

(2023) 03 J&K CK 0032

In the Jammu And Kashmir High Court

Case No : Latters Patent Appeal No. 15 Of 2023, Civil Miscellaneous No. 587 Of 2023

Akash Kharka

APPELLANT

Vs

UT Of J&K & Ors

RESPONDENT

Date of Decision : 17-03-2023

Acts Referred:

Constitution Of India, 1950 — Article 21
Jammu And Kashmir Public Safety Act, 1978 — Section 8, 9
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 279, 337
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 21, 22, 27(a), 29, 60
Indian Penal Code, 1860 — Section 34, 294, 323, 342

Citation : (2023) 03 J&K CK 0032

Hon'ble Judges : Tashi Tabstan, J;M.A. Chowdhary, J

Bench : Division Bench

Advocate : Waheed Choudhary, Monika Kohli, Sumeet Bhatia

Final Decision : Disposed Of

Judgement

M A Chowdhary, J

1. District Magistrate Udhampur (hereinafter called 'the Detaining Authority') exercising the powers conferred in him under section 8 of the Public Safety Act 1978 with amendment of 2012 ordered one Akash Kharkha S/O Late Yash Paul, R/O Ward No.6, Ramnagar Tehsil Ramnagar, District Udhampur (hereinafter called 'the appellant') to be detained and lodged in Central Jail, Kot Bhalwal Jammu, to prevent him from acting in any manner pre-judicial to the maintenance of public peace and order, vide Order No. 05 PSA of 2022 dated 31.08.2022 (hereinafter called 'the detention order').

2. Appellant aggrieved of the detention order preferred a criminal writ petition before this Court which came to be decided by the learned Single Judge vide judgment dated 30.12.2022 passed in WP (Crl) No.42/2022 (hereinafter called

'the impugned order'), rejecting the plea of the appellant and upholding the order passed by the Detaining Authority.

3. The impugned judgment has been assailed on the following grounds:

a) That the bare perusal of the judgment impugned makes it amply clear that the same has been passed by the writ court in a casual and mechanical manner without proper appreciation to the peculiar facts and circumstances of the present case. On this ground alone the judgment impugned required to be set aside and writ petition be allowed by this Hon'ble Court.

b) That it was brought to the kind notice of the writ court that the order of detention is based on the dossier forwarded to the respondent No.2 by the respondent No.3 whereby the reference has been made alleged six FIRs, out of which five FIRs were registered at Police Station Ramnagar and one at Police Station Udhampur these are as follows:

S.No.

Case FIR No.

Registered at Police Station for offences under Sections

1.

19/2019

P/S Ramnagar Offences U/ss 279, 337 RPC, 8/21/22 NDPS Act

2.

109/2019

P/S Ramnagar Offences U/ss 279, 337 RPC

3.

54/2020

P/S Ramnagar Offences U/ss 342, 323, 34 RPC

4.

114/2020

P/S Ramnagar Offences U/ss 294 RPC

5.

532/2022

P/S Udhampur Offences U/ss 8/21/22/ 27(a)/29/60 NDPS Act

6

201/2021

The precise status of these FIRs, was not considered by the detaining authority in the right perspective. The respondents had failed to take into the consideration the fact that all these FIRs are stale in nature. Moreover, the petitioner has been bailed out in all these FIRs which matter has again not been taken into consideration while passing the detention order. All these facts are overlooked by the learned writ court and not appreciated in the right manner.

c) that the learned writ court failed to appreciate that the provision for execution of detention order as provided under section 9 of the J&K Public Safety Act has not been complied with the order of detention was never been read over and explained to the appellant in the language that he understands. Thereby the appellant has been deprived from making an effective representation against the order of detention. On this ground alone the judgment impugned deserves to be set aside.

d) That the learned writ court failed to appreciate that the ground of detention are verbatim of the dossier which clearly reflects the non-application of mind of respondent No.2 but the learned writ court did not appreciate the same and rejected the contention of the appellant.

e) That the learned writ court did not appreciate that the translated version of documents has not been provided to the detainee and were never explained in the language which he understands. On this ground alone the judgment impugned deserves to be set aside.

f) That the learned writ court erred in holding that the detainee has not availed the alternate remedy of filing review before the advisory board whereas the fact remains that he has not been provided with the translated version of the incriminating documents relied by the detention authority, once he is not in possession of documents which he can understand, there is no question of filing of any representation before the Advisory Board.

