

(2021) 12 J&K CK 0056

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 186 Of 2020

Ayaz Bashir Shergojri

APPELLANT

Vs

Union Territory Of J&K And Another

RESPONDENT

Date of Decision : 28-12-2021

Acts Referred:

Constitution Of India, 1950 — Article 22, 22(5)
Jammu And Kashmir Public Safety Act, 1978 — Section 8, 13, 13(1)
Code Of Criminal Procedure, 1973 — Section 161
Unlawful Activities (Prevention) Act, 1967 — Section 20
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 121
Indian Penal Code, 1860 — Section 307

Citation : (2021) 12 J&K CK 0056

Hon'ble Judges : Vinod Chatterji Koul, J

Bench : Single Bench

Advocate : Hamza Prince, Mir Suhail

Final Decision : Dismissed

Judgement

Vinod Chatterji Koul, J

1. The order no.41/DMP/PSA of 2020 dated 24.11.2020, passed by District Magistrate, Pulwama (for brevity "detaining authority"), placing one, Ayaz Bashir Shergojri S/o Bashir Ahmad Shergojri R/o Marwal Tehsil Kakapora, District Pulwama (for short "detenu") under preventive detention so as to prevent him from acting in any manner prejudicial to the security of the State and directing his lodgement in Central Jail, Jammu (Kot-bhalwal), has been challenged in this petition precisely on the following grounds:

i) that detenu was detained illegally and unlawfully and he was not informed of any reasons of same and neither was communicated the grounds of detention, and the material considered in framing the grounds of detention have not been supplied to detenu and, therefore, the procedural safeguards provided under Article 22 of the Constitution of India and Section 13 of J&K Public Safety Act,

have been blatantly violated;

ii) that detention order itself depicts non-application of mind and the detaining authority has relied upon an incident of 22.06.2019 for which an FIR no.40/2019 was lodged. The said FIR is against one Aijaz Ahmad Bhat, who has allegedly joined militancy and there is absolutely no allegation in FIR against detenu and neither is it understood as to how detenu was implicated in the said FIR. The detenu was arrested after lodging FIR on the pretext that some person has given information to police that detenu knew the said person and provided him with food etc., which is absolutely false and was a malicious allegation by some rival villager. Even after lapse of six months, no challan was produced as nothing surfaced in investigation against detenu and finally the Trial Court granted default bail to detenu on 18.01.2020. These vital facts have not been at all considered in grounds of detention;

iii) that the reason given for detention is that on 10.03.2020, some unknown persons hurled grenade at CRPF and during investigation it was found that detenu was involved. An open FIR was lodged and detenu was arrested as allegedly some person had named him without any basis and reason and that the police concerned, as usual, was quick in arresting detenu without verifying allegations or satisfying itself about involvement of detenu. There being absolutely no involvement of detenu and the police could not gather any evidence against him for months. The Trial Court finally bailed out detenu after challan was not filed within statutory period and same has not been filed even till date;

iv) that detenu has not been served with any evidence gathered in investigation which would connect him with the alleged offences. As is evident, the FIRs do not show him to be accused and detaining authority has stated that connection of detenu has been found during investigation and, therefore, incriminating material was to be supplied to detenu, which has not been done inasmuch as he stood bailed out in the FIRs and there is no question of detaining him for same reason;

v) that allegations/grounds of detention are vague and mere assertions of detaining authority, and no prudent man can make an effective representation against these allegations and can only be defended in a court of law and that detenu's father has obtained these documents from respondents but same suffer from absolute non-application of mind. The grounds being vague, sketchy and ambiguous cannot be made reason for detention;

vi) that detaining authority is bound under law to provide all material referred to in the order of detention and the order refers to two FIRs but neither the copy of same nor status of investigation or other information about the said FIRs has been given in grounds of detention and that detenu stood already bailed out and despite lapse of a year challan has not been filed in any of the two FIRs, which aspect has not been considered

vii) that grounds of detention are mere repetition of contents of dossier, although

same needs to be determined from records as the dossier copy was not provided to petitioner or his family, which also constitutes sufficient ground for quashing impugned order;

viii) that question of guilt and innocence of detenu can only be proved in a regular trial and at this stage there is no evidence against detenu. An FIR is a record of mere allegations and is not sufficient to determine guilt of detenu and neither can it be made basis of such detention;

ix) that respondent no.2 has not furnished material and documents, i.e., dossier, copies of FIRs, statements recorded under Section 161 Cr.P.C. and other incriminating material.

2. The respondents have resisted the petition by filing a counter affidavit in which they have denied the contentions raised by the petitioner in the petition and have submitted that there is no illegality in the order of detention as it was necessary to place the detenu under preventive detention so as to prevent him from acting in any manner prejudicial to the security of the State. The detaining authority has, in its affidavit, justified the grounds of detention as well as the impugned detention order while denying the allegation of non-supply of relevant material to the detenu. To substantiate their case, the respondents have produced the detention record.

