

(2023) 10 J&K CK 0024

In the Jammu And Kashmir High Court

Case No : Others Writ Petition No. 884 Of 2017

Attaullah Malik

APPELLANT

Vs

State Of J&K And Others

RESPONDENT

Date of Decision : 12-10-2023

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 12

Citation : (2023) 10 J&K CK 0024

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Salih Pirzada, Faheem Nisar, Mohsin S. Qadiri

Final Decision : Allowed

Judgement

Sanjay Dhar, J

1) The petitioner has challenged detention order No.24/DMA/PSA/ DET/2018 dated 17.08.2016 at its pre-execution stage.

2) It is contended that the respondents are likely to execute the impugned detention order at this belated stage when the petitioner has never concealed himself and was always available in the locality. It is averred that no warrant or any intimation was received regarding the passing of detention order, nor any action has been taken towards execution of the impugned order before perception of threat under the orders of respondent No.3. It is further averred that the impugned detention order has been passed on 17.08.2016 and thereafter the petitioner was committed to custody from 9th December, 2016 to 24th December, 2016 in substantive offence and since the impugned detention order was not executed upon arrest of the petitioner, as such, the same cannot be executed at this belated stage after a delay of more than ten months, which delay is inexplicable and respondent No.3 has no justification to proceed with the execution of the detention warrant. It is averred that the execution of detention warrant is an afterthought in order to prevent the petitioner from defending the

criminal case and in case the respondents succeed in executing the detention warrant, it will cause a prejudice to the petitioner in defending the trial and other criminal cases foisted upon him. It has been further contended that the impugned order has lost the proximity with the object of detention sought under the Act and is only punitive in nature just to deprive the petitioner of opportunity to defend the trial. It is further averred that the petitioner has not been declared as an absconder or a proclaimed offender nor any action has been taken under Section 12 of the Act for attachment of property in furtherance of assumed abscondence which indicates that there were no compelling circumstances to keep the petitioner out of circulation under the detention order for any reprehensive activity. It has been further contended that the grounds of detention are vague and passed on the dictates of the police agency without independent application of mind on the part of the detaining authority.

3) The respondents have contested the writ petition by filing a reply thereto. In the reply, it is submitted that the petitioner has raised disputed questions of fact which cannot be adjudicated upon in writ proceedings. It is averred that none of the fundamental, statutory and legal rights of the petitioner have been infringed. It has been further averred that during the unrest of 2016, the petitioner in association with other miscreants incited, abetted and provoked the youth of District Anantnag to come on roads, raise antinational, anti-government slogans besides using all his tactics to create disturbance and law and order problem by resorting to stone pelting on police/security forces, police establishments and public/private property, for which various criminal cases were registered against him. It is contended that the detention order under Public Safety Act is preventive in nature so as to prevent the petitioner from indulging in activities prejudicial to the maintenance of public order. It has been further contended that there is every apprehension that the petitioner may again indulge in the activities prejudicial to public order and safety of general public and in order to avoid such activities, it is necessary to take preventive measures to prevent the petitioner from indulging in such activities. It has been further averred that the warrant of arrest remains in force till it is executed or cancelled by the issuing authority and that the petitioner was evading his arrest due to which time elapsed in execution of the said warrant. It is contended that there is no malicious, personal or derogatory object of execution of PSA warrant against the petitioner

4) I have heard learned counsel for the parties and perused the pleadings and the documents placed on record.

5) The main ground urged by the petitioner in assailing the impugned order of detention is that the respondents have not taken any steps in execution of the warrant of detention upon him nor have they taken any steps for getting the petitioner declared as an absconder and, as such, the delay in execution of the warrant throws a considerable doubt upon the genuineness of the subjective satisfaction of the detaining authority which in turn renders the impugned order of detention unsustainable in law. It has been further contended that the grounds

of detention are vague and that the order impugned has lost proximity with the object of detention sought to be achieved under the Act.