g) That the learned writ court failed to appreciate that the order of detention has been passed in a mechanical manner and did not meet the requirement of Public Safety Act.

h) That the Hon'ble writ court failed to appreciate that mere apprehension of breach of law and order is not sufficient to meet the standard of provision of law to detain the appellant. Mere surmises of the detaining authority especially when there are no reports of unrest since the detainee was released on bail cannot be subverted to restrict and hamper the personal liberty of the accused by way of order of detention passed against him especially when even Daily Diary Report being referred to in the order impugned is more than 8 months prior to the order of detention. The order impugned, therefore, cannot sustain and deserves to be quashed.

i) That the learned writ court further overlooked the fact and did not appreciate

that the order of detention has been passed without application of mind. The subjective satisfaction of the detaining authority simply is based on the dossier and not substantiated on the basis of record. The order is an arbitrary exercise of the power and has been passed without application of mind. Its consequence has been the deprivation of petitioner's fundamental right to life and liberty as guaranteed to him under Article 21 of the Constitution of India. On this ground the judgment deserves to be set aside.

j) That the learned writ court did not appreciate the personal liberty of an individual cannot be permitted to be observed in breach. By virtue of the powers vested with the respondents, the petitioner has been detained. There is no material to show that the detention would act in any manner prejudicial to the maintenance of public peace and order. The provision of Public Safety Act cannot be pressed into aid for the purpose of passing the order of detention without any basis and without any application of mind.

k) That the judgment impugned cannot be justified on the touch stone of any principle of law. Therefore the same is not sustainable and deserves to be set aside.

l) That in the interest of justice the judgment impugned passed by the writ court requires to be set aside and the writ petition filed by appellant replies to be allowed.

4. Learned counsel for the petitioner argued that the Detaining Authority has passed the detention order without application of mind simply after reproduction of the dossier prepared by the Senior Superintendent of Police concerned. He has further argued that the appellant had been shown to be involved in six cases registered, 2 in 2019, in 2020 each and one in 2021 and 2022 each, therefore, the detention order passed in August 2022 cannot be stated to be having a proximate link to the alleged offence committed by the appellant and the Detaining Authority had relied upon the stale incidents to justify the detention order which is not permissible in view of the law laid down by the Apex Court of the Country.

5. He has further that the appellant had not been provided with all the documents relied upon by the Detaining Authority, as such, the appellant had been rendered disabled to prefer a representation as entitled thereto under the provisions of the Constitution to the Detaining Authority or to the Government. He has also argued that the appellant was not literate in English, as such, the documents supplied to him, if any, cannot be comprehended by him so as to prefer an effective representation against the detention order.

6. Learned counsel for the respondents, ex adverso, argued that the appellant was a hardened criminal involved in the commission of many offences regarding which cases have been registered against him right from the year 2019 and the Detaining Authority, after evaluating the relevant record placed before him, had passed the detention order in the public interest for the maintenance of public

peace and order. He further argued that the writ court has rightly decided the petition filed by the appellant by an elaborate judgment addressing all the aspects raised by the appellant, therefore, the same does not call for any interference while exercising the appellate jurisdiction by this Bench.

7. Heard and considered.

8. The learned Single Judge in para 54 of the impugned judgment has held:

".....Thus, I hold that detention order, which has been issued by the detaining authority after arriving at subjective satisfaction, does not suffer from any legal infirmity as the grounds of detention are definite, proximate and free from any ambiguity. Furthermore, the detenu was duly informed of what weighed with the detaining authority while passing the order of detention. The Detaining Authority has recorded its subjective satisfaction after considering all the material available, thus, I hold that none of the constitutional or statutory provision has been violated."

9. The appellant was ordered to be detained by the Detaining Authority based on the record produced by the concerned police, such as, dossier and other connecting documents. In the grounds of detention, it has been recorded that the appellant is a notorious criminal/drug peddler and found to be involved in a number of criminal acts and transportation of drug consignments in District Udhampur, who has created the reign of terror among the peace loving citizens of the area, with a motive not only to create terror among the peaceful and law abiding citizens but also to commit illegal sale/purchase of narcotics/contraband among innocent youth of the area, posing great threat to the public peace and tranquility and that his criminal activities are highly prejudicial to the maintenance of the public order and tranquility. It has also been enumerated that the appellant was involved in five cases registered at Police Station Ramnagar and one at Police Station Udhampur against him.