3. I have heard learned counsel for parties and considered the matter.

4. The first argument put forth by learned counsel for petitioner is that impugned order of detention is unconstitutional, illegal and bad in law inasmuch as detaining authority has not followed the Constitutional and Statutory procedural safeguards as provided under Article 22(5) of the Constitution of India. It is stated that detenu has been illegally and unlawfully detained in terms of impugned order and was not informed of any reason nor was communicated the grounds of detention, dossier, FIRs, statement of witnesses, material collected during investigation, and the material considered in framing grounds of detention.

In view of above submission, I have gone through the detention record produced by learned counsel for respondents. Perusal of the detention record reveals that the material relied upon by detaining authority has been furnished to detenu at the time of execution of the detention. It is evident from detention record that detenu, at the time of execution of detention order, has been handed over all what has been referred to in grounds of detention by detaining authority, so as to enable him to make an effective representation against his detention. Thus, there is no substance in the submission of learned counsel for petitioner, as is also stated in the petition, that detenu has not been provided grounds of detention, copies of FIRs etc., more particularly when petitioner on his own has annexed with petition copies of impugned detention order dated 24.11.2020, communication dated 24.11.2020 addressed to detenu, grounds of detention as Annexure I, and copy of FIR no.40/2019 as Annexure II, copy of FIR no.15/2020 as Annexure III.

5. The second submission of learned counsel for petitioner is that detaining authority has not assigned any compelling reason for passing order of detention and that detaining authority has not specified the authority before whom the representation has to be made nor has detaining authority informed detenu to make representation to him before the order could be approved/confirmed by the Government.

This submission is again misconceived, for, perusal of grounds of detention unequivocally reveals and portrays compelling and cogent reasons given by detaining authority to pass order of detention. In this regard it would be appropriate to reproduce relevant portion of grounds of detention hereunder:

"You are an Over Ground Worker (OGW) of a banned terrorist organization called as Lashkar-e-Toiba (LeT) active in the area. The aim and object of this organization is to secede the J&K Union Territory from the Union of India and annex it with Pakistan. You have been motivating and instigating the youth of the District Puiwama and its adjoining areas for antinational and ann-social activities thereby jeopardizing the peace, security and tranquility of the UT of J&K in general and District Puiwama in particular. You are motivating youth to join the militant ranks of banned outfit, by exploiting their religious sentiments. Since you believe in the ideology of separatism, therefore, you are continuing your subversive activities thereby posing potential threat to the security of the State. It is not out of place to mention here that you are having a fundamentalist attitude and under the influence of likeminded people you became a hard-core fundamentalist. You have been extending logistic support to the militants since long thereby facilitating their movement from one place to another in a clandestine manner through un-conventional routes just to help them escape from being apprehended by security forces/Police.

As per information received from Police Station Kakapora, one Aijaz Abmad Bhat S/o Ali Mohammad Bhat R/o Laribal Kakapora went missing on 22.06.20 19 and during the search it divulged that the said missing person has joined Lashkar-e-Toiba (LeT) Terrorist Outfit and has uploaded his picture on social media with arms and ammunition, with the intention to challenge the integrity, sovereignty and security of the State. Regarding the incident a Case FIR No.40/2019 U/s 20 UAP Act and 121-RPC was registered in Police Station Kakapora and investigation embarked on. During investigation inter-alai, you were found involved in the commission of the said offence in the instant case as well.

Subsequently on 10.03.2020 unknown terrorists hurled a grenade towards backside Sentry Post No.05 of Police Station Kakapora intention to kill Police/SF personnel, which exploded and resulted in injuries to CRPF constable namely Sonu Kumar No.085194666 of 41/BN CRPF. However, terrorists taking advantage of darkness managed to escape. In this regard, case FIR No.15/2020 U/s 307 IPC and ¾ Explosive Substances Act stands registered in Police Station Kakapora. During the course of investigation it diilged that you are involved in the commission of offences in the instant case.

You aided militants to make an extensive recce of the Pulwama area for carrying out subversive activities. It also transpired that you alongwith your accomplices hatched a conspiracy to attack upon security forces deputed in the area. You along with your accomplices are putting in every effort to sabotage the ongoing DDC and Panchayat Elections. You instead of mending your ways, have been continuously indulging in the unlawful/subversive activities. On the face of your involvement, it is safe to conclude that letting you at large would vitiate the peaceful atmosphere of the area.

