

Jammu & Kashmir High Court - Srinagar Bench
Manzoor Ahmad Khawaja vs State & Ors on 1 July, 2019
HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

HCP No. 268/2018

Reserved on: 10.05.2019
Pronounced on: 01.07.2019

Manzoor Ahmad Khawaja

...Petitioner(s)

Through, Mr. Z.A.Qureshi, Sr.Advocate with Ms. Rehana &
Ms.Razia Amin.

V/s

State & Ors.

...Respondent(s)

Through, Mr. Javaid Iqbal, Sr.AAG.

Coram:

HON'BLE MR. JUSTICE RASHID ALI DAR

JUDGMENT

1. Impugned is the order of detention bearing No. DIVCOM- "K"/168/2018 dated 16.08.2018, whereby the detenu has been taken into preventive detention under Section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988.
2. The order of detention is challenged by the detenu through the medium of this petition on the following grounds:-

"That on 17.04.2018 detenu has to cater the orders placed to his employer of Fenoerx (50 bottles) and had to be supplied to retailers "Khan Medicate, Gava and Doctors Clinic, Gund. While carrying these supplies which had to be supplied to the said clients for which they had placed an order with the employer of the detenu, the detenu was stopped by the police of Police Station, Pattan without any reason, cause or any justification and was booked in FIR No. 81 of 2018 under Section 8/22 of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988. Till date the detenu is in judicial lockup at Sub Jail, Anantnag.

That the detenu was served with the order of detention on 21.08.2018 and except the order of detention and grounds of detention, no other material was provided to the detenu nor was any material/record and other connected documents which have been relied by the detaining authority and which were supplied by the Sr. Superintendent of Police, Baramulla to the detaining authority, thus, depriving the detenu to make an effective representation to the State.

That the copy of detention was sent to the Principal Secretary, Home Department on 16.08.2018 and till date the order passed by the Divisional Commissioner, Kashmir has not been approved by

the Government nor has the period of detention been mentioned either by the detaining authority or by the Government, therefore, the order of detention is liable to be set aside coupled with the fact that the documents which have been relied by the detaining authority in detaining the detenu have not been provided to the detenu.

That the detaining authority has not applied his mind to the provisions of the Act and the provisions of the Constitution particularly Article 22(5) of the Constitution of India. It is a case of non-application of mind by the detaining authority.

That the allegations mentioned in the grounds of detention are vague in the sense that as mentioned in detention order the detenu has been carrying out an illegal trade for supplying the psychotropic substance to the young generation but not a single instance has been quoted in support of this ground in the grounds of detention. There is no proof on record that the detenu is a dealer and is working with Life Science, at Gujarat Ahmadabad Medical Agency. The drugs so seized were to be supplied and is a medial drug used for cough etc. and is also an analgesic drug and is commonly used in the State of Jammu and Kashmir to cater the patients suffering from allergy/cough and it is only when a person used this drug in huge quantity it is not safe. Carrying the drugs to the dealer is not an offence that too when such drug is commonly used for cough etc. That there is no satisfaction recorded by the detaining authority that the ordinary law is not sufficient to prohibit the detenu to repeat the offence as alleged that too when the detenu has not applied for bail; secondly there is no satisfaction recorded that the detention of the detenu is necessary under Section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988. In absence of satisfaction, which was to be recorded by the detaining authority, the order is bad in law and is liable to be set aside."

3. Learned counsel for the detenu pleaded that the impugned order of detention or the grounds of detention formulated by the detaining authority does not indicate any compelling reason necessitating preventive detention of the detenu after he had already been taken in custody by the police for alleged commission of offence under Section 8/22 of the NDPS Act. Learned counsel, thus, submitted that preventive detention of the detenu is illegal for the same having been passed at a time when the detenu was in the custody of the authorities of the State.

4. Learned counsel for the detenu in addition to the grounds of detention of which reference is found in the petition has also made mention as to how counter affidavit filed by respondent No.2 is suggestive of the fact that the order impugned is bad. He has referred to Para 7 & 9 of the said counter affidavit. In Para 7 it is stated that the consignment seized from the detenu clearly shows that the detenu was involved in the illegal trade with conscious mind, in an organized manner which is great threat for sustaining moral values of our society. Thus, this aspect poses a serious threat to the health, wealth and welfare of the people especially young generation of the State in general and of District Kupwara in particular. Whereas, in Para 9 it is being stated that the impugned order has been passed in breach of the mandate of law. Later it was stated in the counter affidavit that on examination of the material/record it was found necessary to prevent the detenu from indulging in the illegal trade of illicit traffic in narcotic drugs and psychotropic substances. However, according to the learned counsel for the detenu there is no scope for treating the same as

clerical error, as the liberty of a person is involved and same has to be done in accordance with the procedure established under law. It is also submission of learned counsel for the petitioner that the material(dossier) which has been received in terms of the communication by the sponsoring agency bearing No. CS/PSA/2018/2631-34 dated 02.05.2018 were not furnished to the detenue rendering the order impugned non-est.

5. One more plea taken by learned counsel for the petitioner is about the vagueness in the grounds of detention. It is being stated that the detenue is exploiting the young generation making them dependent on drugs and to make them habitual addicts, is not being explained, thereby incapacitating the detenue to make an effective representation in terms of Article 22(5) of the Constitution of India.

6. Learned counsel for the detenue, in order to strengthen his arguments, has relied on the judgment of Honble Apex Court reported in AIR 1990 SC 1196, titled Dharmendra Suganchand Chelawat & Anr. Vs. Union of India & ors.

