

(2020) 06 J&K CK 0044
In the Jammu And Kashmir High Court
Case No : Writ Petition (C) No. 53 Of 2020

Ali Mohammad Charloo @ Sagar

APPELLANT

Vs

Union Territory Of J&K And Others

RESPONDENT

Date of Decision : 16-06-2020

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8, 8(4), 13
Code Of Criminal Procedure, 1973 — Section 107, 151
Constitution Of India, 1950 — 22(5), 35(A), 370

Citation : (2020) 06 J&K CK 0044

Hon'ble Judges : Sindhu Sharma, J

Bench : Single Bench

Advocate : Shuja Ul Haq, B. A Dar

Final Decision : Allowed

Judgement

Sindhu Sharma, J

1. This petition has been filed by the detenu through his son challenging his detention vide order No. DMS/PSA/145/2020 dated 05.02.2020 passed by the District Magistrate, Srinagar in exercise of his powers under section 8 of Jammu & Kashmir Public Safety Act.

2. Briefly stated the facts as narrated in the petition are that; the detenu is a member of National Conference Party, a regional political party of the erstwhile State of Jammu and Kashmir. The detenu being an active Member of the party has represented his party in elections held in 1996, 2002, 2008 and 2014 and has also secured the mandate of people. He also held various portfolios as Minister of Home Department, Department of Law, Justice and Parliamentary Affairs and R&B Department.

3. Article 370 of the Constitution of India came to be abrogated on 5th/6th of August, 2019 and apprehending opposition by the petitioner in this regard, he was arrested on 6th of August, 2019 under sections 107 and 151 Cr.P.C. The

order of detention was, however, passed on 05.02.2020 by the detaining authority with a view to prevent him from acting in any manner prejudicial to the maintenance of public order.

4. This detention order has been assailed by the detenu on the following grounds:-

i) That the order of detention is unconstitutional, illegal and bad in law as the detenu was already in custody u/s 107/151 Cr.P.C when the detention order was passed and the detaining authority has neither shown any awareness of the fact nor shown any compelling reasons for passing the order of detention.

ii) There is no subjective satisfaction recorded which is sine qua non for passing the order of detention.

iii) The detaining authority has not assigned any compelling and cogent reason which necessitate for passing the order of detention.

iv) The detenu was not supplied all the material on which the detaining authority has derived its satisfaction.

v) The order of detention is based on verbatim reproduces of the police dossier, and there is no application of mind by the detaining authority.

vi) The grounds of detention were neither referred to the advisory board nor approved by it.

vii) The detention order is based on mere apprehension and grounds of detention are vague, irrelevant and non-existent, which do not disclose any activity prejudice to maintenance of public order or any eminent threat to public order. There is no proximate link with the grounds of detention and threat to public order.

viii) The order of detention has neither been approved by the government within statutory period nor the detenu was heard by the Advisory Board.

5. Mr. Shuja-ul-Haq, learned counsel for the petitioner submits that the petitioner is an active member of National Conference Party, who has always worked within the framework of Constitution of India. It is also the role of opposition to criticize policies of the Government to see that the same are within the framework of Constitution of India for the welfare of the citizens. He, however, submits that the detenu has never been involved in any activity against the maintenance of law and public order. He while reiterating the grounds of detention submitted that the detention order is liable to be quashed because the detaining authority has not shown its awareness to the fact that the detenu was already in custody, and it has not assigned any compelling and cogent reasons for passing the order of detention. Reliance has been placed on judgments in *Thahira Haris & ors. vs. Govt. of Karnataka & ors.*, (2009) 11 SCC 438; *Jai Singh & ors. vs. State of J&K and ors.*, AIR 1985 SC 764' and *Mohd. Yousuf Rather vs. State of Jammu and Kashmir & others*, AIR 1979 SC 1925.

6. Mr. B. A Dar, learned Senior Additional Advocate General appearing for the respondents submitted that the detaining authority has passed the order of detention after carefully examining the record and recorded its satisfaction. It was found necessary to detain the detenu to prevent him from acting in a manner prejudicial to the maintenance of public order and all statutory and constitutional guarantees, have been complied and the grounds of detention were provided to the detenu within the statutory period prescribed under section 13 of the Act. In compliance to District Magistrate's detention order, the warrants were executed by the Executive Officer, Dy. SP (P), Station House Officer, Police Station Khanyar.

7. Mr. Dar further argued that the grounds of detention were explained to the detenu and the execution report is also placed on record. The Government in exercise of its powers under sub section (4) of Section 8 of J&K Public Safety Act, 1978, approved the aforesaid detention order and on the basis of the opinion of the State Advisory Board, has confirmed the detention of the detenu. The detenu, however, despite having received the grounds of detention did not made any representation. In support of his case, he has relied on judgment of the Supreme Court in Haradhan Saha vs. State of W.B., (1975) 3 SCC 198 and also on Mian Abdul Qayoom vs Union Territory of J&K & ors., LPA No. 28/2020 decided on 28.05.2020.

