
(2022) 04 J&K CK 0015

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 87 Of 2021

Arif Ahmad Malla

APPELLANT

Vs

UT Of J&K And Anr

RESPONDENT

Date of Decision : 06-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 22(5)
Indian Penal Code, 1860 — Section 147, 148, 149, 307, 332, 336
Code Of Criminal Procedure, 1973 — Section 161, 164

Citation : (2022) 04 J&K CK 0015

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Wajid Haseeb, Sajad Ashraf

Final Decision : Allowed

Judgement

Sanjay Dhar, J

1) Challenge in this petition is to the order No.DMS/PSA/25/2021 dated 24.06.2021, issued by District Magistrate, Srinagar- respondent No.2 herein, in terms whereof, Arif Ahmad Malla S/o Ali Mohammad Malla R/o Channa Mohalla, Habbak Shanpora, Srinagar (hereinafter referred to as the detainee), has been placed under preventive custody and lodged in Central Jail, Srinagar.

2) Petitioner has contended that the Detaining Authority has passed the impugned detention order mechanically without application of mind. It has been further contended that the Constitutional and Statutory procedural safeguards have not been complied with in the instant case. It has also been urged that the allegations made against the detainee in the grounds of detention are vague and that the material forming the basis of the impugned order of detention and translated version thereof has not been provided to the detainee who is an illiterate person. Petitioner has further contended that the detaining authority has not spelt out the compelling reasons while passing the impugned order.

3) The respondents, in their counter affidavit, have disputed the averments made in the petition and stated that they have followed the provisions of J&K Public Safety Act. It is contended that the detinue has been detained only after following due procedure; that the grounds of detention were read over to the detinue; that there has been proper application of mind on the part of the Detaining Authority while passing the impugned order and that the detinue has been provided all the material. The learned counsel for the respondents also produced the detention records to lend support to the stand taken in the counter affidavit.

4) Considered the rival submissions and also perused the material available on the file as also the detention records as produced by the learned counsel for the respondents.

5) Learned counsel for the petitioner highlighted various grounds while seeking quashment of impugned order but the main grounds that have been argued during the course of arguments are that the detinue was not furnished whole of the material to enable him to make an effective representation against his detention and that the detinue was already implicated in case FIR No.99/2019 for offences under Section 147, 336, 332 IPC and FIR No.03/2002 for offences under Section 147, 148, 149, 336, 323, 307 IPC and there were no compelling reasons for the Detaining Authority to make the impugned detention order and that the Detaining Authority has not spelt out the compelling reasons for detaining the detinue under preventive laws.

6) So far as the first ground of challenge is concerned, a perusal of the detention record produced by learned counsel for the respondents reveals that the material is stated to have been received by the petitioner on 26.06.2021. Report of the Executing Officer in this regard forms part of the detention record, a perusal thereof reveals that it bears the thumb impression of petitioner and according to it, copies of warrant, notice, grounds of detention and FIRs, in total 05 leaves, have been supplied to him.

7) It is clear from the execution report, which forms part of the detention record, that copies of detention order and the dossier have not at all been supplied to the detinue. Apart from this, if we have a look at the grounds of detention, it bears reference to two FIRs Viz. FIR No.99/2019 and FIR No.03/2002. It was incumbent upon respondents to furnish not only the copies of these FIRs but also the statements of witnesses recorded under Section 161/164 of Cr. P. C during investigation of these FIRs as well as the other material on the basis of which petitioner's involvement in these FIRs is show, particularly when the petitioner is not nominated in these FIRs. Thus, contention of the petitioner that whole of the material relied upon by the detaining authority, while framing the grounds of detention has not been supplied to him, appears to be well-founded. Obviously, the petitioner has been hampered by non-supply of these vital documents in making a representation before the Advisory Board, as a result whereof his case has been considered by the Advisory Board in the absence of his representation,

as is clear from the detention record. Thus, vital safeguards against arbitrary use of law of preventive detention have been observed in breach by the respondents in this case rendering the impugned order of detention unsustainable in law.

8) It needs no emphasis that the detainee cannot be expected to make an effective and purposeful representation which is his constitutional and statutory right guaranteed under Article 22(5) of the Constitution of India, unless and until the material on which detention is based, is supplied to the detainee. The failure on the part of detaining authority to supply the material renders detention order illegal and unsustainable. While holding so, I am fortified by the judgments rendered in *Dhananjay Dass v. District Magistrate*, (AIR 1982 SC 1315), *Sophia Ghulam Mohd. Bham V. State of Maharashtra and others* (AIR 1999 SC 3051) and, *Thahira Haris Etc. Etc. V. Government of Karnataka & Ors.* (AIR 2009 SC 2184).

9) The other ground projected by the learned counsel for the petitioner is that the detainee was already implicated in FIR No.99/2019 and FIR No.03/2002, and there were no compelling reasons for the Detaining Authority to make the impugned detention order and that the Detaining Authority has not spelt out the compelling reasons for detaining the detainee under preventive detention.

10) It is trite that the preventive detention orders can be passed even when a person is in police custody or involved in a criminal case but for doing so, compelling reasons are to be recorded. The Detaining Authority is bound to record the compelling reasons as to why the detainee could not be deterred from indulging in subversive activities by resorting to normal law and in the absence of these reasons, the order of detention becomes unsustainable in law. I am supported in my aforesaid view by the judgment of the Supreme Court in the case of *Surya Prakash Sharma v. State of U. P. and others*, 1994 SCC (Cri) 1691.

11) It is also settled position of law that a person involved in a criminal case can be detained under the provisions of preventive detention laws provided there are compelling circumstances for doing so otherwise the order of detention becomes unsustainable. In this connection, it is quite apt to quote following observations of the of Supreme Court in *T. P. Moideen Koya vs. Government of Kerala and ors.*” reported in 2004 (8) SCC 106:

“.....in law there is no bar in passing a detention order even against a person who is already in custody in respect of a criminal offence if the detaining authority is subjectively satisfied that detention order should be passed and that there must be cogent material before the authority passing the detention order for inferring that the detainee was likely to be released on bail”

12) Adverting to the facts of the instant case, the detention record shows that the petitioner was implicated in FIR No.99/2019 and FIR No.03/2002. The detaining authority has not, in the grounds of detention spelled out any reason, much less compelling reasons for resorting to preventive detention, when the petitioner was already booked in two FIRs. Details of specific incidents as regards

the activities of the detainee are not recorded in the grounds of detention. Thus, the detaining authority has not spelled out the compelling reasons for resorting to preventive detention in the case of the petitioner.

13) For the afore-stated reasons, the petition is allowed and the impugned order of is quashed. The detainee is directed to be released from the preventive custody forthwith provided he is not required in connection with any other case.

14) The record, as produced, be returned to the learned counsel for the respondents.