2017 M L D 1548

[Peshawar (Abbottabad Bench)]

Before Qalandar Ali Khan and Syed Muhammad Attique Shah, JJ

RAHEEL---Petitioner

Versus

The STATE---Respondent

W.P. No.1242-A of 2016, decided on 20th April, 2017.

Khyber Pakhtunkhwa Maintenance of Public Order Ordinance (XXXI of 1960)---

----S. 3---Constitution of Pakistan, Arts. 9 & 199---Constitutional petition---Detention---Petitioner was ordered to be detained for 30 days on the grounds of prejudicial to public order, safety, tranquility, constant threat to law and order of the area by indulging in activities to diffuse writ of government---Validity---Grounds on the basis of which detention order of a person could be passed/issued, if had support of sufficient cogent material, would only then satisfy issuance of preventive order---Material/evidence must be of such a nature and character to persuade and satisfy and ordinary prudent person to justify order of preventive detention---Deputy Commissioner, in the present case had not applied his independent mind to alleged material produced before him rather he had mechanically issued order in question on a letter---Such order was untenable under law---Letter in question as well as preventive detention order were violative of Art. 9 of the Constitution---High Court set aside preventive detention order passed by Deputy Commissioner as it was illegal, unlawful and without application of an independent mind---Constitutional petition was allowed in circumstances.

PLD 2003 SC 442; PLD 2016 Pesh. 89; 2004 MLD 1541 and 2004 PCr.LJ 1604 rel.

Sajjad Afzal Khan for Petitioner.

Additional Advocate General for the State.

Date of hearing: 20th April, 2017.

JUDGMENT

SYED MUHAMMAD ATTIQUE SHAH, J.---The petitioner, invoked the writ jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, for declaration to the effect that impugned order/warrant of arrest bearing No. 1328-33/ 3MPO/READER/DC (M) dated: 23.12.2016 issued by the Deputy Commissioner, Mansehra (respondent No.2) whereby the petitioner was ordered to be detained for a period of 30 days under section 3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960 on the so called ground of prejudicial to

public order safety and tranquility constant threat to the law and order of the area and indulging in activities to defuse the writ of the government is arbitrary, fanciful, discriminatory, unconstitutional and without lawful authority, hence, liable to be struck down.

2. The brief and essential facts leading to the institution of this constitutional petition are that the petitioner being a law abiding citizen and is a bonafide resident of village Phul Keri has assailed the impugned order/warrant of arrest dated 23.12.2016, issued by the respondent No.2 under section 3 MPO, which is illegal, based on malice and malafide, just to harass and humiliate the petitioner and thus liable to be struck down.

3. Learned counsel for the petitioner argued that the petitioner is law abiding citizen and never remained involved in any kind of illegal and unwarranted activities. Respondents Nos. 3 and 4, due to their personal malice and mala fide have allegedly shown involved the petitioner in unlawful activities, which has no basis and footing. He prayed for setting aside the impugned letter of respondent No. 3 as well as impugned notification dated: 23.12.2016 issued under section 3 MPO by respondent No. 2.

4. Learned Additional Advocate General fully supported the impugned detention order issued by respondent No. 2 and prayed for dismissal of instant writ petition.

5. Arguments heard and record perused.

6. The respondent No. 4 appeared in pursuance of preadmission notice dated: 07.03.2017 and produced copies of FIRs registered against the petitioner and stated that due to registration of these FIRs the impugned letter was written to respondent No. 2, who thereafter, issued the impugned order dated: 23.12.2016. Respondent No. 4 was categorically asked by the court that whether the petitioner is involved in any activities, prejudicial to the public order, safety and tranquility, or is indulged in the activities, challenging the writ of the State, to which his reply was in negative.

7. From the FIRs, attached with the petition, it transpires that petitioner has been charged in different FIRs under different sections of law and he is facing prosecution in the same. Apart from the FIRs, attached with the petition the respondent No. 4 is not in possession of any other concrete and tangible material/ evidence in support of letter dated: 20.12.2016, sent by respondent No. 3.

8. The impugned order of detention has been based on three grounds:--

i. He is acting prejudicial to public order, safety and tranquility.

ii. He has posed, constant threat to the law and order of the area.

iii. He is indulging in activities to defuse the writ of the government, thus posing threat to public peace in the area.

9. The respondent No.4 has failed to produce any sufficient tangible material/evidence in support of letter dated: 20.12.2016 of respondent No. 3.

10. Order under section 3 of the Ordinance ibid cannot be based on conjectures and surmises, rather it should be based on concrete and tangible evidence. Moreover, the grounds on the basis of which detention order of a person is issued/passed, that must have the support of sufficient cogent material and only thereafter, it would satisfy the issuance of preventive order. Furthermore, the material/evidence must be of such a nature and character to persuade and satisfy an ordinary prudent person to justify the order of preventive detention. It is the consistent view of the superior courts of the country that a person cannot be deprived from his liberty on a flimsy/shaky and insufficient material/evidence. Wisdom in this respect drawn from PLD 2003 Supreme Court 442. Wherein, it is held:--

> "It can be concluded safely that satisfaction can only be based on some evidence or record justifying the detention order which is badly lacking in this case".

In the above cited judgment the apex Court has thrashed out the entire law available on the subject. Reliance can also be placed on PLD 2016 Peshawar 89. Wherein it is held:--

> "Needless to say that it has consistently been held umpteen times by the Courts that powers under section 3 MPO could not be invoked for detention of persons on the grounds other than provided for by the law. As such, preventive detention of a person who is either accused of an offence or convicted for a crime would not only amount to double jeopardy but would also militate against the spirit of the relevant law, prescribing procedure and penalties for commission of offences, as resort to preventive measures is useful only before commission of the offence and not after the offence has been committed, where-after case is registered and legal process for prosecution of the perpetrator is initiated".

11. Article 9 of the Constitution provides for the security of the person "No person shall be deprived of life and liberty save in accordance with law". Now under the provision of section 3 of the Ordinance ibid, the authority which is issuing preventive detention order under section 3 of MPO, must satisfy itself that material/ evidence produced before him are sufficient to justify the detention order, without it, it would be violative of Article 9 of the Constitution. Wisdom is derived from 2004 MLD 1541, wherein it is held that:--

> "To my mind, life and liberty of citizens is too much important, no person can be deprived of this precious liberty, unless allegations against him are prima facie proved from the record. In the instant, case prima facie this court is of the view that these allegations against the petitioners are not proved from the record in hand after making tentative assessment of the evidence".

Wisdom is further derived from 2004 PCr.LJ 1604, wherein it is held that:--

> "It is well settled now that even the Constitution of Islamic Republic of Pakistan provides that no person shall be deprived of life, liberty save in

accordance with law. Indeed the State has to act within the limits of law wherever, the life or liberty of individual is affected"

12. From the impugned order of detention it transpires that respondent No. 2 has not applied his independent mind to the alleged material produced before him, rather he has mechanically issued the impugned order on the letter of respondent No. 3, which is untenable under the law.

13. From the available record it clearly manifests that the impugned letter No.5061/PA dated: 20.12.2016 of respondent No. 3, as well as order of preventive detention issued by respondent No. 2 is violative of Article 9 of the Constitution.

14. Keeping in view the above stated facts and circumstances of the case, this court reached to the conclusion that the preventive detention order of respondent No. 2 is illegal, unlawful and issued without application of independent mind, hence, the same is set-aside and struck down.

MH/138/P Petition allowed.

;