investigation of aforesaid case, were ever supplied to the detenu. The above mentioned material, thus, assumes significance in the facts and circumstances of the case. It needs no emphasis, that the detenu cannot be expected to make a meaningful exercise of his Constitutional and Statutory rights guaranteed under Article 22(5), Constitution of India and Section 13, J&K Public Safety Act, 1978, unless and until the material on which the detention order is based, is supplied to detenu. It is only after the detenu has all said material available that he can make an effort to convince the Detaining Authority and thereafter Government that their apprehension concerning activities of detenu are baseless and misplaced. If the detenu is not supplied material, on which the

detention order is based, he cannot be in a position to make an effective representation against his detention order. The failure on the part of the Detaining Authority to supply the material relied at the time of making detention order to the detenu, renders detention order illegal and unsustainable. While holding so, reference may be made to law laid down in ***Thahira Haris Etc. Etc. v. Government of Karnataka*** [AIR 2009 SC 2184]; ***Union of India v. Ranu Bhandari*** [2008, Cr. L. J. 4567]; ***Dhannajoy Dass v. District Magistrate*** [AIR, 1982 SC 1315]; ***Sofia Ghulam Mohammad Bam v. State of Maharashtra & ors*** [AIR, 1999, SC 3051]; and ***Syed Aasiya Indrabi v. State of J&K & ors*** [2009 (I) S.L.J 219].

11. Article 22(5), Constitution provides a precious and valuable right to a person detained under preventive detention law - J&K Public Safety Act 1978, to make a representation against his detention. It needs no emphasis that a detenu, on whom preventive detention order is slapped, is held in custody without a formal charge and trial. The detenu is held in custody on a mere suspicion that his apprehended activities may be prejudicial to the security of the State or maintenance of public order. Article 22(5) of the Constitution and Section 13 of the Act, thus make it obligatory for Detaining Authority to provide detenu earliest opportunity of making an effective and meaningful representation against his detention. The object is to enable the detenu to convince the Detaining Authority and the Government, as the case may be, that all apprehensions regarding his activities are grossly misplaced and his detention is unwarranted. To make the Constitutional and Statutory right available to detenu meaningful, it is necessary that detenu be informed with all possible clarity what is/are apprehended activity/ies that persuaded Detaining Authority to make detention order. In case grounds of detention are vague,

ambiguous and confusing, the detenu cannot be expected to make a representation against his detention. The grounds of detention mention that the detenu is alleged to have been playing vital role in transportation of militants, carrying of money and arms, ammunition from one place to another. The detenu has not been given the particulars of militants, whom he is alleged to have been transporting. It was incumbent upon the detaining authority to give adequate information regarding identity of militants, with whom the detenu was alleged to have associated to indulge in subversive activities. The detenu, only after getting the said information, would have been in a position to explain his stand and make an effort to convince the competent authority that his preventive detention was unwarranted. These are only few instances to illustrate that the grounds of detention are vague and ambiguous and bound to keep the detenu guessing about what really was intended to be conveyed by the detaining authority. It is well settled law that even where one of the grounds relied upon by the detaining authority to order detention is vague and ambiguous, Constitutional and Statutory right of the detenu to make a representation against his detention are taken to have been violated. Reference in this regard may be made to ***State of Maharashtra and others v. Santosh Shankar Acharya*** [AIR 2000 SC 2504]; ***Chaju Ram v. State of J&K*** [AIR 1971 SC 263]; ***Dr. Ram Krishan v. The State of Delhi & ors.*** [AIR 1953 SC 318]; ***Mohd Yousuf Rather Versus State of J&K*** [AIR 1979 SC 1925]; and ***Ghulam Nabi Shah v. State of J&K & others*** [2005(I) SLJ 251].

12. For the afore-stated facts, reasons and the law, the petition is allowed and detention order No.02/DMB/PSA/2013 dated 2nd May 2013, passed by District Magistrate, Baramulla – respondent No. 2, directing detention of *Shri Zubair Ahmad*

Malik @ Tipu son of Gh. Mohi-din Malik resident of Batpora Mumkak, Sopore District Baramula, quashed. The respondents, in view of quashment of detention order, are stripped of any authority to detain the detenu under order No.02/DMB/PSA/2013 dated 2nd May 2013. Resultantly, the respondents are directed to release the detenu from preventive detention, ordered vide order No.02/ DMB/PSA/2013 dated 2nd May 2013.

13. Disposed of.

14. Detention record be returned to the counsel for respondents.

**(Tashi Rabstan)
Judge**

**Srinagar
23/09/2013**
Ajaz Ahmad