

HIGH COURT OF JAMMU & KASHMIR
AT SRINAGAR

HCP No.691/ 2016

Date of decision:22-03-2017

Javaid Ahmad Naikoo

Vs.

State of J&K & others

Coram:

Hon'ble Mr. Justice Mohammad Yaqoob Mir, judge

Appearing counsel:

For the Petitioner(s):	Mr. M. Ayoub Bhat.
For the respondent(s):	Mr. M. A. Wani, AAG.

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| i) | Whether to be reported
in Digest/Journal: | YES/ NO |
| ii) | Whether to be reported
in Press/Media: | YES/NO /OPTIONAL |
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1) Impugned is the order of detention bearing No.104/DMP/PSA/16 dated 17.11.2016, passed by District Magistrate, Pulwama, in terms whereof, detenue has been detained and lodged in District Jail, Kathua.

2) Learned counsel for the petitioner contended that the detenue has been deprived of making an effective representation in view of non-furnishing of the material forming base for his detention, which appears to have prevailing force. The respondents have not placed anything on record to show that the material which has been considered by the detaining authority while passing the

detention order has been furnished to the detainee so as to enable him to file an effective representation as against the detention which in turn negates the right guaranteed under Article 22(5) of the Constitution. In this view I am fortified by the judgment *Sophia Ghulam Mohd. Bham v. State of Maharashtra and others* (AIR 1999 SC 3051), wherein it has been held:

“....The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the grounds are based flows from the right given to the detainee to make a representation against the order of detention. A representation can be made and the order of detention can be assailed only when all the grounds on which the order is based are communicated to the detainee and the material on which those grounds are based are also disclosed and copies thereof are supplied to the person detained, in his own language.”

3) One of the requirements for deriving subjective satisfaction is to formulate the grounds of detention which shall form basis for passing the order of detention. In the order impugned as passed by District Magistrate, it is recorded; “*Whereas on the basis of dossier placed before me by the Superintendent of Police, Awantipora, vide his No.Conf/PSA/2016 dated 10.11.2016, I am satisfied...*”, which shows that Detaining Authority has not sifted the material for

preparation of the grounds of detention. Copy of the grounds of detention is placed on file but not referred to in the order of detention. Non-application of mind is clear, therefore, an invasion to personal liberty was impermissible.

4) 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. Such power has to 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 preventive order, still then procedural safeguards are to be adhered. 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 horse* the law. In this view, I am fortified by 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.

5) The cumulative effect of the aforesaid position leads to the only one conclusion i.e. the order of detention impugned is not valid, as such, quashed. The detainee is ordered to be released from the preventive custody forthwith provided he is not required in connection with any other case

6) Disposed of as above.

(Mohammad Yaqoob Mir)
Judge

Srinagar
22.03.2017
"Bhat Altaf"