Jammu & Kashmir High Court
Shamim Ahmad Beigh vs State Of J And K And Ors. on 18 May, 2006
Equivalent citations: 2007 (1) JKJ 429
Author: J Singh
Bench: J Singh
JUDGMENT J.P. Singh, J.

1. Shamim Ahmad Beigh seeks a writ of certiorari for quashing Order No. Det/PSA/06/210 dated 13.02.2006 passed by second respondent, District Magistrate Anantnag, directing his detention under the J&K Public Safety Act, 1978.

Detention has been questioned, in nutshell, on the ground that on an earlier occasion also the petitioner was detained in preventive custody vide second respondent's order No. Det/PSA/05/3 64 dated 07.01.2005, which was quashed by this Court in terms of its judgment dated 25.10.2005 recorded in case No. HC 94/2005 and that in view of the quashing earlier detention order, the petitioner could not be detailed on the same allegations on which his detention hn-1 been quashed by this Court on an earlier occasion. The petitioner submits that there was no material on records before District Magistrate on the basis whereof a satisfaction could be reached at that the petitioner was indulging in activities detrimental to the security of the State. It is urged by the petitioner that delay in execution of the warrant for 11/2 months renders the detention order unsustainable.

2. Counter affidavit filed by the State-respondent indicates that the petitioner is an over-ground worker of terrorist organization namely 'Hazibul Mujahideen' and had been providing food and shelter to the militants operating in Anantnag town. It is further urged by the respondents that petitioner had been found involved in extortion from general public for providing the extortion money to the militants of Hazibul Mujahideen outfit for carrying subversive activities. Various other allegations too have been raised by the respondents, on the basis whereof, the detention order issued in respect of the petitioner, is sought to be justified. In addition to the support provided by the official respondents to the detention order and grounds of detention on the basis whereof detention of the petitioner has been ordered by District Magistrate, Anantnag, it is urged that the petitioner is disentitled to maintain his petition because he had not surrendered before coming to the Court to question his detention.

3. I have heard learned Counsel for the parties and perused the records supplied by Sh. M.A. Rathore, learned Addl. AG.

4. True it is that earlier detention order issued in respect of the petitioner was quashed by this Court vide its judgment dated 1:110.2005 delivered in case No. HC 94/2005; this, however, in my opinion, would not debar the State-respondent from passing a fresh order of detention because the detention of the petitioner had been quashed only on the ground of non-supply of material relied upon by the detaining authority in directing the detention of the petitioner. The Bench, dealing with Habeas Corpus Petition No. 94/2005, had not commented on the merits of the case as to whether or not the material on records was sufficient to warrant detention of the petitioner in preventive custody. That being the case, the substratum of petitioner's case falls because sum and substance of all the

grounds raised by the petitioner against his present detention, is that after the quashing of his earlier detention by this Court, no further order of detention could be issued by the State-respondent.

5. I find sufficient force in the submission of Sh. Rathore that the petitioner, unless he surrenders to custody, cannot maintain his writ petition to question his detention. In taking this view, I am supported by 'Union of India and Ors. v. Vidya Bagaria' reported as , wherein rely on 'Syed Taker Bawamiya v. Joint Secretary to the Govt India and Ors.' ; and AIR SCW 4' the Supreme Court concluded as follows:

7. This Court's decision in Union of India and Ors. v. Parasmal Rampuria throws considerable light as to what would be the proper course for a person to adopt when he seeks to challenge an order of detention on the available grounds like delayed execution of detention order, delay in consideration of the representation and the like. These questions are really hypothetical in nature when the order of detention has not been executed at all and the detenue has avoided service and incarceration and when challenge is sought to be made at pre-execution stage. It was observed as under:

In our view, a very unusual order seems to have been passed in a pending appeal by the Division Bench of the High Court. It is challenged by the Union of India in these appeals, A detention order under Section 3(1) of the COFEPOSA Act was passed by the authorities on 13-9-1996 against the respondent. The respondent before surrendering filed a writ petition in the High Court on 23-10-1996 and obtained an interim stay of the proposed order, which had remained unserved. The learned Single Judge after hearing the parties vacated the ad interim relief. Thereafter, the respondent went in appeal before the Division Bench and again obtained ad interim relief on 10-1-1997 which was extended from time to time. The writ appeal has not been still disposed of.

When the writ petition was filed, the respondent had not surrendered. Under these circumstances, the proper order which was required to be passed was to call upon the respondent first to surrender pursuant to the detention order and then to have all his grievances examined on merits after he had an opportunity to study the grounds of detention and to make his representation against the said grounds as required by Article 22(5) of the Constitution.

8. In Sunil Fulchand Shah v. Union of India and Ors. 2000 (3) SCC 409 a Constitution Bench of this Court observed that a person may try to abscond and thereafter take a stand that period for which detention was directed is over and, therefore, order of detention is infructuous. It was clearly held that the same plea even if raised deserved to be rejected as without substance it should all the more be so when the detenue stalled the service of the order and/or detention in custody by obtaining orders of Court. In fact in Sayed Taher's case (supra) the fact position shows that 16 years had elapsed yet this Court rejected the pica that the order had become stale.

9. These aspects were once again highlighted recently in Hare Ram Pandey v. State of Bihar and Ors. and Union of India v. Amritlal Manchanda and Ors. after an elaborate and exhaustive consideration of the matter.

10. The High Court does not appear lo have considered the case in the background of whether any relief was available to the writ petitioner even before the order of detention was executed. The cryptic observation that the decision "is off the point", seems to be not only evasive but lacks judicious application of mind. Consequently, the order is liable lo be set aside. It is open to the respondent to surrender to custody as was observed in Parasmal Rampuria's case (supra) and take such pleas as are available in law to the person concerned. These aspects were once again sufficiently highlighted in Amrit Lal Manchanda's case (supra)

6. For all what has been said above, I would hold that jurisdiction of the High Court may not be invoked for questioning an order of preventive detention unless the detenue first surrenders or makes out an exceptional case seeking indulgence of the Court on the lines provided in Sayed Taher Bawamiya's case reported as . Petitioner has not surrendered to custody before filing this petition. No exceptional circumstances too have been projected in the petition.

7. This petition is, therefore, dismissed as not maintainable.

8. No order as to costs.