

(2022) 10 J&K CK 0028

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 136 Of 2021

Aakib Hussain Bhat

APPELLANT

Vs

Union Territory Of J&K & Others

RESPONDENT

Date of Decision : 19-10-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 226
Jammu And Kashmir Public Safety Act, 1978 — Section 8
Indian Penal Code, 1860 — Section 34
Arms Act, 1959 — Section 7, 25

Citation : (2022) 10 J&K CK 0028

Hon'ble Judges : Moksha Khajuria Kazmi, J

Bench : Single Bench

Advocate : Shuja-Ul-Haq, Faheem Shah

Final Decision : Dismissed

Judgement

Moksha Khajuria Kazmi, J

1. Aakib Hussain Bhat [“the detainee”] has filed this petition through his brother, seeking quashment of detention order passed by District Magistrate, Anantnag [“the detaining authority”] vide No. 28 DMA/PSA/DET/2021 dated 12.07.2021, impugned in this petition.

2. By virtue of the impugned detention order passed by the detaining authority in exercise of powers conferred under section 8 of the Jammu and Kashmir Public Safety Act, 1978 [“the Act”], the detainee has been taken into preventive custody with a view to prevent him from acting in any manner, prejudicial to the security of the state. The impugned detention order has been passed on the basis of material supplied by the police in the shape of dossier and other allied documents.

3. The impugned detention order is assailed by the detainee, primarily on the grounds: (1) That the detainee was already in custody in FIR No. 30 of Police

Station Srigufwara, when the detention order was passed and there was no likelihood of the detainee getting released on bail. (2) That the material on which the detaining authority has passed the impugned detention order, has not been supplied to the detainee, thereby, preventing him to make an effective representation. (3) That the detaining authority has drawn its satisfaction on the basis of dossier placed before it by the police authorities.

4. Counter affidavit has been filed by respondents which inter-alia reveals that whatever material was required to be furnished to the detainee, has been furnished to him and he was also informed of his right to make a representation but he did not make any. It is contended that the grounds of detention are precise, proximate, pertinent and relevant. There is no vagueness or staleness and the incidents clearly substantiate the subjective satisfaction arrived at by the detaining authority. It is further urged that grounds of detention sufficiently connect the detainee with the activities, which on the face of it are highly prejudicial to the security of the State and as such, detention order does not suffer from any legal infirmity.

5. I have heard learned counsel for parties and considered the matter. I have gone through the detention record submitted by Mr. Faheem Shah, learned counsel for respondents.

6. Learned counsel for petitioner avers that detaining authority has made a single FIR basis in grounds of detention for putting the detainee in preventive detention and that could not have been made use of for detention.

7. It may not be out of place to mention here that the Supreme Court, in several decisions, has held that even one prejudicial act can be treated as sufficient for forming requisite satisfaction for detaining a person.

The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if, it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be, made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention and an order of preventive detention is also not a bar to prosecution. Discharge or acquittal of a person will not preclude detaining authority from issuing a detention order. In this regard the Constitution Bench of the Supreme Court in Haradhan Saha's case while considering various facets concerning preventive detention, observed:

"32. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched.

An order of preventive detention may be, made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.

33. Article 14 is inapplicable because preventive detention and prosecution are not synonymous. The purposes are different. The authorities are different. The nature of proceedings is different. In a prosecution an accused is sought to be punished for a past act. In preventive detention, the past act is merely the material for inference about the future course of probable conduct on the part of the detenu.

34. The recent decisions of this Court on this subject are many. The decisions in *Borjahan Gorey v. State of W.B.*, *Ashim Kumar Ray v. State of W.B.*; *Abdul Aziz v. District Magistrate, Burdwan* and *Debu Mahato v. State of W.B.* correctly lay down the principles to be followed as to whether a detention order is valid or not. The decision in *Biram Chand v. State of U.P.*, (1974) 4 SCC 573, which is a Division Bench decision of two learned Judges is contrary to the other Bench decisions consisting in each case of three learned Judges. The principles which can be broadly stated are these. First, merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act. Second, the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the Code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention. Third, where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or the public order. Fourth, the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order. Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances."

7. The detention record produced by respondents would reveal that detenu after leaving his studies started helping his father in fields, however, surfaced in the picture as a useful instrument in the capacity of an Over Ground Worker (OGW) of militants, particularly banned terrorist organization, Lashkar-e-Toiba (LeT). On May 5th, 2021, the detenu along with his associate were apprehended at Chiniwader Bawoora Kanelwan crossing by Police and 3 RR after a long chase and on his personal search, 11 rounds of AK 47 were recovered from the possession

of the detainee. The activities of the detainee has created insecurity, pain and fear in the minds of general public and have direct bearing on the maintenance of security of the state.

