HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

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HCP No.677/2016

Date of Decision: 30 /05/2017

Ghulam Ahmad Parray

Versus

State of J&K and others

Coram:

Hon'ble Mr Justice Tashi Rabstan, Judge

Appearing counsel:

For petitioner(s): Mr Nasir Qadiri, Advocate

For respondent(s): Mr Asif Maqbool, GA vice Mr Q.R.Shamas, Dy.AG

Whether to be reported in Digest/Journal? Yes/No

1. Detenu – *Ghulam Ahmad Parray son of Late Abdul Satar Parray resident of Parray Mohalla, Tehsil Hajin District Bandipora*, seeks quashment of Detention Order No.53/DMB/PSA of 2016 dated 25th November 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. I have heard learned counsel for parties and considered the matter.

4. 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, 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. In support of 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***; and ***Mohammad Ashraf Khan v. State & ors 2010 (I) SLJ 365***.

5. Learned counsel for respondents states that detention order has been passed on subjective satisfaction by detaining authority and detention order is in accordance with law and there is no violation or infringement of rights guaranteed under the Constitution of India. Hence, he pleads that petition be dismissed.

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. The right which the detenu enjoys under Article 22(5) is of immense importance. In order to properly comprehend the submissions of the detenu, Article 22(5) is reproduced as under:

> "22(5). When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

This Article of the Constitution can be broadly classified into two categories: (i) the grounds on which the detention order is passed must be communicated to the detenu as expeditiously as possible and (ii) proper opportunity of making representation against the detention order be provided.

13. 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 detenue 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."

14. The Constitution of India – Article 22(5) and Section 13, J&K Public Safety Act 1978, guarantee two important safeguards to the detenu – first that the detenu is informed of grounds of detention that prompted the detaining authority to pass the detention order and second that the detenu is allowed to represent against his/her detention immediately after the detention order is made or executed. The Constitutional and Statutory safeguards guaranteed to the detenu are to be meaningful only if the detenu is handed over the material referred to in the grounds of detention that lead to subjective satisfaction that the preventive detention of detenu is necessary to prevent him from acting in any manner prejudicial to the security of the State or public order and further it is ensured that the grounds of detention are not vague, sketchy and ambiguous so as to keep the detenu guessing about what really weighed with the detaining authority to make the order.

15. Detention order makes mention of material record such as dossier and other connecting documents relied upon by the detaining authority while making detention order. The counter affidavit as also detention record does not convincingly establish that all the documents referred to in the detention order were actually supplied to the detenu. The grounds of detention make reference to various FIRs to have been registered against detenu. The involvement of detenu in the cases/FIRs appears to have weighed with detaining authority while making detention order. The counter affidavit, however, does not indicate that copies of First Information Reports,

statements recorded under section 161 Cr.P.C. and other material collected in connection with investigation of case(s) mentioned in grounds of detention, were ever supplied to detenu. The material, mentioned in grounds of detention, thus assumes significance in the facts and circumstances of the case. It needs no emphasis that detenu cannot be expected to make a meaningful exercise of his Constitutional and Statutory rights guaranteed under Article 22 (5) of Constitution of India and Section 13 of Jammu and Kashmir Public Safety Act, 1978, unless and until the material on which detention order is based, is supplied to him. It is only after detenu has all said material available, that he can make an effort to convince the Detaining Authority and thereafter Government that their apprehension as regards his activities are baseless and misplaced. If the detenu is not supplied material, on which 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 detaining authority to supply material relied at the time of making detention order to detenu, renders detention order illegal and unsustainable. While holding so, I draw support from law laid down in ***Thahira Haris*** case (supra); ***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; and Union of India v. Ranu Bhandari 2008 Cr. L. J. 4567;***

16. 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]***.

17. It is to be made clear that whatever material is collected by the police or any other agency has to be placed before detaining authority and it is then detaining authority, who, on the scrutiny thereof, has to ascertain as to whether there is any solid base for allegations as shall be constrained in the material so collected. The authority has to derive subjective satisfaction and then to formulate grounds of detention. In the present case 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 detenue is a copy of the

police dossier, which was placed before the District Magistrate for his subjective satisfaction in order to detain the detenue. 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."

18. 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 detenue 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 detenue 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 detenue, 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 genuineness 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."

19. 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."

20. 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.

21. For reasons discussed above, the petition is allowed and detention order No.53/DMB/PSA of 2016 dated 25th November 2016, passed by the District Magistrate, Bandipora – respondent No.2, directing detention of *Ghulam Ahmad Parray son of Late Abdul Satar Parray resident of Parray Mohalla, Tehsil Hajin District Bandipora*, quashed. Respondents are directed to set the detenu at liberty. **Disposed of**.

22. Record be returned to counsel for respondents.

(Tashi Rabstan)
Judge

Srinagar
30 May 2017
Ajaz Ahmad