6) So far as the legal position as regards the judicial review of a detention order prior to its execution is concerned, the same has been discussed by the Supreme Court in the case of *Additional Secretary to Govt. of India & Ors. vs. Smt. Alka Subash Gada & anr.* 1992 Suppl (1) SCC 496. In the said case, the Supreme Court has observed that the scope of judicial review of a detention order prior to its execution is very limited. The Court has enumerated following grounds on which the Courts can exercise their power of judicial review in such cases:

(i) That the impugned order is not passed under the Act under which it is purported to have been passed;

(ii) That it is sought to be executed against a wrong person;

(iii) That it is passed for a wrong purpose;

(iv) That it is passed on vague, extraneous and irrelevant grounds; or

(v) that the authority which passed it had no authority to do so;

7) In *Deepak Bajaj vs. State of Maharashtra and anr.* AIR 2009 SC 628, the grounds/principles laid down by the Supreme Court in *Alka Subas Gadia's* case for entertaining judicial review of a detention order, were held only to be illustrative and not exhaustive.

8) The parameters on which the detention order can be challenged at the pre-execution stage have been clarified by the Supreme Court in *Subhash Poptlal Dave v. Union of India and Another* (2014) 1 SCC 280. Paragraphs 15 and 49 are relevant to the context and the same are reproduced as under:

"15. From the ratio of the aforesaid authoritative pronouncements of the Supreme Court which also include a Constitution Bench judgment [*Sunil Fulchand Shah v. Union of India*, (2000) 3 SCC 409 : 2000 SCC (Cri) 659] having a bearing and impact on the instant matters, the question which emerges is that if the order of detention is allowed to be challenged on any ground by not keeping it confined to the five conditions enumerated in *Alka Subhash Gadia [Govt. of India v. Alka Subhash Gadia, 1992 Suppl (1) SCC 496 : 1992 SCC (Cri) 301]* except the fact that there had been sufficient materials and justification for passing the order of detention which could not be gone into for want of its execution, then whether it is open for the proposed detenu to contend that there is no live link between the order of detention and the purpose for which it had been issued at the relevant time. In the light of ratio of the decisions referred to hereinabove and the law on preventive detention, it is essentially the sufficiency of materials relied upon for passing the order of detention which ought to weigh as to whether the order of detention was fit to be quashed and set aside and merely the length of time and liberty to challenge the same at the pre-execution stage which obviated the execution of the order of preventive detention cannot

be the sole consideration for holding that the same is fit to be quashed. When a proposed detenu is allowed to challenge the order of detention at the pre-execution stage on any ground whatsoever contending that the order of detention was legally unsustainable, the Court will have an occasion to examine all grounds except sufficiency of the material relied upon by the detaining authorities in passing the order of detention which legally is the most important aspect of the matter but cannot be gone into by the Court as it has been allowed to be challenged at the pre-execution stage when the grounds of detention have not even been served on him.

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49. The question whether the five circumstances specified in Alka Subhash Gadia case [Govt. of India v. Alka Subhash Gadia, 1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] are exhaustive of the grounds on which a pre-execution scrutiny of the legality of preventive detention order can be undertaken was considered by us earlier in the instant case. We held that the grounds are not exhaustive. [Subhash Popatlal Dave v. Union of India, (2012) 7 SCC 533 : (2012) 3 SCC (Cri) 415] But that does not persuade me to hold that such a scrutiny ought to be undertaken with reference to the cases of those who evaded the process of law."

9) From the foregoing analysis of law on the subject, it is clear that the order of detention, at pre-execution stage, can be challenged on any ground, except on the ground of sufficiency of material relied upon by the detaining authority in passing the order of detention as the said ground cannot be gone into by the Court at the pre-execution stage when the grounds of detention have not been served upon the petitioner. This means that detention order at pre-execution stage can also be challenged on the ground that the detaining authority has not taken any steps for executing the detention order for a considerable period of time and said approach of the executing authorities throws a doubt about the genuineness about the subjective satisfaction of the detaining authority.

