

HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

.....

HCP No.511/2016

Date of Decision: 30 /05/2017

Zubair Ahmad Wani

Versus

State of J&K and another

Coram:

Hon'ble Mr Justice Tashi Rabstan, Judge

Appearing counsel:

For petitioner(s): Mr. Nasir Qadiri, Advocate

For respondent(s): Mr. Q. R. Shamas, Dy. AG

Whether to be reported in Digest/Journal?

Yes/No

1. Detenu – Zubair Ahmad Wani son of Nazir Ahmad Wani resident of Qazipora Tehsil and District Bandipora, through his uncle, seeks quashment of detention order No.45/DMB/PSA of 2016 dated 13th October 2016, that District Magistrate, Bandipora (for brevity “Detaining Authority”), has passed, directing preventive detention of detenu, on the grounds detailed in petition on hand.

2. Respondents have filed reply affidavit and resisted the petition.

3. Heard and considered.

4. At threshold, learned counsel for respondents states that detention order has been passed on subjective satisfaction by detaining authority. He further states that impugned detention has been extended for further period of three months vide Government Order No.Home/PB-V/160 of 2017 dated 12th January 2017, and therefore, petition is liable to be dismissed.

5. Learned counsel for petitioner states that detenu was required to be supplied all documents, statements and other material relied upon in the grounds of detention, like FIRs, statements recorded in the said FIRs, material collected during investigation of said FIRs, so as to enable him to make an effective and meaningful representation against his detention and failure to supply such material/documents, amounts to violation of Article 22(5) of the Constitution of India and even detenu, independent of making representation to the Government, was not informed to make a representation to Detaining Authority as well. His submission is that ground of detention is *ad verbum* of Dossier. He, therefore, further avers that extension of detention is also liable to be quashed. To cement his submissions, learned counsel refers to judgements passed in *Rajinder Arora v. Union of India* (2006) 4 SCC 796; *Powanammal v. State of Tamil Nadu and anr.* AIR 1999 SC 618; *State of Maharashtra & ors v. Santosh Shankar Acharya* AIR 2000 SC 2504; *Rekha v. State of Tamilnadu* AIR 2011 SCW 2262; *Thahira Haris Etc. Etc. v. Government of Karnataka* AIR 2009 SC 2184; *G. M. Shah v. State of J&K* (1980) 1 SCC 132; *Talib*

Hussain v. State of J&K & ors 2009 (II) SLJ 849; Nissar Ahmad Bhat v. State & ors 2014 (III) SLJ 1047; Shahmali v. State and others 2010 (1) SLJ 56; Dilawar Magray v. State of J&K & ors 2010 (II) SLJ 696; and Sajad Ahmad Khan v. State & ors 2010 (II) SLJ 743.

6. Article 22(3)(b) of the Constitution of India that permits preventive detention, is only an exception to Article 21 of the Constitution. An exception is an exception and cannot ordinarily nullify the full force of the main rule, which is the right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting the civil liberties of the people and not to put them in jail for a long period without recourse to a lawyer and without a trial.

7. It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is that in substance a detention order of three months, or any other period(s), is a punishment of that particular period's imprisonment. What difference is it to the detenu whether his imprisonment is called preventive or punitive? Further 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', The detaining authority passes the order of detention on subjective satisfaction. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. 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.

8. 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. 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 mandatory and vital. The Supreme Court in Rekha's case (supra) while making reference to law laid down in ***Kamleshwar Ishwar Prasad Patel v. Union of India and Others (1995) 2 SCC 51*** 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 nature of alleged activities of the detenu. The Supreme Court quoted with approval the observation made in ***Ratan Singh Vs. State of Punjab and others 1981 (4) SCC 481***, emphasising the need to ensure that the Constitutional and Statutory safeguards available to a detenu were followed in letter and spirit 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 detenu's."

9. The procedural requirements are the only safeguards available to a detenu since the Court is not expected to go behind the subjective satisfaction of Detaining Authority. As laid down by the Apex Court in ***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.

