

(2019) 03 J&K CK 0128

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 470 Of 2018

Aamir Karim Sofi

APPELLANT

Vs

State Of Jammu & Kashmir And Another

RESPONDENT

Date of Decision : 20-03-2019

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8, 8(a), 11, 11(1)(a), 11(1)(b), 17

Unlawful Activities (Prevention) Act, 1967 — Section 13, 19

Code Of Criminal Procedure, 1973 — Section 161, 164A

Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 120B, 148, 149, 307, 332, 336, 353

General Clauses Act, 1897 — Section 21

Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 — Section 3

Constitution Of India, 1950 — Article 22(5), 226

Citation : (2019) 03 J&K CK 0128

Hon'ble Judges : Sanjay Kumar Gupta, J

Bench : Single Bench

Advocate : Wajid Haseeb, Mir Shafaqat Hussain, Asif Maqbool

Judgement

1. By dint of order bearing No.109/DMB/PSA/2018 dated 04-12-2018 passed by the Respondent No.2/District Magistrate Baramulla in exercise of powers vested in him under Clause (a) of Section (8) of the Jammu and Kashmir Public Safety Act, 1978 (for short the Act of 1978), one Aamir Karim Sofi S/o Abdul Kareem Sofi R/o Khanpora Baramulla, District Baramulla (petitioner herein), has been detained and lodged in Sub Jail Hira Nagar, Jammu.

2. In the petition, it has been stated that the detainee was arrested in the month of March 2018 and was thereafter taken to police station Baramulla and was implicated in case FIR No. 61/2018 under Section 13, 19 ULA (P) Act. While being in the custody of aforementioned case the detainee was shifted to District Jail Kathua Jammu to be detained to preventive custody in terms of order No. 18/DMB/PSA/2018 dated 07.05.2018. It is stated that petitioner challenged the said

detention order before High Court in HCP 125/2018 and court quashed the said detention order on 17.10.2018. Then petitioner served the quash order to concerned jail authorities and the detainee was discharged from preventive custody and was shifted to Police Station Baramulla and was taken back into custody of the FIR No.61/2018 registered against him wherefrom he was shifted to PSA. While being in the judicial custody of the aforementioned criminal cases the detainee was once again booked under Public Safety Act and was this time shifted to Sub Jail Hiranagar, by virtue of impugned detention order.

3. The order impugned passed by the respondent no.2 has been challenged in the petition inter alia on the grounds that the detainee was already in preventive custody and the said order was quashed by this Court and the detainee was discharged from preventive custody thereupon and after that no fresh activity has been attributed to the detainee between the period of his release from preventive custody and the impugned order.

4. That the activities alleged in the grounds of detention on which the detaining authority has relied upon so as to reach his so called satisfaction related to 9th April 2018 and the detention order has been passed on 04.12.2018 i.e. after elapse of eight months. The allegations had lost the proximity with the time of passing of detention order in absence of any fresh activity.

5. That the detaining authority despite having the knowledge that the earlier detention order has been quashed by the Hon'ble Court, has not given any fresh reason or allegation against the detainee to pass the detention order.

6. That from the perusal of the grounds of detention it appears that the impugned order is re-detention of a person on same grounds against which a detention order has been passed and same has terminated for certain reasons. That the re-detention order cannot be passed under Section 8 of Public Safety Act, but can be passed under Section 17 of the Act and it is the government only, which can pass such order and District Magistrate has no powers to pass such an order. Even though the detaining authority has mentioned a different FIR as allegations in the impugned detention grounds, however, such activity had been taken place prior to the detention, way back in 2013 and 2016, which has been quashed as such the allegation cannot be taken into consideration for passing a fresh detention order as the detainee has already suffered a preventive detention after the occurrence of said activity has taken place. It is furthermore stated that the detainee was already in custody in case FIR No.263/2016 and had a number of cases pending investigation against him as per the grounds of detention. The detainee had neither applied for bail nor bail was otherwise granted to him and there was no prospect of the detainee coming out of the custody in near future as the detainee was required to be in commission of offence under Chapter IV of the Unlawful Activities Act wherein grant of bail is exception. The detaining authority despite having the knowledge of the fact of the custody of the detainee, has not spelled out any reasonable compelling reasons to the detention order and the detention order was not justified in the given circumstances as there were no

real possibility of the detainee coming out of custody in near future.

