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Mohammad HussaIn Avan Vs. State of J and K and ors.

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Court : Jammu and Kashmir

Decided On : Mar-29-2005

Reported in : 2005(3)JKJ400

Judge : Mansoor Ahmad Mir, J.

Acts : Jammu and Kashmir Public Safety Act, 1978 - Section 8; ;Indian Arms Act - Sections 7 and 25

Appeal No. : HCP No. 216/2003

Appellant : Mohammad HussaIn Avan

Respondent : State of J and K and ors.

Advocate for Def. : M.A. Wani, AAG

Advocate for Pet/Ap. : Qazi Rashid, Adv.

Disposition : Petition allowed

Judgement :

Mansoor Ahmad Mir, J.

1. Subject Javed Hussain Avan son of Mohammad Hussain Avan resident of Pehlipora Keller Teh. Shopian Pulwama through his father Mohammad Hussain Avan seeks to quash the detention order No. 86/DMP/PSA/03 dated 23.08.2003

passed by District Magistrate, Pulwama in exercise of the powers under Section 8 of Jammu and Kashmir Public Safety Act, 1978 directing the detention of the detenu for a period of 24 months.

2. The detention order has been challenged on various grounds which can be aptly and precisely enumerated as under:

3. The detention order, grounds of detention, dossier and material (documents) on which the subjective satisfaction has been derived have not been furnished to the detenu and detenu has not been able to make effective representation; that the detenu was in police custody at the time of passing of detention order and there was no need to detain him in preventive custody; the detention orders suffers from non-application of mind. The grounds of detention are coached in English language, while as the detenu cannot understand the said language and it was duty of the detaining authority to furnish translated script of the detention order and material to the detenu in his own language; the grounds of detention were not explained to the detenu in his own language.

4. The respondents have resisted the petition in terms of the reply affidavit on the grounds which can be summarized as under; -

That detenu was in custody in FIR No. 114/03 under Section 7/25 of Indian Arms Act P/S Rajora Pulwama; the activities of detenue were highly prejudicial to the security of the State and as such the detenue was detained under provisions of Public Safety Act vide Order No. DMP/PSA/86 dated 23.08.2003; that detenue has not made any effective representation; that the contents of the detention order were read over and explained to the detenue in Urdu and Kashmiri languages.

5. Heard. Perused. Considered. Mr. M.A. Wani frankly conceded that the detaining authority has not made mention of the fact in the detention order that there were compelling reasons to detain the detenue in preventive custody in terms of Public Safety Act despite of the fact that the detenue was in custody at the time of passing of detention order.

The Apex Court in a judgment reported in AIR 1995 SCW page 1841 has held that the detention order must disclose that there are compelling reasons for detaining a person in terms of the Public Safety Act despite of the fact that the said person is in custody at the relevant point of time.

6. While applying the test to the instant case, there must be material before detaining authority on the basis of which satisfaction can be derived that detenue was likely to be released on bail in near future and he may indulge in such activities which are prejudicial to the security of the State. Not to speak of spelling out the compelling reasons, the Magistrate has not even made a whisper about the said fact that detenue is already in custody. Mr. Wani, AAG frankly conceded the said fact. Thus the detention order suffers from non-application of mind and on this count alone needs to be quashed.

7. In the grounds of detention, reference has been made to FIR No. 114/2003 under Section 7/25 of Indian Arms Act P/S Rajora Pulwama and, the confessional statement made by the detenue. Both the said documents have not been supplied to the detenue, while as the supplying of documents is must. In Sophia Ghulam Mohammad Bham v. State of Maharashtra and Ors., : 1999 CriLJ4064 , the Apex Court reiterated and reads as under; -

'...The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the grounds are based flows from the right given to the detenu to make a representation can be made and the order of detention can be assailed only when all the grounds on which the order is based are communicated to the detenue and the material on which those grounds are based are also disclosed and copies thereof are supplied to the person detained in his own language.'

8. Thus one comes to an inescapable conclusion that detention order is not legally sustainable.

In para-d of the reply affidavit, the respondents have averred that the contents of the detention order were read over and explained to the detenue in Urdu and Kashmiri languages. No such record is annexed with the counter even with the

record. However, there is a Photostat copy which appears to have been written by one Abdul Ahad, ASI No. 8328 which discloses that detention order has been explained in Kashmiri and Urdu languages. Whether the detenue was knowing the said languages, there is no record to that effect on file. Even original of the said report is not on the record. The State should have produced affidavit of the serving officer. No such affidavit is on the file. Even in reply affidavit, name of the serving officer has not been given.

9. This view is fortified by the Apex Court judgment reported 2005 (1) JKJ 7(SC), State Legal Aid Committee, J&K; v. State of J&K; and Ors.

10. Thus the mandatory provision of law has not been complied with. On this count also, the detention order needs to be quashed.

Having glance of the aforesaid discussion, it is hereby held that detention order needs to be quashed.

11. Accordingly, the petition is allowed. The detention order is hereby quashed with the command to the State to release the detenue forthwith provided, he is not required in any other case.

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