8. Heard learned counsel for the parties and perused the record.

9. The order of detention in this case has been passed on the apprehension referred in the grounds of detention in Para Nos. 3 to 7, which are reproduced as under :-

"Whereas, you are a known political figure in Srinagar City and enjoys good popularity in Khanyar Constituency which is part of down town area of Srinagar city, besides you are having a good liaison with respectable and youth of the area. Recently in July-2019 you have addressed your party workers at your residence situated at Airport Road Humhama stating there that if Article 370 & 35 (A) are abrogated you will unite and raise voice against Union of India as has already been decided by National Conference, besides informed your party workers about various decision taken by National Conference if Article 370 & 35 (A) will be abrogated by Government of India.

Whereas, reportedly you impressed upon his party workers who attended meeting at your residence that youth of Khanyar Constituency be informed regarding the meeting and tell them to be ready for mass agitation if Article 370 is revoked. Presently you are General Secretary of National Conference and are very vocal against abolishing of Article 370 and 35 (A) of Constitution of India and also against bifurcation of erstwhile J&K State. You have led many protest marches in this behalf and created problems in public order within District Srinagar, besides instigated general youth in general, party workers and youth belonging to your constituency in particular. Your capacity can be gauged from

this fact that you were able to convince your electorates to come out and vote in huge numbers even during peak militancy and poll boycotts.

Whereas, you took out a protest rally alongwith about 250 party workers towards Lalchowk in view of Court hearing of Article 35 (A) and while addressing at Khansahib Budgam you criticized government for alleged anti people policies including abrogation of Article 370 & 35(A) of Indian Constitution. While addressing a party workers meeting you again criticized Government for alleged anti people policies and attempt to Abrogation Article 370 & 35 (A) of India Constitution.

Whereas, you have been very vocal against abolishing of Article 370 and 35(A) of Constitution of India and also against bifurcation of erstwhile J&K State. You have posted may provoking and instigating comments/ideas on social networking sites, so as to instigate common people against the decision of Union of India.

Whereas, your activities are highly prejudicial to the maintenance of Public order and have a significant effect and influence upon the ideology of common people. Your capacity of influencing people for any cause could be gauged from this fact that you were able to convince your electorate to come out and vote in huge numbers even during peak militancy and poll boycotts. Your activities are aiming to raise a voice against union of India by way of encouraging mass agitation, thus, it would be safely said that by way of your influence in Beerwah/Sonawar constituency you can get large numbers to protest against decision taken by Government of India."

10. However, whether the activities referred above would be sufficient for his detention has to be considered when compared to grounds of detention in case titled Mohd. Yousuf Rather vs. State of Jammu and Kashmir and others, AIR 1979 SC 1925. These grounds are extracted below:-

'You are a die-hard Naxalite and you are notorious for your activities which are proving prejudicial to the maintenance of public order. You are in the habit of organising meetings, secret as well as public, in which you instigate the people to create lawlessness which spreads panic in the minds of a common people. You are also reported to be in the habit of going from one village to the other, with intent to compel the shopkeepers to close down their shops and participate in the meetings. You are reported to have recently started a campaign in villages, asking the inhabitants not to sell their extra paddy crop to the Government and in case they are compelled to do so, they should manhandle the Government officials deputed for the purpose of purchasing shali on voluntary basis from the villagers.

On 9-2-79 you, after compelling the shopkeepers to close down their shops, organised a meeting at Chowalgam and asked the participants to lodge protests against the treatment meted out to Shri Z. A. Bhutto, late Prime Minister of Pakistan by General Zia-UI-Haq, in fact, you did not have any sympathy for the late Prime Minister, but you did it with the intent to exploit the situation and

create lawlessness'."

11. Even though the detenu in above case before the Supreme Court was a die-hard Naxalite and as compared to the grounds of detention in the present case, which in a democracy are the normal activities of a politician, who admittedly is an active member of National Conference party since 1977 and has been legislature as well as the Member of Cabinet in the erstwhile State of Jammu & Kashmir. His opposition to the abrogation of Articles-370 & 35(A) of the Constitution of India is not sometime new, but the question is whether such apprehension could be a ground for his detention in the present case while considering the grounds of detention with the case of Mohd. Yousuf Rather. In my opinion, the grounds of detention of the detenu are so fragile in the present case that they do not justify his detention in view of the law laid down by the Supreme Court in case of Mohd Yousuf Rather (supra), holding that:

"We are primarily concerned in this case with Article 22(5) which is as follows:

".....The extent and the content of Article 22(5) have been the subject matter of repeated pronouncements by this Court (Vide, State of Bombay v. Atmaram, Dr. Ramkrishna Bharadwaj v. State of Delhi, Shibbanlal Saxena v. State of Uttar Pradesh, Dwarkadas Bhatia v. State of Jammu & Kashmir. The interpretation of Article 22(5), consistently adopted by this Court, is, perhaps, one of the outstanding contributions of the Court in the cause of Human Rights. The law is now well settled that a detenu has two rights under Article 22(5) of the Constitution: (1) To be informed, as soon as may be, of the grounds on which the order of detention is based, that is, the grounds which led to the subjective satisfaction of the detaining authority and (2) to be afforded the earliest opportunity of making a representation against the order of detention, that is, to be furnished with sufficient particulars to enable him to make a representation which on being considered may obtain relief to him. The inclusion of an irrelevant or non-existent ground among other relevant grounds is an infringement of the first of the rights and the inclusion of an obscure or vague ground among other clear and definite grounds is an infringement of the second of the rights. In either case there is an invasion of the Constitutional rights of the detenu entitling him to approach the Court for relief. The reason for saying that the inclusion of even a single irrelevant or obscure ground among several relevant and clear grounds is an invasion of the detenu's constitutional right is that the Court is precluded from adjudicating upon the sufficiency of the grounds and it cannot substitute its objective decision for the subjective satisfaction of the detaining authority."

12. Finally, in Para-20 of the aforesaid judgment, it was held that the allegations are irrelevant and vague. Paras-20 & 24 are reproduced as follows:-

"20. The distinction made in Naresh Chandra Ganguly's (supra) case between the 'preamble', meaning thereby the recital in terms of the statutory provision and the 'grounds' meaning thereby the conclusions of fact which led to the passing of

the order of detention does not justify any distinction being made between introductory facts, background facts, and 'grounds' as such. All allegations of fact which have led to the passing of the order of detention are 'grounds of detention'. If such allegations are irrelevant or vague the detenu is entitled to be released.

24. In paragraph five it is said that the detenu instigated educated unemployed youth to go on a hunger strike. A hunger strike, in our country, is a well known form of peaceful protest but it is difficult to connect it with public disorder. We consider this ground also to be vague and irrelevant. The allegation that the detenu made derogatory remarks about Shri Sheikh Mohammed Abdullah, Chief Minister of Kashmir, and compared him with General Zia of Pakistan appears to us, again, to be entirely irrelevant. I do not think it is necessary to refer to all the grounds in any further detail as that has been done by my brother Shinghal, J."

13. The detention is also bad because he has been arrested under Sections 107/151 Cr.P.C. and was still in custody when the detention order was passed. However, there is nothing on record to show that the detaining authority was aware of the fact or that the detenu was likely to be released. Detaining Authority, in such a case, must show that there are compelling reasons for detention, in the absence of which, his detention would be illegal as held by the Supreme Court in *Vijay Kumar vs. Union of India & ors.* AIR 1988 SC 934 which reads as under :-

"(i) awareness of the detaining authority of the fact that the detenu is already in detention and

(ii) there must be compelling reasons justifying such detention, despite the fact that the detenu is already under detention."

14. Moreover, there is nothing in the grounds of detention as to when and on which date he took out a protest rally with 250 party workers towards Lal Chowk after the so-called hearing, Article 35 (A) before whom as also the date on which he addressed gathering at Khansahib Budgam where he allegedly criticized the Government. Every such activity should have nexus with the alleged abrogation of Articles which took place on 5th & 6th of August, 2019 but no such nexus has been alleged in the grounds of detention.

15. The detention order of detenu is illegal because the Detaining Authority has not shown its awareness to the fact that the detenu was already in custody in view of the law laid down in *N. Meera Rani Vs. Government of Tamil Nadu*, AIR 1989 SC 2027, which states as under:-

"We may summarise and reiterate the settled principle. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case; preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc. ordinarily it is

not needed when the detenu is already in custody; the detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order; but, even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities the detention order can be validly made even in anticipation to operate on his release. This appears to us, to be the correct legal position.

In this case this Court has pointed out that there was no indication in the detention order read with its annexure that the detaining authority considered it likely that the detenu could be released on bail and that the contents of the order showed the satisfaction of the detaining authority that there was ample material to prove the detenu's complicity in the Bank dacoity including sharing of the booty in spite of absence of his name in the FIR as one of the dacoits. The Court held that the order for detention was invalid since it was made when the detenu was already in jail custody for the offence of bank dacoity with no prospect of his release."

16. The judgments relied upon by the learned Sr. AAG have no relevance to the facts of this case.

17. In view of the above discussion, there is no need to advert to the other grounds taken in the petition.

18. For the aforesaid reasons, this petition is allowed and the impugned detention order No. DMS/PSA/145/2020 dated 05.02.2020 passed by the District Magistrate, Srinagar is hereby quashed. Respondents shall set the detenu at liberty forthwith, provided he is not required in any other case.

19. Let the detention record be returned back to the learned counsel for the respondents against proper receipt.