7. That the respondent no.2 has not furnished the copy of dossier, relied upon by the detaining authority for passing the order of detention, nor the relevant material, like copy of FIR, Statement under Section 161, 164-A Cr. P.C, seizure memos of the cases mentioned in the grounds of detention, copy of the earlier order of detention and grounds of said detention, the copy of order of this Hon'ble Court whereby the said order was set aside in HCP no.125/2018, has been furnished to the detainee to enable him to make an effective representation by giving his version of facts attributed to him and make an attempt to dispel the apprehensions nurtured by the detaining authority concerning alleged involvement of the detainee in the alleged involvement of the detainee in the alleged activities, against the said order to the competent authority since filing of an effective representation it is necessary to provide him the copies of the dossier, connecting documents and the material and as in the instant case respondent no.2 has not provided any such material and as in the instant case respondent no.2 has not provided any such material to the detainee therefore the constitutional rights guaranteed to the detainee under article 22 (5) of the constitution of India stands infringed.

8. In the counter affidavit, the District Magistrate Baramulla, respondent no. 2 herein, has stated that none of the fundamental, statutory or any legal rights of the detainee stand violated/infringed by the answering respondents. That the detainee's preventive detention has been ordered by the detaining authority in terms of Section 8 of J&K Public Safety Act, 1978 with a view to prevent detainee from acting in any manner prejudicial to the maintenance of security of the State, in as much as safeguards provided under the constitution as also the rights of the detainee have duly been honoured and followed while ordering his detention. Detainee having failed to avail equally alternate efficacious remedy of submitting representation despite information/opportunity extended to him against the impugned detention as such detainee is legally stopped to maintain instant petition against the detention order. It is stated that detainee namely Aamir Kareem Sofi S/o Abdul Kareem Sofi R/o Khanpora Baramulla, District Baramulla is detained in terms of detention order No.109/DMB/PSA/2018 dated 04.12.2018 with a view to prevent him from acting in any manner prejudicial to the maintenance of security of the State and was directed to be lodged in Sub Jail Hiranagar. The detention order along-with the grounds of detention and other material which was relied upon by the detaining authority stands furnished to the detainee. It has been further submitted that the grounds of detention are precise, proximate and relevant. Also activities of the detainee have been reflected in the grounds of detention and the same were highly prejudicial to the preservation of public order and his remaining at large would have caused more damage to the public property and public order, and in order to curb his activities, the detainee was detained under the provisions of J&K Public Safety Act, 1978. The detention order was executed on 09.12.2018 and the grounds of detention were read over to the detainee by police officers concerned, besides that these authorities also

explained and read over the grounds of detention to detenue.

9. I have heard learned counsel for the parties and gone through the record produced by the learned GA.

10. From the pleadings of parties, it is evident that petitioner was already detained vide order No. 18/DMB/PSA/2018 dated 07.05.2018 under PSA and same was challenged before High Court in HCP 125/2018 by petitioner and High court quashed the said detention order on 17.10.2018.

Perusal of judgement of this court would reveal that, court has held that no material /documents were supplied to petitioner so it was quashed. The grounds mentioned in that order were that, petitioner was involved in FIR 61/2018 for offences u/s 13/19 unlawful activity Act, he intended to join LET terrorist out lift and he was taken in police custody on 14.4.2018 in FIR 61/2018 for offences u/s 13/19 unlawful activity Act. It also mentions here that petitioner was already in custody when previous detention order was passed.

11. In new detention order impugned in this petition, the grounds of detention are same except some additional grounds that petitioner has also been involved in two more FIRs; one 289/2013 under section 307/148/149/332/336 RPC and another FIR 263/2018 u/s 13 ULA prevention Act and 307/148/149/336/353/332/120-B RPC. It has also been mentioned that due to some technical reason previous detention order was quashed.

