HIGH COURT OF JAMMU AND KASHMIR-
SRINAGAR

Case No: HC(p) 298/2017 **Dated** : 30th of Dec., 2017

MOHAMMAD SALEEM TANTRAY ***VERSUS*** *STATE AND ORS.*

ORDER SHEET

CORAM:

HON'BLE *MR. JUSTICE M.K.HANJURA- JUDGE*

i. Whether to be approved for reporting in NET : Yes/No

ii. Whether to be approved for reporting in Digest/Journal : Yes/No

FOR THE PETITIONER/s : MR. LONE ALTAF

FOR THE RESPONDENT/s: . MR. ASIF MAQBOOL, GA

(M.K.HANJURA-J)

1/ The detenue - Mohammad Saleem Tantray, was detained vide order No. 86/DMB/PSA/2017 dated 21-08-2017 passed by District Magistrate, Baramulla, in exercise of powers vested in him under clause (a) of section (8) of the Jammu & Kashmir Public Safety Act, 1978 (for short Act of 1978) and he was lodged in Central Jail Kotbhalwal, Jammu. The detenue continues to be in Central Jail Kotbhalwal, Jammu, at the moment. The order of detention was executed on 24th of August, 2017. The notice of detention has been given to the detenue and the contents of the detention warrant, as contended, have been read over to him in the english language and explained to him in kashmiri language which he understood fully well.

02/ The order of detention has been challenged on the grounds, inter alia, that the detenue could not have been detained under the provisions of PSA when he was already booked in substantive offences under various F.I.Rs. It is also argued that the detenue has been deprived of the right to file an effective representation against the order of his detention, as the relevant material, relied upon by the Detaining Authority while passing the impugned order of detention,

in the form of the copy of dossier, the copy of FIRs, the statements recorded under section 161 of the Code of Criminal Procedure (Cr.PC), and the communication received from the Superintendent of Police, Baramulla, have not been furnished to him. Learned counsel for the petitioner has argued that the respondents, in their reply affidavit, have stated that the detention warrant was executed on 24-08-2017 by one ASI Bashir Ahmad No. EXK/791294-63/B of DPL Sopore, who read over and explained the contents of the same to the detenue. Assuming the contention to be correct, the said ASI ought to have filed an affidavit to substantiate so, which has not been done in the case on hand. The petition, on this ground alone, deserves to be allowed and, as a consequence thereof, the order of detention is liable to be quashed.

03/ Learned counsel for the respondents has argued that the order of detention has been passed after taking into consideration the relevant provisions of J & K Public Safety Act. 1978 (JKPSA). The grounds of detention have been conveyed to the detenue in the language with which he is conversant and these have been read over and explained to him at the place of his detention, i.e. Central Jail, Kotbhalwal. Therefore, the order of detention does not suffer from any vice. It has been passed with due diligence and it will sustain in the eyes of the law. The arguments of the learned counsel for the respondents are in tune and in line with the pleadings of the respondents.

04/ **Heard** and considered. The detention record has also been perused.

05/ As already stated, the impugned order of detention has been challenged chiefly, on the ground that the detenue could not have been detained under the provisions of PSA when he was already booked

in substantive offences in case bearing F.I.R No. 239/2017 u/s 147, 148, 149, 336 & 307 RPC, registered in Police Station Sopore. The detenue, as pleaded in the petition, was arrested on 12-08-2017. This has not been rebutted or proved otherwise by the respondents, meaning thereby that when the impugned order of detention dated 21-08-2017 was passed, the detenue was already in the custody.

06/ Preventive detention, as has been held in the cases of **A.K.Gopalan v. State of Madras (1950) SCR 88** and **Rekha vs. State of Tamil Nadu (AIR 2011 SCW 2262)**, is, by nature, repugnant to democratic ideas and an anathema to the rule of law. The Supreme Court in Rekha's case (supra) emphasized that article 22 (3) (b) of the Constitution of India is to be read as an exception to article 21 of the Constitution of India and not allowed to nullify the right to personal liberty guaranteed under article 21. The Supreme Court further observed that since 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 guaranteed by Article 21 of the Constitution of India which was won after long, arduous, historic struggles. It has, therefore, to be understood that if the ordinary law of the land (India Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal. The Supreme Court added that it must be remembered that if, in the case of preventive detention, no offence is proved and there is no conviction, which can only be sanctioned by legal evidence, preventive detention is often described as "jurisdiction of suspicion." 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. The Supreme Court, after putting reliance on the law laid down in Kamleshwar Ishwar Prasad Patel vs. Union of India and others (1995) 2 SCC 51 (para 49) observed that 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 rigor cannot be allowed to be diluted on the basis of the nature of alleged activities of the detenue. The Supreme Court quoted with approval the observation made in **Ratan Singh Vs. State of Punjab and others 1981 (4) SCC**, emphasizing the need to ensure that the constitutional and statutory safeguards available to a detenue are followed in letter and spirit. It observed, *but the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty are to have any meaning in our democratic set up, it is essential that at least those safeguards are not denied to the detenues.*

07/ The procedural requirements are the only safeguards available to a detenue since the Court is not expected to go behind the subjective satisfaction of Detaining Authority. As laid down by the Apex Court in the case of **Abdul Latif Abdul Wahab Sheikh v. B.K.Jha and anr. (1987) 2 SCC 22**, 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.

