

(2022) 04 J&K CK 0047

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 195 Of 2021

Bashir Ahmad Koka

APPELLANT

Vs

UT Of J&K And Ors

RESPONDENT

Date of Decision : 19-04-2022

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 302, 307
Arms Act, 1959 — Section 7, 25

Citation : (2022) 04 J&K CK 0047

Hon'ble Judges : M.A.Chowdhary, J

Bench : Single Bench

Advocate : S.A. Hussain, Insha Rashid

Final Decision : Disposed Of

Judgement

M.A.Chowdhary, J

1. District Magistrate, Anantnag (hereinafter called 'Detaining Authority') in exercise of powers under Section 8 of the Jammu & Kashmir Public Safety Act, 1978, passed the detention Order No. 44/DMA/PSA/DET/2021 dated 19.10.2021 (for short 'impugned order'), in terms whereof the Petitioner namely Bashir Ahmed Koka S/O Late Mohammad Jamal Koka R/O Dardpora chaklipora, Achabal District Anantnag (for short 'detenue') was ordered to be detained and lodged in Central Jail, Jammu.

2. The impugned detention order has been challenged through the medium of the instant petition on following grounds:-

i/ That the detenue was shown to be involved in case FIR No.11/2004 U/Ss 307,302 RPC and 7/25 I.A. Act registered at P/S Achabal who has already been acquitted by the Hon'ble Court in the said case.

However, this fact was not brought before the detaining Authority and there is even no mention of it in the grounds of detention or police dossier. It appears

that there is total non-application of mind on the part of detaining authority and detention orders deserves to be quashed on this ground.

ii/ That there is delay of almost more than 17 years for passing the impugned detention order, that the last alleged activity had taken place in the year 2004, while as order of detention has been passed on 19.10.2021 which has snapped the live proximate link between the alleged activity and passing the impugned order of detention and also there was no fresh material before the detaining authority which prompted him to pass the impugned detention order. It also shows total non-application of mind on the part of detaining authority. On this ground also the detention order deserves to be set aside.

iii/ that the detaining authority has not prepared the grounds of detention by itself which is a pre-requisite for it before passing any detention order. The authority has to derive subjective satisfaction to formulate the grounds of detention. It also appears non-application of mind on the part of detaining authority. Further it is stated that the material referred to or relied upon in the grounds of detention by the detaining authority in arriving at its subjective satisfaction get incorporated and become part of the grounds of detention by reference and the right of the detainee to be supplied copies of such documents, statements and other materials to the detainee so that he can make a representation against his detention. On this grounds also the impugned order is bad in law.

iv/ The conclusion of the detaining authority that preventive detention of the detainee has become imperative as inadequacy of statutory provisions, the normal laws were not sufficient to deter the detainee from anti-social activities is without any reasoning and cogent material. There is non-application of mind on the part of detaining authority while passing the impugned detention order. The detaining authority has not mentioned details of the FIR(s) and did not explain in detail allegations against the detainee and are vague and unambiguous as such there is total non-application of mind on the part of detaining authority, therefore, detention order is liable to be set aside.

3. Respondents have filed counter Affidavit asserting therein that the material has been supplied to the detainee in the form of grounds of detention and the detainee was also informed of his right to make a representation to the government against his detention but he did not file representation which means he had no grievance or complaint against his preventive detention. It is also stated that the grounds of detention are precise, proximate, pertinent and relevant and there is no vagueness or staleness in the grounds of detention. It is also averred in the counter affidavit that the detention of the detainee has been ordered strictly in accordance with the provisions of J&K PSA Act, 1978 and the procedural safeguards prescribed under the provisions of PSA and the rights guaranteed to the detainee under the constitution have strictly been followed in the case. Further it is stated that the grounds of detention give complete account of the activities of the detainee which on the face of it are highly prejudicial to

the security of the State as such there was no option left to the detaining authority but to order detention of the detainee under PSA, 1978. Lastly that even grant of bail in criminal offence cannot debar the detaining authority to order prevent detention of an individual when preventive detention of such individual is found necessary as is the case in respect of the petitioner/detenu.

4. I have heard learned counsel for parties. I have also perused the detention record produced by learned counsel for respondents and considered the matter.