12. In LPAHC NO.9 /2019 case titled Basharat Ahmad Mir v. State decided on 30.1,2019 ,it is held by this court as under:-

13. There is absolutely no mention in the grounds of the detention with regard to any activity the detenu has indulged in or continued with after quashment of his earlier detention order dated 19th May, 2017.

5. For the foregoing reasons and in view of the settled legal position, fresh order of detention on the selfsame grounds is vitiated in the law and therefore could not sustain. We are supported by three Judge Judgement of the Supreme Court rendered in the case of Ibrahim Bachu Bafan vs. State of Gujarat (1985) 2 SCC 24. While noticing similar provision of Conservation of Foreign Exchange and provisions of Smuggling Activities Act 1974 (COFEPOSA), Supreme Court in paragraph 10 has held thus:-

" ...The power conferred under clauses (a) and (b) of sub-section (1) of Section 11 is in fact extension of the power recognized under Section 21 of the General Clauses Act and while under the General Clauses Act, the power is exercisable by the authority making the order, the named authorities under clauses (a) and (b) of Section 11 (1) of the Act are also entitled to exercise the power of revocation. When the High Court exercises jurisdiction under Article 226 of the Constitution it does not make an order of revocation. By issuing a high prerogative writ like habeas corpus or certiorari it quashes the order impugned before it and by declaring the order to be void and striking down the same it nullifies the order.

The ultimate effect of cancellation of an order by revocation and quashing of the same in exercise of the high prerogative jurisdiction vested in the High Court may be the same but the manner in which the situation is obtained is patently different and while one process is covered by Section 11(1) of the Act, the other is not known to the statute and is exercised by an authority beyond the purview of sub-section (1) of Section 11 of the Act. It is, therefore, our clear opinion that in a situation where the order of detention has been quashed by the High Court, sub-section (2) of Section 11 is not applicable and the detaining authority is not entitled to make another order under Section 3 of the Act on the same grounds".

6. This judgement was subsequently followed by the Supreme Court in the case of Chhagan Bagwan Kahar vs. N. L. Kalna & Ors, 1989 AIR 1234. Referring to earlier judgement of the Supreme Court in the case Ghulam Nabi Zaki vs. State of Jammu and Kashmir, 1970 (3) SCR 35: 1971 CriLJ (N) 24 which was rendered in the context of State PSA and also taking note of Constitution Bench Judgement in the case of Hadibandhu Dass vs. District Magistrate Cuttak (1969) 1 SCR 227, the Supreme Court in the case supra concluded thus:-

"... It emerges from the above authoritative judicial pronouncements that even if the order of detention come to an end either by revocation or by expiry of the period of detention there must be fresh facts of 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. In the present case, no doubt, the order of detention contains fresh facts. In addition to that the detaining authority has referred to the earlier detention order and the judgement of the High Court quashing it, presumably for the purpose of showing that the detenu in spite of earlier detention order was continuing his bootlegging activities".

7. It is thus seen that detaining authority while arriving at subjective satisfaction has not only taken into consideration the future prospectus of the detenu indulging in similar activities but has also taken into consideration the grounds on which the earlier order of detention dated 19th May, 2017 had been passed. The judgement referred to above lend support to the contention of the learned counsel for the appellant that the detention order without fresh material was not sustainable.

8. The learned Single Judge has not adverted to the aforesaid ground of challenge. We, therefore, are inclined to interfere with the judgement impugned.

9. It may be noted that pursuant to the opinion of the Advisory Board, the detenu was directed to be detained under PSA for the period of six months in the first instance vide Government Order No. Home/PB-V/290 dated 13th March, 2018 which on its expiry w.e.f. 22nd August 2018, was further extended for a

period of six months in terms of Government Order No.Home/PB- V/888 of 2018 dated 20th August 2018, which extended period, shall now, expire on 21st February, 2019.

