

# HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

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HCP No.628/2016

Date of Decision: 31 /07/2017

**Kaiser Ahmad Bhat**

Versus

**State of J&K and another**

***Coram:***

**Hon'ble Mr Justice Tashi Rabstan, Judge**

***Appearing counsel:***

For petitioner(s): Mr Ashiq Hussain, Adv vice Mr Mir Shafqat Hussain, Advocate

For respondent(s): Mr B. A. Dar, Sr. AAG

***Whether to be reported in Digest/Journal?***

***Yes/No***

1. Detenu – *Kaiser Ahmad Bhat son of Khursheed Ahmad Bhat resident of Nawa Kadal, Tarbal near Ahmed Sahab Astan, Srinagar*, seeks quashment of detention order No.DMS/PSA/56/2016 dated 7<sup>th</sup> October 2016, that District Magistrate, Srinagar (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 the outset, 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 from time to time by three consecutive extension orders made vide Government Order Nos.Home/PB-V/108/2017 dated 11<sup>th</sup> January 2017; Home/PB-V/861 of 2017 dated 8<sup>th</sup> April 2017; and Home/PB-V/1330 of 2017 dated 10<sup>th</sup> July 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 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. He, therefore, further avers that extension of detention is also liable to be quashed. He contends that preventive detention of a person by a State after branding him a ‘disgruntled element’ merely because the normal legal process is ineffective and time-consuming in curbing the evil he spreads, is illegal and thus preventive detention cannot be resorted to when sufficient

remedies are available under the general laws of the land for any omission or commission under such laws. To cement his submissions, learned counsel relies on decisions rendered in *Sandeep Atmaram Parwal v. The State of Maharashtra and others* 1997 CRI.L.J. 111; *Sophia Gulam Mohd. Bham v. State of Maharashtra and others* AIR 1999 SC 3051; *Mehraj-ud-din Rather v. State and others* 2007 (I) SLJ 136; *Shahmali v. State and others* 2010 (I) SLJ 56; *Zakir Maqbool Khan v. State of J&K & ors* 2011 (II) SLJ 733; and *Thahira Haris and others v. Government of Karnataka and others* (2009) 11 SCC 438.

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 under Article 21 of the Constitution. Fundamental rights are meant for protecting civil liberties of 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. 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 v. State of Tamilnadu AIR 2011 SCW 2262*, 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 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 detenu. The Supreme Court quoted with approval observation made in *Ratan Singh v. 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 as the Court is not expected to go behind 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 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, detention cannot be held to be in accordance with the procedure established by law within 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. When a person is detained in pursuance of a detention order, the detaining authority is required to communicate the grounds of detention, on which the detention order has been made, so as to make him able and in a position to file a representation against detention order either to the Government or detaining authority. The grounds of detention, thus, in terms of Section 13 of J&K Public Safety Act, are to be communicated to detenu when he is detained in pursuance of detention order.

14. Perusal of file as also record would reveal that Senior Superintendent of Police, Srinagar, vide no.Lgl/Det-2983/2016/6092-95 dated 5<sup>th</sup> October 2016 had produced material record, such as dossier and other connecting material in respect of detenu. The record divulges that the material, relied upon by detaining authority, such as FIRs, statements recorded in the said FIRs, material collected during investigation of FIRs, has not be furnished to detenu 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.

15. 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.

16. 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.

17. It may not be out of place to mention here that preventive detention is not a quick alternative to normal legal process, is the saying of the Supreme Court in a recently decided case titled in *Criminal Appeal no.965 of 2017 (Arising out of SLP (Cri.) no.3651 of 2017) titled V. Shantha v. State of Telangana & ors*, 2017 SCC OnLine SC 623, decided on 24<sup>th</sup> May 2017. The Supreme Court has held that *preventive detention of a person by a State after branding him a 'goonda' merely because the normal legal process is ineffective and time-consuming in 'curbing the evil he spreads', is illegal* and that detention of a person is a serious matter affecting the liberty of the citizen. Preventive detention cannot be resorted to when sufficient remedies are

available under the general laws of the land for any omission or commission under such laws, the Supreme Court observed. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detenu 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. To classify the detenu as a 'disgruntled element' cannot be sufficient to invoke the statutory powers of preventive detention. No doubt the offences alleged to have been committed by detenu are such as to attract punishment under the prevailing laws but that has to be done under the said prevalent laws and taking recourse to preventive detention laws would not be warranted. Preventive detention involves detaining of a person without trial in order to prevent him from committing certain types of offences. But such detention cannot be made a substitute for the ordinary law and absolve investigating authorities of their normal functions of investigating crimes, which detenu may have committed. After all, preventive detention cannot be used as an instrument to keep a person in perpetual custody without trial. My views are fortified by judgements rendered in *Rekha's* case and *V. Shantha v. State of Telangana* case (supra).

18. For the reasons discussed above, the petition is allowed and detention order No.DMS/PSA/56/2016 dated 7<sup>th</sup> October 2016, passed by the District Magistrate, Srinagar – respondent No.2, directing preventive detention of *Kaiser Ahmad Bhat son of Khursheed Ahmad Bhat resident of Nawa Kadal, Tarbal near Ahmed Sahab Astan, Srinagar*, as also extension orders bearing Government Order No.Home/PB-V/108/2017 dated 11<sup>th</sup> January 2017; No.Home/PB-V/861 of 2017 dated 8<sup>th</sup> April 2017; and No.Home/PB-V/1330 of 2017 dated 10<sup>th</sup> July 2017, are quashed. Respondents are directed to set the detenu at liberty. **Disposed of.**

19. Record be returned to counsel for respondents.

( Tashi Rabstan )  
Judge

**Srinagar**  
31<sup>st</sup> July 2017  
*Ajaz Ahmad*