The activities as projected in the forgoing Paras of the instant dossier run heavily against you and are highly prejudicial to the Security of the State. Being highly motivated to carry on the illegal designs you are not likely to desist from indulging in antinational and antisocial activities and the normal laws are not sufficient to deter you from indulging in such activities. Therefore, in order to prevent you from indulging in the activities, which are prejudicial to the Security of the State, it is necessary to detain you by invoking the provisions of J&K Public Safety Act, 1978."

It is apparent from grounds of detention, as reproduced above, that detenu is a close associate and overground worker of Lashkar-e-Toiba (LeT) outfit, providing aid and assistance to the said outfit, and motivating and instigating the youth of the District Pulwama and its adjoining area for antinational and antisocial activities thereby jeopardizing the peace, security and tranquillity of UT of J&K in general and District Pulwama in particular. It is also mentioned in grounds of detention that as per information received from Police Station Kakapora, one Aijaz Ahmad Bhat went missing on 22.06.2019 and joined Lashkar-e-Toiba (LeT) Terrorist Outfit and uploaded his picture on social media with arms and ammunition, with the intention to challenge the integrity, sovereignty and security of the State and in this respect a case FIR No. 40/2019 U/S 20 UAP Act and 121-RPC was registered in Police Station Kakapora and during investigation, the detenu has been found involved in the commission of the said offence. Further, on 10.03.2020 unknown terrorists hurled a grenade towards backside Sentry Post No. 5 of Police Station Kakapora with an intention to kill police personnel, which exploded and resulted in injuries to CRPF constable, however, terrorists taking advantage of darkness managed to escape. In this regard, case FIR No. 15/2020 U/S 307IPC and 3/4 Explosive Substances Act stands registered in police Station Kakapora. During the investigation, it divulged that the detenu has been involved in the commission of offence. Detenu is said to have aided militants to make an extensive recce of Pulwama area for carrying out subversive activities and that he along with his accomplices hatched a conspiracy to attack upon security forces deputed in the area. It is further mentioned in grounds of detention that activities of detenu are highly prejudicial to security of the State and he is not likely to desist from indulging in antinational and antisocial activities and that normal laws are not sufficient to deter detenu from indulging in such activities.

The detenu has been very well informed to make representation to the Government as well as detaining authority as is self-evident from communication no.DMP/PSA/169-72 dated 24.11.2020, addressed by detaining authority to the detenu.

In that view of matter, sufficient grounds have been given by detaining authority to place detenu under preventive detention.

6. Another submission of learned counsel for petitioner is that subjective satisfaction has not been derived by detaining authority which is sine quo non for passing the order of detention and that grounds of detention are mere repetition of dossier prepared by Senior Superintendent of Police concerned.

I have examined detention record, produced by learned counsel for respondents. It is evident from the detention record that the detention order was made on proper application of mind, to the facts of the case and detenu was delivered at the time of execution of the detention order, the material and grounds of detention and was also informed that he had a right to represent against his preventive detention both before detaining authority as also the Government. The detaining authority has narrated the facts and figures that made the authority to exercise its powers under Section 8 of the Act of 1978, and record subjective satisfaction that detenu was required to be placed under preventive detention in order to prevent him from acting in any manner prejudicial to the security of the State.

7. Perusal of record reveals that detention order has been approved by the Government within time. Impugned detention order has been passed on 24.11.2020, which was approved by the Government vide Order no.HOME/ PB-V/1807 of 2020 dated 27.11.2020. The Advisory Board gave its opinion on 16.12.2020, in which it is mentioned that information in terms of Section 13(1) of the Act of 1978 was duly given to detenu by detaining authority and grounds of detention and other material were furnished to detenu at the time of taking him into detention, and that the same were read over and explained to detenu in Urdu/Kashmiri languages. Report of the Advisory Board also reveals that detenu was also informed about his right of making representation against his detention to the detaining authority as also to the Government and that no representation is stated to have been made by detenu. The Advisory Board has opined that there is sufficient cause for detention of detenu for preventing him from acting in any manner prejudicial to the security of the State. Upon receipt of the opinion of the Advisory Board, the Government vide Order no. HOME/ PB-V/1877 of 2020 dated 23.12.2020 confirmed the impugned order of detention.

8. In examining the question whether the ordinary laws of the land would have sufficed, and whether recourse to preventive detention was unnecessary, it must be borne in mind that the compulsions of the primeval need to maintain order in the society without which the enjoyment of all rights, including right to personal liberty of citizens, would lose their meaning, provide justification for laws of

preventive detention. These laws posit that an individual's conduct, prejudicial to maintenance of public order, security of State, preservation of forest wealth, provides grounds for satisfaction for a reasonable assessment of possible future manifestations of similar propensities on the part of the offender. The object of the law of preventive detention is not punitive, but is only preventive. In preventive detention no offence is to be proved nor is any charge formulated. The justification of such detention is suspicion and reasonability.