7. On the other hand, Mr. Javaid, learned Sr.AAG, submitted that the Divisional Commissioner was right in ordering the detention of the detenue as his activities were prejudicial to the State. He has also referred to Section 6, 9, 10 and 11 of the J&K Prevention of Illicit Traffic Substance Act, 1988 and submits that the order of detention is proper. He has placed reliance on the judgments of Honble Apex Court reported in AIR 1993 SC 962, Birendra Kumar Rai Vs. Union of India & ors., and AIR 2001 SC 2303, Rajan Worlikar Vs. State of Karnataka & Ors.

8. Heard the rival arguments.

9. Legal position in regard to preventive detention of a person, who is already in custody of the State Agencies in connection with commission of offence under substantive law allegedly committed by him is well settled. Normally, preventive detention of such a person should not be ordered. However, preventive detention of such a person can still be ordered, if the detaining authority has compelling reasons to believe that he is likely to be released in the substantive offence either on bail or due to his acquittal or discharge. In Binod Singh v District Magistrate Dhanbad, Bihar and others, (1986) 4 SCC 416, Honble Apex Court has held that if a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In Surya Prakash Sharma v State of U.P. and others, 1994 Supp (3) SCC 195, Honble Apex Court has referred to an earlier three-Judge Bench judgment in Dharmendra Suganchand Chelawat v Union of India, (1990) 1 SCC 746, wherein observation has been made in following manner:

"The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenue is already in detention: and (ii) there were compelling reasons justifying such detention despite the fact that the detenue is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implied that there must be cogent material

before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

10. The grounds of detention formulated by the detaining authority inter alia would show that the detenu was a member of an organized drug trafficking gang working in district Baramulla, which was involved in procuring, transporting and sale of psychotropic substances. He has spoiled the youth of the area by supplying them narcotic drugs leading to law and order problem, according to the detaining authority. However, he was apprehended on 17.04.2018 and 50 bottles of Phenerex were recovered from his possession and the aforementioned case was, thus, registered against him. The detaining authority was, thus, of the opinion that it has become imperative to detain the detenu in preventive detention with a view to prevent him from further committing any offence under the provisions of the NDPS Act.

11. It is clear that the detaining authority was aware that at the time of passing of the order of detention the detenu was already in custody in connection with offence under Section 8/22 of NDPS Act, which is a non-bailable offence. The order of detention or the grounds of detention would show that the detaining authority has not recorded any reason to believe that there was any possibility of immediate release of the detenu from custody nor any compelling reason for passing the order of detention at that point of time has been stated.

12. To explain it further, the alleged recovered substance in terms of FIR No.81/2018 does appear to fall within the ambit of commercial slab in terms of the provisions of NDPS Act and so the bail in ordinary situation could not be granted due to rigor of Section 37 of NDPS Act. There is nothing in the detention order to infer that the bail can be granted in favour of the petitioner herein in view of the involvement in the case of this nature. Normal law, rightly according to the learned counsel for the petitioner, could properly deal with the matter in hand. Bail even if granted in favour of the detenu by the regular criminal court, could be challenged before appropriate forum. Reliance on the judgment of Mohammad Ashraf Mir Vs. State & Ors. (HCP No.69/2018), can be made.

13. It is also true that the allegations levelled against the detenu that he was involved in exploiting the young generation by making them drug addicts, is all vague and in such situation the petitioner herein would not be in a position to submit a meaningful representation before the detaining authority or the competent authority to have a fresh look into the matter. Vagueness does invalidate the detention order in the circumstance. In this regard reliance can be taken on the judgment of Chaju Ram Vs. State of J&K, AIR 1971 SC 263, wherein their lordships have observed and enunciated that:-

"Even as to the grounds, we have something to say. The grounds charge him with having conspired with some leaders of Democratic Conference and having incited landless people of R.S Pura Tehsil to forcibly occupy the land comprised in Nandpur Mechanised Farm and to have persuaded them to resist violently any attempt to evict

them. No details of the leaders of the Conference or of the persons incited or the dates on which he conspired or incited the squatters or the time when such conference took place, are mentioned. It would be impossible for anybody to make a representation against such grounds. These grounds, on the authorities of this Court, too numerous to be cited here, must be held to be vague. Therefore on both the twin grounds, namely, that he was deprived of his right to make a representation and also because the grounds in themselves were very vague, we must hold that there was no compliance with the law as laid down in the Jammu and Kashmir Preventive Detention Act. The result, therefore, is that the detention must be declared to be unlawful and Chaju must be declared to be entitled to his liberty. He is ordered to be released. The detenu was questioned by us and he expressed a desire that he may not be released in Delhi, because he has no means of going back. He asked to be released in Jammu. We direct therefore that he shall be taken back to the place where he was in detention in Jammu and released within the shortest possible time."

14. In view of the legal position as stated above and in particular having regard to the fact that an order of preventive detention against a person passed at a time when that person is already in the custody of the State Authorities for commission of the Act under substantive law, is illegal unless there is possibility of immediate release of a person from custody in the substantive offence and there are compelling reasons for passing of the order of preventive detention. Such a situation is required to be reflected in the order of detention or the grounds of detention formulated by the detaining authority. The impugned order is, therefore, liable to be quashed on this count alone.

15. Resultantly, this petition is allowed. The impugned detention order bearing No. DIVCOM-"K"/168/2018 dated 16.08.2018, is quashed. The detenu namely Manzoor Ahmad Khawaja S/o Ghulam Rasool Khawaja R/o Noulari, Pattan, District Baramulla, is directed to be set free, if not required in any other case(s).

16. Disposed of accordingly.

(RASHID ALI DAR) JUDGE Srinagar 01.07.2019 Muzammil. Q MUZAMIL QADIR 2019.07.02 10:47 I attest to the accuracy and integrity of this document