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

11. Preventive detention is a serious invasion of personal liberty and meagre safeguards that the Constitution provides against improper exercise of the power, must be jealously watched and enforced by the Court, has been said by the Supreme Court in ***Dr. Ram Krishan Bhardwaj v. The State of Delhi and ors 1953 SCR 708***. Detenu has a right, under Article 22(5), to be furnished with particulars of the grounds of his detention, sufficient to enable him to make a representation which on being considered may give relief to him. This constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, and if same has not been done, the detention cannot be held to be in accordance with the procedure established by law within the meaning of Article 21. The detenu is, therefore, entitled to be released and set at liberty.

12. Preventive detention law makes room for detention of a person without a formal charge and without trial. The person detained is not required to be produced before the Magistrate within 24 hours, so as to give an opportunity to the Magistrate to peruse the record and decide whether the detenu is to be remanded to police or judicial custody or allowed to go with or without bail. The detenu cannot engage a lawyer to represent him before the detaining authority. In the said background it is of utmost importance that whatever procedural safeguards are guaranteed to the detenu by the Constitution and the preventive detention law, should be strictly followed. The Supreme Court in ***Rekha's*** case (supra), while emphasising need to adhere to procedural safeguards, 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.”

13. In the present case Detaining Authority – respondent No. 2, did not inform detenu that detenu, independent of his right to file representation against his detention to the Government, has also right to submit a representation to Detaining Authority till detention was considered by the Government and approved. Detaining authority has, in effect, violated Constitutional and Statutory rights of detenu, guaranteed under Article 22 (5), Constitution of India and Section 13, Jammu and Kashmir Public Safety Act. Reference in this regard may be made to the law laid down in *State of Maharashtra and others versus Santosh Shankar Acharya*, AIR 2000 SC 2504 and *Shabir Ahmad Malik v. State of J&K & ors* 2011 (1) JKJ 171 [HC] and *Mohammad Ashraf Khan v. State & ors* 2010 (I) SLJ 365.

14. Detenu’s detention has been ordered on the basis of grounds of detention framed by District Magistrate. Perusal of grounds of detention would show that it is a verbatim copy of Dossier of Senior Superintendent of Police submitted by him to the concerned Magistrate. Qua verbatim reproduction of Dossier this Court in *Naba Lone v. District Magistrate* 1988 SLJ 300 while dealing with a case where a similar situation arose, observed:

“The grounds of detention supplied to the detenu is a copy of the police dossier, which was placed before the District Magistrate for his subjective satisfaction in order to detain the detenu. This shows total non-application of mind on the part of the detaining authority. He has dittoed the Police direction without applying his mind to the facts of the case.”

15. This Court again in *Noor-ud-Din Shah v. State of J&K & Ors*. 1989 SLJ 1, quashed detention order, which was only a reproduction of Dossier supplied to the Authority on the ground that it amounted to non-application of mind. The Court observed:

“I have thoroughly by examined the dossier submitted by the Superintendent of Police, Anantnag, to District Magistrate, Anantnag as also the grounds of detention formulated by the latter for the detention of the detenu in the present case, and I find the said grounds of detention are nothing but the verbatim reproduction of the dossier as forwarded by the Police to the detaining authority. He has only changed the number of paragraphs, trying in vain to give it a different shape. This is in fact a case of non-application of mind on the detaining authority. Without applying his own mind to the facts of the case. He has acted as an agent of the police. It was his legal duty to find out if the allegations levelled by the police against the detenu in the dossier were really going to effect the maintenance of public order, as a result of the activities, allegedly, committed by him. He had also to find out whether such activities were going to affect the public order is future also as a result of which it was necessary to detain the detenu, so as to prevent him from doing so. After all, the preventive detention envisaged under the Act is in fact only to prevent a person from acting in any manner which may be prejudicial to the maintenance of public order, and not to punish him for his past penal acts. The learned District Magistrate appears to have passed the

impugned order in a routine manner being in different to the import of preventive detention as or detained in the Act, Passing of an order without application of mind goes to the root of its validity, and in that case, the question of going into the genuinenss or otherwise of the grounds does not arise. Having found that the detaining authority has not applied his mind to the facts of the case while passing the impugned order, it is not necessary to go to the merits of the grounds of detention, as mandated by Section 10-A of the Act.”