10. For the foregoing reasons, this Appeal is allowed. Judgement of the Single Bench is set aside. The order of detention impugned in the writ petition 14th February, 2018 is quashed. Consequently, the detenu namely Basharat Ahmad Mir S/o Late Abdul Khaliq Mir R/o Munpappy, Budgam is directed to be released unless he is required in some other case.

In view of above the detention order impugned in this petition, is not according to law. Another ground taken is that petitioner was already in jail in FIR 61/2018 for offences u/s 13/19 Unlawful Activity Act as he was taken in custody on 14.4.2018 and was not bailed out as he never applied for bail in said FIR; petitioner was already in custody at the time of passing of previous detention order was subsequently quashed; so as per counsel for petitioner grounds of detentions should have mentioned that there were compelling reasons to keep the petitioner in preventive detention in case he released on bail. Preventive detention is resorted to, to thwart future action. If the detenu is already in jail charged with some offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made. There is nothing to indicate the awareness of the detaining authority that detenu was already in jail and yet the impugned order is required to be made.

14. In SLJ (11) 2017 page 650, it has been held as under:-

Relevant para- 11.

11/ We shall take up the first point with regard to the ground of satisfaction that has to be recorded by the detaining authority in case the detenu is already in custody in connection with some other case. In this context the need to refer to the decision of the Supreme Court in *Surya Prakash Sharma (supra)*. Paragraphs 5, 6 & 7 are relevant and they are extracted herein below:

"5. The question as to whether and in what circumstances an order for preventive detention can be passed against has had been engaging the attention of this Court since it first came up for consideration before a Constitution Bench in *Ramereshwar Shaw versus District Magistrate, Burdwan*. To eschew prolixity we refrain from detailing all those cases except that of *Dharmendra Suganchand Chelawat versus Union of India*, wherein a three Judge Bench, after considering all the earlier relevant decisions including *Ramereshwar Shaw* answered the question in the following words :

"The decisions referred to above led to the conclusion that an order for detention

can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detainee is already in detention; and

(ii) there were compelling reasons justifying such detention despite the fact that the detainee is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which, it may be satisfied that (a) the detainee is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detainee, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

6. When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be sustained though the grounds of detention indicate the detaining authority's awareness of the fact that the detainee was in judicial custody at the time of making the order of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of the averment made in the grounds of detention that if the aforesaid Surya Prakash Sharma is released on bail "he may again indulge in serious offences causing threat to public order" (emphasis supplied). To put it differently the satisfaction of the detaining authority that the detainee might indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified.

7. On the conclusions as above, we quash the order of detention"

12/ From the above decision, it is evident that for an order of detention to be valid in respect of a person in custody, it is necessary that the grounds of detention must show that: (i) the detaining authority was aware of the fact that the detainee is already in custody; and (ii) there were compelling reasons justifying such detention despite the fact that the detainee is already in detention. The expression "compelling reasons" has also been explained by the Supreme Court as signifying that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detainee is likely to be released from the custody in the near future and (b) taking into account the nature of the antecedent activities it is likely that after his release from custody he would indulge in prejudicial activities and that it was necessary to detain him in order to prevent him from engaging in such activities.

13/ In the present case we find that although there is mention of the fact that the detainee had been arrested in connection with F.I.R No. 100/2016 but, it is not clear as to whether the detaining authority was aware of fact that the detainee continued to be in custody. Furthermore, if we assume that the detaining authority was aware that the detainee was in custody in respect of FIR

No. 100/2016, the compelling reasons, referred to above, have not been indicated in the grounds of detention. In other words, the grounds of detention nowhere make a mention or indicate satisfaction that the detainee was being likely to be released from custody in near future. Therefore, in view of the decision of Supreme Court in Surya Prakash Sharma, this alone vitiate the detention order."

14. Respondents have thus not complied with cardinal principles of law while passing the detention order against petitioner. In view of what has been discussed above, detention order No.109/DMB/PSA/2018 dated 04-12-2018, passed by the Respondent No.2/District Magistrate Baramulla is quashed on these grounds only. Detainee to be set free if not required in any other case.