08/ Looking at the instant case from the above perspective, the detenue was already booked in substantive offences in case bearing F.I.R No. 239/2017 u/s 147, 148, 149, 336 & 307 RPC, registered in Police Station Sopore. He was arrested on 12-08-2017 and at the time of the passing of the impugned order of detention, he was in the custody of the respondents. This F.I.R forms the baseline of the order

of the detention of the detenue. The question, that arises for consideration, therefore is, can an order of detention be passed on the face of what has been detailed above. The answer to this question can be a big ***"No"*** taking into consideration the law laid down by the Apex Court of the Country at para 24 sub para (6) of the judgment delivered in the case of Sama Aruna Vs. State of Telangana and another, reported in AIR 2017 SC 2662, which reads as under:-

> *"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 detenue 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."*

09/ The same view has been repeated and reiterated by the Hon'ble Supreme Court in paragraph 13 of the judgment delivered in the case of V.Shanta Vs. State of Telangana and others, reported in AIR 2017 SC 2625, which is as follows:

> *"13. The order of preventive detention passed against the detenue states that his illegal activities were causing danger to poor and small farmers and their safety and financial well being. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detenue from indulging in further prejudicial activities in the business of spurious seeds, affecting maintenance of public order, and that there was no other option except to invoke the provisions of the Preventive Detention Act as an extreme measure to insulate the society from his evil deeds. The rhetorical incantation of the words "goonda" or "prejudicial to maintenance of public order" cannot be sufficient justification to invoke the draconian powers of preventive detention. To classify the detenue as a "goonda" affecting public order, because of inadequate yield from the chilli seed sold by him and prevent him from moving for bail even is a gross abuse of the statutory power of Preventive Detention. The grounds of detention are ex facie extraneous to the Act."*

10/ Testing the case on hand on the touchstone of the law laid down above, the detenue could not have been detained after taking recourse to the provision of PSA, when he was involved in the commission of substantive offences in which he was arrested and had not applied for bail. The proper course would have been to challenge the order of bail, if granted to him. The detenue could not have been detained preventatively. This single infraction renders the order of detention liable to be set aside.

11/ The learned counsel for the petitioner has argued that the officer, who handed over the detenue to the jail authorities of the Central Jail, Kotbhalwal, along with the relevant documents, should have filed an affidavit in the mater, which has not been done. From a bare glimpse of the execution report, what gets revealed is that the detention warrant has been executed on 24-08-2017 at Central Jail, Kotbhalwal, Jammu. It also states that the contents of the detention warrant and the grounds of detention were read over to the detenue and explained to him in kashmiri languages, which language he understood fully well and in token thereof, his signature was attained on the execution report itself. To eradicate all doubts, it was incumbent on the part of the officer, namely, ASI Bashir Ahmad, who did the exercise of handing over the documents and conveying the contents thereof to the detenue, to file an affidavit in order to attach, at least, a semblance of fairness to his statement. Resort can, in this behalf, be had to the law laid down by the apex Court of the country in the case of State Legal Aid Committee, J&K versus State of J&K & others, reported in AIR 2005 SC 1270, wherein it has been held as under :

> *"1/ Though several questions have been raised in this petition, it is not necessary to deal with them in detail as we find that there is no definite material to show that the requirements of section 13 of the Jammu & Kashmir Public Safety Act, 1978, (in short the Act),*

requiring the grounds of order of detention to be disclosed/communicated to the person affected by the order has been complied with. Though in the affidavit filed by the State, it has been stated that the contents of the warrants and grounds of detention were served, read over and explained to the assesse and he was informed about his right to make a representation against the detention, if he so desired, there is no material placed on record to substantiate this stand. It is stated in the affidavit that the detenue refused to receive copy of the detention order and also refused to put his signatures on the documents. The least the State could have done is to file an affidavit of the person who wanted to serve the relevant documents and an endorsement to the effect that there was refusal. Even the name of the official has not been indicated in the affidavit. That would have been sufficient to comply with the requirements of section 13 of the Act."

12/ Viewed in the context of all that has been said and done above, the petition is allowed, as a consequence of which, the order of detention bearing No. 86/DMB/PSA/2017 dated 21-08-2017 passed by the respondent No.2 – District Magistrate, Baramulla, is **quashed** with a further direction to the respondents to release the person of Mohammad Saleem Tantray S/O Bashir Ahmad Tantray R/O Mohalla Noorbagh, Sangrama, Sopore, District Baramulla, Kashmir, forthwith from the preventive custody, unless required in any other case.

13/ The petition is, accordingly, **disposed** of along with connected IAs. The record shall be returned to the learned counsel for the respondents.

***TARIQ* Mota**
SRINAGAR,
30-12-2017

(M.K.HANJURA)
JUDGE