

(2023) 11 J&K CK 0022

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 223 Of 2022

Aamir Amin Dar

APPELLANT

Vs

Union Territory Of Jammu & Kashmir And Others

RESPONDENT

Date of Decision : 09-11-2023

Acts Referred:

Constitution Of India, 1950 — Article 21, 22(5)

Indian Penal Code, 1860 — Section 302

Arms Act, 1959 — Section 7, 25

Unlawful Activities (Prevention) Act, 1967 — Section 13, 16, 18, 20, 38

Citation : (2023) 11 J&K CK 0022

Hon'ble Judges : M. A. Chowdhary, J

Bench : Single Bench

Advocate : Wajid Mohammad Haseeb, Zahid Noor

Final Decision : Allowed

Judgement

M. A. Chowdhary, J

1. Through the medium of the instant petition, the petitioner has questioned the order of detention bearing No. 02/DMP/PSA/22 dated 07.04.2022 (for short 'impugned order') passed by District Magistrate Pulwama- respondent No. 2 (for short 'Detaining authority') by virtue of which the petitioner (for short 'the detainee') has been ordered to be detained under the Jammu & Kashmir Public Safety Act, 1978 (for short 'the Act').

2. It is stated in the petition that the detainee was initially arrested by the police and was implicated in FIR No.15/2020 registered at Police Station Tral for the commission of offences punishable under Sections 302 IPC, 7/25 Arms Act, 16, 18, 20 and 38 of ULA(P) Act, but was admitted to default bail on 07.10.2020, however, he was not released. During his continuation of arrest in the above mentioned FIR, the detainee was detained under the Act vide Detention Order No. 31/DMP/PSA/20 dated 13.10.2020. The said order of detention was challenged by the detainee through the medium of writ petition bearing WP(Crl)

No. 181/2020 and the said order was quashed by this Court by virtue of the judgment dated 30.07.2021, copy whereof is enclosed with the petition. It is further stated that the detenue was again arrested in April 2022 and thereafter was detained under the provisions of Public Safety Act in terms of the impugned order, which is challenged through the medium of the instant petition. It is stated that the detenue had filed representation against his detention but the same was not considered by the respondents as per the provisions of law.

3. The detenue has questioned the impugned order of detention inter alia on the grounds that the constitutional as well as procedural safeguards as envisaged under the Constitution of India as well as under the Act, have not been complied with by the Detaining Authority while passing the order of detention; that the order of detention was neither referred to the Advisory Board nor was approved within the stipulated time. No material, which has been relied upon by the Detaining Authority, has been furnished to the detenue thereby depriving him of his valuable right of making effective representation against preventive detention; and the order of detention has been passed on stale grounds.

4. Counter affidavit has been filed, perusal of which reveals that the detenue has been detained pursuant to the order of detention passed by the Detaining authority and while doing so, the procedural as well as statutory safeguards enshrined under Article 22(5) of the Constitution of India and Section 13 of the Act, have been fully complied with by the respondents. They have further stated that all the requisite documents have been supplied to the detenue so as to enable him to make an effective representation to the Detaining Authority and to the Government. The order of detention was executed and the detenue was taken into preventive custody after the contents of the detention order/warrant and the grounds of detention were read over and explained to him in the language which he fully understood and the detenue was also informed of his right to make representation to the Detaining Authority. The Detaining Authority found it necessary to detain the detenue under the Act.

5. Heard learned counsel for the parties, perused the detention record as has been made available by learned counsel for the respondents and considered the material on file.

6. Learned counsel for the detenue, besides agitating all the grounds, has vehemently argued that as the subsequent order of detention has been passed substantially on the same grounds on the basis of which the earlier detention order was passed, as such, the order of detention is bad in law.

7. On the contrary, learned GA appearing for the respondents, contended that all the documents have been served upon the detenue. He has also contended that the detention order is legal and all procedural and statutory safeguards have been complied with while passing the order of detention, as such, the order of detention is sustainable in the eyes of law.