10) Adverting to the facts of the case, it has been contended by the petitioner that though the impugned order of detention was passed by the detaining authority on 17.08.2016, yet the same has not been executed upon the petitioner even after the date of filing of the writ petition i.e upto 28th of June, 2017, whereafter its execution was stayed by this Court in terms of order dated 30.06.2017. As against this, the respondents have submitted in their reply that the petitioner was evading his arrest due to which time elapsed in execution of the execution warrant.

11) If we have a look at the documents produced by the petitioner, it appears that he was arrested on 19.12.2016 in FIR No.120 of 2016 of Police Station, Kokernag, whereafter he was released on bail in terms of order dated 24.12.2016 passed by the Chief Judicial Magistrate, Anantnag, meaning thereby that the petitioner was in custody from 19.12.2016 to 24.12.2016. The impugned detention order was passed on

17.08.2016. Thus, the contention of the respondents that the petitioner was evading arrest, cannot be accepted because at least from 19.12.2016 to 24.12.2016 the petitioner was in custody of the Police and if the respondents would have been really serious in executing the warrant of detention against him, they could have easily done so while he was in their custody. The respondents have not placed on record anything to show that they have made any effort to execute the warrant of detention upon the petitioner. In fact, no record has been produced by the respondents to support their contention that the petitioner was evading the arrest. Thus, it can safely be stated that respondents have shown slackness and remissness in executing the warrant of detention upon the petitioner. This throws considerable doubt about the subjective satisfaction of the detaining authority, thereby rendering the impugned order of detention unsustainable in law.

12) The Supreme Court in the case of Mohd. Farook v. Joint Secretary to Govt. of India, (2000) 2 SCC 360, while discussing the effect of delay in executing the warrant of detention has observed as under:

"27. In A. Mohd. Farook (supra), the detention order was passed on 25.02.1999, however, it was executed by the Detaining Authority on 05.04.1999. Although the detainee was present in the Court of Addl. Chief Metropolitan Magistrate on 25.02.1999 and 25.03.1999, but neither the Detaining Authority, nor the Executing Authority served the detention order on the detainee, at the earliest. In these circumstances, the Supreme Court held as follows:

"9. There is catena of judgments on this topic rendered by this Court wherein this Court emphasised that the detaining authority must explain satisfactorily the inordinate delay in executing the detention order otherwise the subjective satisfaction gets vitiated. Since the law is well settled in this behalf we do not propose to refer to other judgments which were brought to our notice.

10. As indicated earlier the only explanation given by the detaining authority as regards the delay of 40 days in executing the detention order is that despite their efforts the petitioner could not be located at his residence or in his office and therefore the order could not be executed immediately. No report from the executing agency was filed before us to indicate as to what steps were taken by the executing agency to serve the detention order. In the absence of any satisfactory explanation explaining the delay of 40 days, we are of the opinion that the detention order must stand vitiated by reason of non execution thereof within a reasonable time. From Annexure P.2 (the proceeding sheet of the M.M. Court Madras) it appears that the petitioner (accused) was present in the court of Additional Chief Metropolitan Magistrate on 25.2.1999 as well on 25.3.1999. Despite such opportunities neither the detaining authority nor the executing agency as well as sponsoring authority were diligent to serve the detention order on the petitioner at the earliest. In this view of the matter, we are of the opinion that the subjective satisfaction of the detaining authority in issuing detention order dated February 25, 1999 is vitiated. It is in these circumstances it is not

possible for us to sustain the detention order."

13) From the aforesaid ratio laid down by the Supreme Court, it is manifest that unexplained delay in execution of warrant of detention vitiates the subjective satisfaction of the detaining authority in issuing the detention order. Therefore, the impugned order of detention is not sustainable in law.

14) View thus, the impugned order of detention deserves to be quashed and is quashed accordingly. The petition is allowed.