8. As is discernible from grounds of detention, detainee was apprehended by police Station Srigufawara and 3 RR along with his associate at Kanelwan, when the detainee along with his associate felt uneasy and began to run away and after a long chase were caught hold of and during the search some rounds of AK 47 were recovered from the possession of the detainee. In this regard case FIR No.30/2021 under Sections 34 IPC, 7/25 Indian Arms Act, was registered in Police Station Srigufwara and investigation set in motion. During investigation it has come to fore that the detainee is providing every kind of logistic support to the militants, besides being a close aid of militant Uzair Ashraf Dar S/O Mohd Ashraf Dar R/O Wandina Shopian.

9. In such circumstances, suffice, is to say that there had been material before detaining authority to come to the conclusion arrived at and, it cannot be said that such subjective satisfaction was wrongly arrived at or grounds of detention are self-contradictory or vague. The role of detainee has been specifically described.

10. Even otherwise it is settled law that this Court in proceedings under Article 226 of the Constitution has limited scope of scrutinizing whether detention order is based on the material placed before it, and cannot go further to examine the sufficiency of such material. This Court cannot sit in appeal over the decision of detaining authority and cannot substitute its own opinion over that of detaining authority when grounds of detention are precise, pertinent, proximate and relevant. This Court can only examine grounds disclosed by the Government in order to see whether they are relevant to the object which the legislation had in view, that is, to prevent detenu from engaging in activities prejudicial to security of the State or maintenance of public order. In this regard I am fortified by law laid down by the by the Supreme Court in *State of Gujarat v. Adam KasamBhaya* (1981) 4 SCC 216; *State of Punjab v. Sukhpal Singh* (1990) 1 SCC 35; *Union of India v. Arvind Shergill* (2000) 7 SCC 601; *Pebam Ningol Mikoi Devi v. State of Manipura*, (2010) 9 SCC; and *Subramanian vs. State of T.N.* (2012) 4 SCC 699.

11. In the aforesaid backdrop, it would be apt to refer to the observations made by the Constitution Bench of the Supreme Court in the case of *The State of Bombay v. Atma Ram Shridhar Vaidya* AIR 1951 SC 157. The paragraph 5 of the judgment lays law on the point, which is profitable to be reproduced infra:

"5. It has to be borne in mind that the legislation in question is not an emergency legislation. The powers of preventive detention under this Act of 1950 are in addition to those contained in the Criminal Procedure Code, where preventive detention is followed by an inquiry or trial. By its very nature, preventive detention is aimed at preventing the commission of an offence or preventing the detained person from achieving a certain end. The authority

making the order therefore cannot always be in possession of full detailed information when it passes the order and the information in its possession may fall far short of legal proof of any specific offence, although it may be indicative of a strong probability of the impending commission of a prejudicial act. Section 3 of the Preventive Detention Act therefore requires that the Central Government or the State Government must be satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to (1) the defence of India, the relations of India with foreign powers, or the security of India, or (2) the security of the State or the maintenance of public order, or (3) the maintenance of supplies and services essential to the community it is necessary So to do, make an order directing that such person be detained. According to the wording of section 3, therefore, before the Government can pass an order of preventive detention it must be satisfied with respect to the individual person that his activities are directed against one or other of the three objects mentioned in the section, and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. The wording of the section thus clearly shows that it is the satisfaction of the Central Government or the State Government on the point which alone is necessary to be established. It is significant that while the objects intended to be defeated are mentioned, the different methods, acts or omissions by which that can be done are not mentioned, as it is not humanly possible to give such an exhaustive list. The satisfaction of the Government however must be based on some grounds. There can be no satisfaction if there are no grounds for the same. There may be a divergence of opinion as to whether certain grounds are sufficient to bring about the satisfaction required by the section. One person may think one way, another the other way. If, therefore, the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of mala fides cannot be challenged in a court. Whether in a particular case the grounds are sufficient or not, according to the opinion of any person or body other than the Central Government or the State Government, is ruled out by the wording of the section. It is not for the court to sit in the place of the Central Government or the State Government and try to determine if it would have come to the same conclusion as the Central or the State Government. As has been generally observed, this is a matter for the subjective decision of the Government and that cannot be substituted by an objective test in a court of law. Such detention orders are passed on information and materials which may not be strictly admissible as evidence under the Evidence Act in a court, but which the law, taking into consideration the needs and exigencies of administration, has allowed to be considered sufficient for the subjective decision of the Government."

12. The reliance placed by learned counsel for petitioner on the judgment of Apex Court delivered in case Anita Kushwaha v. Pushap Sudan 2016 AIR SC

3506; judgment dated 9th June 2017 passed by Division Bench of this Court in Tariq Ahmad Dar v. State of J&K & Rekha v. State of T. Nadu 2011 AIR (SCW) 2262, are extremely distinguishable from the facts of the present case and do not bolster the case set up by petitioner.

13. For the foregoing discussion, the instant petition fails and is, accordingly, dismissed.

14. Detention record be returned to counsel for respondents.