9. The essential concept of preventive detention is that detention of a person is not to punish him for something he has done, but to prevent him from doing it. Its basis is the satisfaction of the Executive of a reasonable probability of detenu acting in a manner similar to his past acts, and preventing him by detention from so doing. Preventive detention, an anticipatory measure, is resorted to when the executive is convinced that such detention is necessary to prevent a person detained from acting in a manner prejudicial to certain objects which are specified by the law. In preventive detention no offence is proved, and justification of such detention is suspicion or reasonable probability. The order of detention is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of surrounding circumstances. The power of preventive detention is exercised in reasonable anticipation. It may or may not relate to an offence. It does not overlap with the prosecution even if it relies on certain facts for which prosecution may be, or may have been, launched. An order of preventive detention may be made before or during prosecution. It may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.

Reference to judgement dated 02.04.2021 in WP(Crl) no.567/2019 titled Zubair Ahmad Laway v. State of J&K and another, and judgement dated 03.05.2021 titled Mohd Iqbal v. Union Territory of J&K, in view of the distinguishable facts and circumstances of the case in hand, will not give any aid or assistance to the case of petitioner.

10. It is advantageous to mention that a six Judge Constitution Bench of the Supreme Court way back in the year 1951, in the case of *The State of Bombay v. Atma Ram Shridhar Vaidya*, AIR 1951 SC 157, while looking into the scope subjective satisfaction arrived at by the detaining authority has held that the same is extremely limited and that the Court, while examining the material, which is made basis of subjective satisfaction of detaining authority, would not act as a court of appeal and find fault with satisfaction on the ground that on the basis of the material before detaining authority, another view was possible. Such being the scope of enquiry in this field, and the contention of counsel for petitioner, therefore, cannot be accepted. While going through the grounds of detention and dossier, I do not find that grounds of detention are ditto copy of dossier supplied by sponsoring authority. As is evident from the detention record, the material has been supplied to detenu. and all this material was before

detaining authority when it arrived at subjective satisfaction that the activities of detenu are such, which would entail preventive detention under J&K Public Safety Act, 1978.

11. It is pertinent to mention here that the powers of preventive detention under the Act of 1978 are in addition to those contained in the Criminal Procedure Code, where preventive detention is followed by an inquiry or trial. By its very nature, preventive detention is aimed at preventing commission of an offence or preventing detained person from achieving a certain end. The authority, making the order, therefore, cannot always be in possession of full detailed information when it passes the order and the information in its possession may fall far short of legal proof of any specific offence, although it may be indicative of a strong probability of impending commission of a prejudicial act. The Act of 1978, therefore, requires that the State Government must be satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to public order, security of State, or preservation of forest wealth, it is necessary so to do, make an order directing that such person be detained.

12. As can be derived from the provisions of Section 8 of the Act, before the Government can pass an order of preventive detention it must be satisfied with respect to the individual person that his activities are directed against one or other of the objects mentioned in the section, and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. The provisions of the Section 8, thus, clearly provide that it is the satisfaction of the State Government on the point which alone is necessary to be established. It is significant that while the objects intended to be defeated are mentioned, the different methods, acts or omissions by which that can be done are not mentioned, as it is not humanly possible to give such an exhaustive list. The satisfaction of the Government, however, must be based on some grounds. There can be no satisfaction if there are no grounds for the same. There may be a divergence of opinion as to whether certain grounds are sufficient to bring about the satisfaction required by the section. One person may think one way, another the other way. If, therefore, the grounds on which it is stated that the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of mala fides cannot be challenged in a court. Whether in a particular case the grounds are sufficient or not, according to the opinion of any person or body other than the State Government, is ruled out by the wording of the section. It is not for the court to sit in the place of the Government and try to determine if it would have come to the same conclusion as the Government. As has been generally observed, this is a matter for subjective decision of the Government and that cannot be substituted by an objective test in a court of law. Such detention orders are passed on information and materials which may not be strictly admissible as evidence under the Evidence Act in a court, but which the law, taking into consideration the needs and exigencies of administration, has allowed

to be considered sufficient for subjective decision of the Government.

13. To wrap up, it is relevant to refer to the observations of the Supreme Court while dealing with the question of preventive detention in the case of Prakash Chandra Mohan v. Commissioner, 1986 Cr.L.J. 786. The Supreme Court observed that it must be remembered that observance of written law about the procedural safeguards for protection of individual is normally the high duty of public official but in all circumstances not the highest. The law of self-preservation and protection of the country and national security may claim in certain circumstances higher priority.

14. For the reasons discussed above, the instant petition is without any merit and is, accordingly, dismissed with connected CM(s).