8. On the perusal of grounds of detention, it transpires that the order impugned

has been passed on the similar grounds as narrated in the earlier grounds of detention on the basis of which the earlier order of detention was passed; only sequence of incidents has been altered. During the investigation in FIR No. 15/2020 registered at Police Station Tral, the detainee was found a highly committed over ground worker (OGW) of banned terrorist organization JeM (Jaish-e-Mohammad), who was actively supporting the terrorists of the said organization in raising terrorists support structure and motivating the members of young generation to join terrorist ranks in the name of 'Jihad'. The detainee was arrested and on questioning, he was found involved in passing information regarding movement of one Shabir Ahmad Bhat to the terrorists of JeM and the said person was assassinated by the said terrorists on 06.03/2020 at Gamraj road Tral after hatching criminal conspiracy with the detainee. It is worth to mention here that the said incident occurs in the year 2020, whereas the earlier detention order was passed on 13.10.2020, meaning thereby that on the basis of said FIR, the detainee was not ordered to be detained earlier. The grounds of detention of the earlier detention order have been taken into consideration while passing the present impugned order of detention by the Detaining Authority. The same grounds could not have been relied upon by the respondents for issuance of fresh detention order.

9. With no specific allegations, involvement of the detainee has been shown in the commission of offences in a case registered vide FIR No. 15/2020 registered at Police Station Tral under Sections 302 IPC, 7/25 Arms Act, 16, 18, 20 and 38 of ULA(P) Act, with no details as to his trial or its outcome. This too is a stale ground to base the detention in the month of April 2022, of an incident in the year 2020, after a period of more than two years. The afore-stated grounds of detention, as such, are general allegations against the detainee, with no specific instances/incidents. The detention order based on such vague and stale grounds is not sustainable, for the reason that the detaining authority before passing the order has not applied its mind to draw subjective satisfaction to order detention of the detainee by curtailing his liberty which is a valuable and cherishable right guaranteed under Article 21 of the Constitution of India. In this regard reliance can be placed on the judgments of Supreme Court in the cases (i) Jahangirkhan Fazal Khan Pathan Vs. Police Commissioner Ahmadabad (1989) 3 SCC 590 and, (ii) Abdul Razak Nanekhan Pathan Vs. Police Commissioner Ahmadabad AIR 1989 SC 2265.

10. The law is well settled that if the order of detention comes to an end either by revocation or by the expiry of the period of order of detention, there must be fresh facts for passing a subsequent order of detention. When the detention order has been quashed by the Court, the grounds of said detention order are not to be taken into consideration either as a whole or in part even along with the fresh grounds of detention in order to pass a fresh detention order and, if such previous grounds of detention are taken into consideration while passing a fresh detention order, the order of detention will be vitiated.

11. In the judgment rendered in case 'Chhagan Bagwan Kahar v. N.L. Kalna, reported as (1989) 2 SCC 318', the Hon'ble Apex Court has discussed the above issue meticulously, relevant Para of which is reproduced as under :-

"12. It emerges from the above authoritative judicial pronouncements that even if the order of detention comes to an end either by revocation or by expiry of the period of detention there must be fresh facts for passing a subsequent order. A fortiori when a detention order is quashed by the court issuing a high prerogative writ like habeas corpus or certiorari the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the court strikes down an earlier order by issuing rule it nullifies the entire order."

12. Again in the case 'Jahangir Khan Fazal Khan Pathan Vs. The Police Commissioner, Ahmadabad and another, (1989) 3 SCC 590', the Supreme Court has held as under:

".....It is, therefore, clear that an order of detention cannot be made after considering the previous grounds of detention when the same had been quashed by the Court, and if such previous grounds of detention are taken into consideration while forming the subjective satisfaction by the detaining authority in making a detention order, the order of detention will be vitiated. It is of no consequence if the further fresh facts disclosed in the grounds of the impugned detention order have been considered."

13. In view of the above settled proposition of law, this petition is allowed. Detention Order No. 02/DMP/PSA/22 dated 07.04.2022 is quashed. Detenue namely Aamir Amin Dar S/O Mohammad Amin Dar R/O Noorabad Tral District Pulwama, be set free from the preventive custody provided he is not required in any other case(s).

14. Detention record, as produced, be returned back to the learned counsel for the respondents.

15. Petition is disposed of accordingly.