16. A similar situation arose in ***Jai Singh and Ors. v. State of Jammu & Kashmir AIR 1985 SC 764*** before the Supreme Court. The Court quashed detention as it found that there cannot be a greater proof of non-application of mind and that the liberty of a subject being a serious matter, it is not to be tripled with in this casual, indifferent and routine manner. The Court observed:

“First taking up the case of Jai Singh, the first of the petitioners before us, a perusal of the grounds of detention shows that it is a verbatim reproduction of the dossier submitted by the Senior Superintendent of Police, Udhampur to the District Magistrate requesting that a detention order may kindly be issued. At the top of the dossier, the name is mentioned as Sardar Jail Singh, father’s name is mentioned as Sardar Ram Singh and the address is given as village Bharakh, Tehsil Reasi. Thereafter it is recited “The subject is an important member of....”

Thereafter follow various allegations against Jai Singh, paragraph by paragraph. In the grounds of detention, all that the District Magistrate has done is to change the first three words “the subject is” into “you Jai singh, S/o Ram Singh, resident of village Bharakh, S/o Ram Singh, resident of village Bharakh, Tehsil Reasi”. Thereafter word for word the police dossier is repeated and the word “he” wherever it occurs referring to Jail Singh in the dossier is changed into ‘you’ in the grounds of detention. We are afraid it is difficult of find greater proof of non-application of mind. The liberty of a subject is a serious matter and it is not to be trifled with in this casual, indifferent and routine manner.”

17. Applying this settled legal position to the facts of the present case, I find the order impugned cannot stand as it is based on the grounds of detention, which is only a verbatim copy of police dossier. In the facts and circumstances, I find non-application of mind on part of detaining authority while passing order impugned. In view of this ground, I need not to go to other grounds raised in the petition.

18. Further to point out here that individual liberty is a cherished right that is one of most valuable fundamental rights guaranteed by our Constitution to the citizens of the country. In the scheme of Constitution, utmost importance has been given to life and personal liberty of the individual. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established. In the matter of preventive detention, there is deprivation of liberty, therefore, safeguards provided by Article 22 of the Constitution of the India, have to be scrupulously adhered to. Procedural reasonableness, which is invoked, cannot have any abstract standard or general pattern of reasonableness. The nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the

evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, all provide the basis for considering the reasonableness of a particular provision. The procedure embodied in the Act has to be judged in the context of the urgency and the magnitude of the problem, the underlying purpose of the restrictions and the prevailing conditions.

19. The history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the Court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is of great importance. Personal liberty protected under Article 21, is so sacrosanct and so high in the scale of constitutional values that it is the obligation of detaining authority to show that impugned detention meticulously accords with the procedure established by law. However, the constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of State's security, public order, disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions. In a case of preventive detention, no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. But at the same time, when a person's greatest of human freedoms, i.e. personal liberty, is deprived, the laws of preventive detention are required to be strictly construed, and a meticulous compliance with the procedural safeguards, howsoever technical, has to be mandatorily made. Reference in this regard is made to *Haradhan Saha v The State of West Bengal & Others*, (1975) 3 SCC 198 and *Union of India v. Paul Manickam & Another*, (2003) 8 SCC 342.

20. For the reasons discussed above, the petition is allowed and detention order No.45/DMB/PSA of 2016 dated 13th October 2016, passed by the District Magistrate, Bandipora – respondent No. 2, directing detention of *Zubair Ahmad Wani son of Nazir Ahmad Wani resident of Qazipora Tehsil and District Bandipora*, as also extension order bearing Government order No.Home/PB-V/160 of 2017 dated 12th January 2017, are quashed. Respondents are directed to set the detenu at liberty. **Disposed of.**

21. Record be returned to counsel for respondents.

(Tashi Rabstan)
Judge

Srinagar
May 2017
Ajaz Ahmad