

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

HCP No.438/2018

*Reserved on:22.05.2019*

*Pronounced on:30.05.2019*

---

Basharat Ahmad Bazaz

...Petitioner(s)

Through: Mr. Shafqat Hussain, Advocate

V/s

State of J&K & anr.

...Respondent(s)

Through: Mr. Javed Iqbal, Sr. AAG

---

**CORAM:**

**Hon'ble Mr Justice Rashid Ali Dar, Judge.**

- 
- |     |   |        |
|-----|---|--------|
| i)  | Whether approved for reporting in<br>Law journals etc.: | Yes/No |
| ii) | Whether approved for publication<br>in press:           | Yes/No |
- 

**JUDGMENT**

1) Detenu –*Shri Basharat Ahmad Bazaz son of Late Gh. Hassan Bazaz resident of Malik Angan Fateh Kadal, Srinagar*, through his mother seeks quashment of detention order No.DMS/PSA/37/2018 dated 16.11.2018, passed by District Magistrate, Srinagar (for brevity “*Detaining Authority*”), directing preventive detention of the detenu.

2) The detention order, through the medium of petition on hand, has been challenged on the grounds that the detenu was arrested by the police personnel without any justification and cause on 23<sup>rd</sup> October, 2008 and was thereafter taken to Police Station, Nowhatta, and was thereafter implicated in case FIR No.22/2018. The detenu applied for bail which was granted by the Court of 1<sup>st</sup> Additional Sessions Judge, Srinagar, on 10.11.2018, but was not released and instead was detained in terms of impugned order. The respondents are stated to have ignored to provide material relied upon by the detaining

authority while passing the impugned order of detention and thus deprived the detenu of his Constitutional and Statutory rights. Grounds of detention are stated to be vague, baseless, non-existent and unfounded and there is non-application of mind on the part of detaining authority while passing the impugned detention order.

3) Respondents, on notice, appeared and filed the counter affidavit wherein they have vehemently denied the averments made in the petition. It is also contended that the procedure prescribed by law has been strictly followed. The requirement material has been furnished to the detenu. The detention record has also been produced. The detenu was providing logistic support to militants. The grounds of detention are precise, proximate, pertinent and relevant. There is no vagueness or staleness in the grounds.

4) Heard learned counsel for the parties and perused the record.

5) Learned counsel for the petitioner contended that that the detenu had been admitted to bail in FIR No.22/2018 but this fact has not been made mention of in the grounds of detention and instead it is mentioned therein that there is every likelihood of detenu getting bailed out. Either detaining authority has been kept in dark or otherwise detaining authority has not applied its mind properly. While detaining a person under Public Safety Act, detaining authority is under a legal obligation to analyze all the circumstances and material and then to gather conclusion about the requirement of depriving a person of his personal liberty. Non-mention about the grant of bail is serious lapse which in turn gives rise to the inference that there is non-application of mind. Similar situation has been dealt with by the Apex Court. It is quite relevant to quote following portion from para 8 of the judgment rendered by

the Hon'ble Apex Court in the case of "*Anant Sakharam Raut v. State of Maharashtra and another*" reported in AIR 1987 SC 137:-

*"We hold that there was clear non-application of mind on the part of detaining authority about the fact that the petitioner was granted bail when the order of detention was passed. In the result we set aside the judgement of the Bombay High Court under appeal, quash the order of detention and direct that the petitioner be released forthwith....."*

6) Since the detainee was in the custody of the police at the time of passing of the order of detention, therefore, question arises for consideration whether an order of detention could be passed on the face of such an eventuality? The answer to this question is emphatically "No", taking into consideration the law laid down by the Hon'ble Apex Court in "*Sama Aruna v. State of Telangana & Anr*" (AIR 2017 SC 2662). Para 24 of the said judgment is apposite to be quoted herein below:

*"24. There is another reason why the detention order is unjustified. It was passed when the accused was in jail in Crime No.221 of 2016. His custody in jail for the said offence was converted into custody under the impugned detention order. The incident involved in this offence is sometime in the year 2002-03. The detainee could not have been detained preventively by taking this stale incident into account, more so when he was in jail. In Ramesh Yadav v. District Magistrate, Etah and ors, this Court observed as follows:*

*"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detainee was released on bail he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed."*

7) The same view has been repeated and reiterated by the Hon'ble Supreme Court in the judgment delivered in the case of "*V. Shantha v. State of Telangana & Others*" (AIR 2017 SC 2625). In this regard, Para 13 of the said judgment is relevant to be quoted as under:

*"The order of preventive detention passed against the detainee states that his illegal activities were causing danger to poor and small farmers and their safety and financial well-being. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detainee 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 the society from his evil deeds. The rhetorical incantation of the words "goonda" or "prejudicial to maintenance of public order" cannot be sufficient justification to invoke the draconian powers of preventive detention. To classify the detainee as a "goonda" affecting public order because of inadequately yield from the chilli seed sold by him and prevent him from moving for bail even is a gross abuse of the statutory power of preventive detention. The grounds of detention are ex-facie extraneous to the Act."*

8) Testing the instant case on the touchstone of the law laid down above, the detainee could not have been detained after taking recourse to the provisions of the Public Safety Act when he was already in the custody of the police authorities in the cases, the details whereof have been given in the grounds of detention. His custody in police for the offences referred in the grounds of detention, has been converted into the custody under the impugned detention order. May be the detaining authority might have been laboring under the belief that the detainee applies for bail, he may succeed in seeking his release but this apprehension of the detaining authority could have been guarded against by resisting and opposing the bail application. In the event of his release on bail, the State could have exercised its right to knock at the

doors of higher forum. This single infraction knocks at the bottom of the contention raised by the State that the detinue can be detained preventatively when he is already in custody and has not applied for bail. It cuts the very root of the state act. The State could have taken recourse to the ordinary law of the land.

9) Learned counsel for the petitioner also contended that the detention order is bad as there are no specific allegations attributed to the petitioner in the grounds of detention and the grounds of detention are vague

10) On the other hand, though the learned counsel for the respondents tried to justify the passing of order impugned by stating that the grounds of detention are precise, proximate, pertinent and relevant. There is no vagueness or staleness in the grounds but the detention record did not support him in his effort.

11) Perusal of the record produced on behalf of the respondents, substantiates the contention raised on behalf of the petitioner. Grounds *inter-alia* pleaded in the petition mainly have been projected in this background along-with the plea that there are no specific allegations attributed to the petitioner in terms of grounds of detention. Omission on part of detaining authority to do so is being pleaded to have incapacitated the petitioner to submit a representation in terms of Section 13 of PSA and which is also guaranteed under Article 22 (5) of Constitution of India. The grounds of detention do not reveal as to who were the anti-national element accompanied by detinue for carrying out the specific activities. Similarly, the close association with the radicals is not being explained to make any intangible

cause by quoting particulars of those radicals. I am of the opinion that impugned order is to be treated as non-est in light of what is noted above. Reliance, in this regard, is placed on the judgment of the Apex Court in “*Chaju Ram Vs. The State of Jammu & Kashmir*” reported in AIR 1971 SC 263.

12) For what has been stated above, the order of detention impugned bearing No. DMS/PSA/37/2018 dated 16.11.2018, passed by District Magistrate, Srinagar, is not valid, as such, is quashed. The detenu is directed to be released from the preventive custody provided he is not required in connection with any other case.

13) The record, as produced, be returned to the learned counsel for the respondents.

(Rashid Ali Dar)  
Judge

Srinagar  
30.05.2019  
“*Bhat Altaf, PS*”