10. FIR No. 19/2019 registered at Police Station Ramnagar, is regarding commission of offences punishable under sections 279, 337 RPC and 8/21/22 of NDPS Act as one gram heroin had been recovered from his possession on 06.03.2019 near SDPO Office Ramnagar. FIR No. 109/2019 is for the commission of offence punishable under sections 279, 337 RPC registered at Police Station Ramnagar, with the accusation that on 18.10.2019 he had in a rash and negligent manner while driving a Wagon R Car hit a splendor bike causing injuries to the biker Parvin Kumar and his wife Madhu Rani. FIR No. 54/2020 under sections 342, 323, 34 IPC was also registered at Police Station Ramnagar against the appellant with an accusation that on 01.06.2020 he had illegally confined one Sunil Kumar of Ward No. 8, Ramnagar, and assaulted him. FIR No. 114/2020 under section 294 IPC had been registered against the appellant with an accusation that he had to have committed obscene act against a lady at his shop. FIR No. 201/2021 was registered at Police Station Ramnagar under sections 8/21/22 of NDPS Act with an accusation that on 01.12.2021 at Kaugha,

03 grams heroin was recovered from the possession of appellant and one Rakesh Kumar travelling with him in his Wagon R car. FIR No. 532/2022 under sections 8/21/22/27(a)/29/60 of NDPS Act registered at Police Station Udampur, is with regard to allegation that on 07.10.2020, some contraband (Chita) was recovered from him and his companion Ravi Kumar when his Car Wagon R was subjected to checking at Domail Chowk.

11. In the aforesaid cases, the appellant was stated to have been facing trial but admitted to bail. The Detaining Authority has not recorded as to whether the appellant had been admitted to bail or not in the cases registered against him which shows that the Detaining Authority had not been updated with regard to the cases wherein the appellant was facing trial with regard to his bail. In all cases of detention, which are based on the criminal cases registered against the detainee, it is incumbent upon the Detaining Authority to record in the grounds of detention as to whether ordinary criminal law had not prevented such person, so as to draw satisfaction to order preventive detention. The appellant has been detained vide impugned order passed on 31.08.2022 based on the cases registered in the years 2019, 2020 and 2021. The last case stated to have been registered against the appellant was December 2021. The order detaining the appellant in the month of August 2022, after lapse of eight months, in our opinion cannot be justified having been ordered on stale incident without having proximate link of the alleged incident, with the detention order.

12. We are fortified to take the aforestated view, in view of the law laid down in P.U Iqbal Vs. Union of India & Ors. reported as (1992) 1 SCC 434, by the Hon'ble Supreme Court which held as under:-

"14. Now, there can be no doubt-and the law on this point must be regarded as well settled by these two decisions-that if there is unreasonable delay between the date of the order of detention and the date of arrest of the detainee, such delay, unless satisfactorily explained, would throw considerable doubt on the genuineness of the subjective satisfaction of the District Magistrate and it would be a legitimate inference to draw that the District Magistrate was not really and genuinely satisfied as regards the necessity for detaining the petitioner.

15. Chinnappa Reddy, J. speaking for the Bench in Bhawarlal Ganeshmalji v. State of Tamil Nadu has explained as follow:

It is further true that there must be a 'live and proximate link' between the grounds of detention alleged by the detaining authority and the avowed purpose of detention namely the prevention of smuggling activities. We may in appropriate cases assume that the link is 'snapped' if there is a long and unexplained delay between the date of the order of detention and the arrest of the detenu. In such a case, we may strike down an order of detention unless the grounds indicate a fresh application of the mind of the detaining authority to the new situation and the changed circumstances. But where the delay is not only adequately explained but is found to be the result of the recalcitrant or refractory

conduct of the detenu in evading arrest, there is warrant to consider the 'link' not snapped but strengthened.

18. It is manifestly clear from a conspectus of the above decisions of this Court, that the law promulgated on this aspect is that if there is unreasonable delay between the date of the order of detention and the date of arrest of the detenu, such delay unless satisfactorily explained throws a considerable doubt on the genuineness of the requisite subjective satisfaction of the detaining authority in passing the detention order and consequently render the detention order bad and invalid because the 'live and proximate link' between the grounds of the detention and the purpose of detention is snapped in arresting the detenu. A question whether the delay is unreasonable and stands unexplained depends on the facts and circumstances of each case."

