

**HIGH COURT OF JAMMU AND KASHMIR  
AT SRINAGAR**

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HCP No.88/2017

Date of Decision: 31 /05/2017

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**Sajad Ahmad Dar**  
Versus  
**State of J&K and another**

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***Coram:***  
**Hon’ble Mr Justice Tashi Rabstan, Judge**

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***Appearing counsel:***  
For petitioner(s): Mr. M. A. Qayoom, Advocate  
For respondent(s): Mr. Asif Maqbool, GA

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| Whether to be reported in Digest/Journal? | Yes/No |
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1. Detenu – *Sajad Ahmad Dar son of Ghulam Nabi Dar resident of Heewan Sheeri, District Baramulla*, through his father, seeks quashment of Detention Order No.253/DMB/PSA/2017 dated 6<sup>th</sup> February 2017, that District Magistrate, Baramulla (for brevity “*Detaining Authority*”), has passed, directing preventive detention of detenu, on the grounds detailed in petition on hand.
2. Reply affidavit, at request, is taken on record. Respondents have resisted the petition.
3. I have heard learned counsel for parties and considered the matter.
4. Learned counsel for petitioner states that detenu cannot be detained again under the provisions of Public Safety Act, unless he is released from detention and fresh facts come into existence, which warrant his further detention. Detenu, according to learned counsel, was detained vide detention order no.81/DMB/PSA/2016 dated 26<sup>th</sup> August 2016, which was quashed by order dated 29<sup>th</sup> December 2016 passed in HCP no.334/2016. However, detenu was not released and was kept in continuous unlawful detention until impugned detention order passed. His further submission is that grounds of detention, pressed into service to place detenu under preventive detention, are identical to grounds of detention in support of earlier detention order, which stands quashed by this Court, which according to learned counsel, is suggestive of the fact of non-application of mind on part of detaining authority.
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 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.”

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. It is pertinent to mention here that this Court in earlier Habeas Corpus Petition (HCP No.334/2016), wherein the detention order no.81/DMB/PSA/2016 dated 26<sup>th</sup> August 2016 against detenu, was questioned, while quashing the detention order, dealt with the issue and held that grounds of detention made use of in support of detention order, could not be employed to make a fresh detention order after the previous detention order is quashed by the Court. The authoritative judicial pronouncements on the subject is that even if the order of detention comes to an end either by revocation or by expiry of the period of detention, there must be fresh facts for passing a subsequent order. *A fortiori* when a detention order is quashed by the Court issuing a high prerogative writ like habeas corpus or certiorari, the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the Court strikes down an earlier order by issuing rule, it nullifies the entire order. It is, therefore, clear that an order of detention cannot be made after considering the previous grounds of detention when the same had been quashed by the Court, and if such previous grounds of detention are taken into consideration while forming the subjective satisfaction by the detaining authority in making a detention order, the order of detention will be vitiated. It is of no consequence

if the further fresh facts disclosed in the grounds of the impugned detention order have been considered. Reference in this regard is made to ***Chhagan Bhagwan Kahar v. N. L. Kalna and others AIR 1989 SC 1234***; ***Jahangir Khan Fazal Khan Pathan v. The Police Commissioner, Ahmedabad and another AIR 1989 SC 1812***; ***Ramesh v. State of Gujarat AIR 1989 SC 1881***. Detention order, impugned herein, is thus liable to be quashed only on the ground that grounds of detention made use of by respondent No.2 while passing earlier detention order, subsequently quashed, have been pressed into service while passing detention order in question.

16. The 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***;

17. 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].

18. For reasons discussed above, the petition is allowed and detention order No.253/DMB/PSA/2017 dated 6<sup>th</sup> February 2017, passed by the District Magistrate, Baramulla – respondent No. 2, directing detention of *Sajad Ahmad Dar son of Ghulam Nabi Dar resident of Heewan Sheeri, District Baramulla*, 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> May 2017  
*Ajaz Ahmad*