13. On perusal of the record produced by the respondents, it appears that the appellant had been furnished 83 leaves of the documents including detention order, notice of detention, grounds of detention, dossier of detention and copies of FIR, statements of witnesses and other relating documents on 2nd September 2022 by SI Daljit Singh of Police Station Ramnagar. The detention case was referred to the Advisory Board and vide report dated 21st September 2022, it was recorded that there is sufficient cause for detention of the detenu under section 8 of the Act and based on this report of the Advisory Board, the Government of J&K had approved the detention order passed by the Detaining Authority vide Government Order No. Home/PB/V/2142 of 2022 dated 8th September, 2022.

14. The cases which have been made basis for passing the detention order by the Detaining Authority are three with regard to the NDPS Act and three with regard to ordinary offences which were not of any serious nature. The consignment of the narcotics alleged to have been recovered from the possession of the appellant or his accomplice were not that of commercial in nature and that may have been the reason that he was released on being admitted to bail by the Special Court under NDPS Act. There is no record available on the file which could persuade the Detaining Authority to draw its subjective satisfaction that either the appellant was involved in the illicit trade as a kingpin or active member of a nexus or syndicate, or to have committed very serious and heinous offences, so as to hold that he was threat to public order. In absence of any such satisfaction, the preventive detention of a person in our opinion is not justifiable.

15. A similar view has been taken by the Hon'ble Supreme Court in Rushikesh Tanaji Bhoite Vs. State of Maharashtra & Ors. reported as (2012) 2 SCC 72, wherein the Apex Court has observed that :-

"9. In a case where detenu is released on bail and is enjoying his freedom under the order of the court at the time of passing the order of detention, then such order of bail, in our opinion, must be placed before the detaining authority to enable him to reach at the proper satisfaction.

10. In the present case, since the order of bail dated August 15, 2010 was neither placed before the detaining authority at the time of passing the order of detention nor the detaining authority was aware of the order of bail, in our view, the detention order is rendered invalid. We cannot attempt to assess in what manner and to what extent consideration of the order granting bail to the detainee would have effected the satisfaction of the detaining authority but suffice it to say that non-placing and non-consideration of the material as vital as the bail order has vitiated the subjective decision of the detaining authority."

16. In another case titled *Vijay Narain Singh Vs. State of Bihar & Ors.* reported as (1984) 3 SCC 14, Hon'ble Apex Court has held that:-

"When a person is enlarged on bail by a competent criminal court, great caution should be exercised in scrutinising the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal court."

17. Right to personal liberty of an individual is zealously protected by the Constitution of India and can only be compromised in accordance with law and for preventive detention there must be sufficient material to draw satisfaction by the Detaining Authority, that in case the said person is not detained under preventive detention, he may be a threat either to the security of the State or to the public order. The public order, however, cannot be mistaken as law and order since both the terms apparently seem to be interchangeable but 'Public Order' is definitely something beyond the 'law and order' which, may cause unrest in the society at large and not merely be a local law and order problem which can be tackled by invoking the provisions of ordinary law.

18. It appears that the sponsoring authority i.e police and the Detaining Authority, had been persuaded to ask for and order detention under Public Safety Act of the appellant, due to his alleged involvement in the commission of offences under NDPS Act. The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (PIT NDPS Act) can be resorted to for detention of any such person so as to prevent drug trafficking. The sponsoring authority instead of resorting to this remedy has chosen to seek detention under PSA.

19. On a keen consideration of whole gamut of the facts and circumstances of the case, it is observed and held that the detention order passed by the Detaining Authority was not in consonance with law, firstly, for the reason that the Detaining Authority had not considered all the aspects of the material placed before it, before drawing subjective satisfaction and secondly, that the cases registered against the appellant relied upon to invoke the preventive detention were of such a nature being stale and without having any proximate link with the detention order, after a lapse of eight months. The detention order was, thus, not liable to be upheld. The learned Single Bench appears not to have considered the aforesaid aspects of the case.

20. For the foregoing reasons and the observations made hereinabove, the appeal is allowed and the impugned judgment dated 30.12.2022 passed in WP (CrI) No.42/2022 is set aside. As a consequences, the writ petition filed by the appellant is allowed and the order of detention bearing No. 05 PSA of 2022 dated 31.08.2022 passed by the District Magistrate Udhampur, is hereby, quashed with a direction to release the appellant-Akash Kharkha S/O Late Yash Paul, R/O Ward No.6, Ramnagar Tehsil Ramnagar, District Udhampur forthwith in case he is not required in any other case.

21. The appeal is, thus, disposed of.

22. Detention Record of the case be returned back.