5. Learned counsel for petitioner states that the last alleged activity mentioned in the grounds of detention is of the year 2004, i.e., FIR No.11/2004, whereas impugned detention order has been passed after 17 years, that is, on 19.10.2021. Unexplained delay, according to him, between alleged activity and passing of impugned detention order has rendered impugned detention unjustified. He also argued that detenu was acquitted by the court in the aforesaid case and therefore, reliance on the said case to pass impugned detention order reflects non-application of mind on the part of detaining authority.

6. Learned counsel for the respondents has argued that the detainee was ordered to be detained for maintenance of 'Security of the State' and had he been let free there would have been every likelihood of his indulging in anti-national activities. It is further stated that the grounds of detention are precise, proximate, pertinent and relevant. There is no vagueness or staleness in the grounds. The incident clearly substantiates the subjective satisfaction arrived at by the detaining authority. It is also argued that the detention of the detainee has been ordered strictly in accordance with the provisions of J&K PSA, 1978 and the procedural safeguards prescribed under the provisions of the PSA and the rights guaranteed to the detainee under the constitution have strictly been followed in the case.

7. In view of the case set up and submissions made by learned counsel for the parties, it would be appropriate to say that perusal of grounds of detention reveals that last activity, in which detenu allegedly indulged took place in the year 2004 and not only this, the detenu has been acquitted by the Court. The detention of the detainee has been ordered on the basis of FIR No. 11/2004 registered in the year 2004, therefore, this case has no proximity of time with the detention order. Respondents have failed to explain the delay in passing the order of detention and therefore, on this ground alone impugned order is liable to be quashed. This important fact of the matter is missing in the grounds of detention and reliance on case-FIR No.11/2004 by detaining authority to arrive at subjective satisfaction, amounts to non-application of mind on the part of detaining authority. Law in this regard is clear.

8. The Supreme Court in *Rajinder Arora v. Union of India* (2006) 4 SCC 696 has held that if no explanation is furnished for long delay in passing order of detention, the same is vitiated in law. Live and proximate link between the past conduct of the detainee and the imperative need to detain have to be harmonized

to rely upon the alleged illegal activities of the detainee. Old and stale incidents shall be of no use as has been held in "Sama Aruna Vs State of Telangana & Anr." reported as (2018) 12 SCC 150. Relevant paragraph No.16 is extracted as under:

"16. Obviously, therefore, the power to detain, under the Act of 1986 can be exercised only for preventing a person from engaging in or pursuing or taking some action which adversely affects or is likely to affect adversely the maintenance of public order; or for preventing him from making preparations for engaging in such activities. There is little doubt that the conduct or activities of the detenu in the past must be taken into account for coming to the conclusion that he is going to engage in or make preparations for engaging in such activities, for many such persons follow a pattern of criminal activities. But the question is how far back? There is no doubt that only activities so far back can be considered as furnish a cause for preventive detention in the present. That is, only those activities so far back in the past which lead to the conclusion that he is likely to engage in or prepare to engage in such activities in the immediate future can be taken into account. In Golam Hussain vs State of W.B, this Court observed as follows:(SCC p.535 para 5)

5."No authority, acting rationally, can be satisfied, subjectively or otherwise, of future mischief merely because long ago the detenu had done something evil. To rule otherwise is to sanction a simulacrum of a statutory requirement. But no mechanical test by counting the months of the interval is sound. It all depends on the nature of the acts relied on, grave and determined or less serious and corrigible, on the length of the gap, short or long, on the reason for the delay in taking preventive action, like information of participation being available only in the course of an investigation. We have to investigate whether the causal connection has been broken in the circumstances of each case".

Suffice it to say that in any case, incidents which are said to have taken place nine to fourteen years earlier, cannot form the basis for being satisfied in the present that the detenu is going to engage in, or make preparation for engaging in such activities".

9. Dossier had been submitted by Senior Superintendent of Police, Anantnag to recommend detention of the detainee on 19.10.2021 and the detaining authority also passed the detention order on the same day i.e. 19.10.2021 , which clearly suggests non-application of mind by the Detaining Authority.

10. The detention order was stated to have been executed on 21.10.2021 through SI Mohd. Ashraf who served on the detainee just 16 leaves of detention order (01 leaf), notice of detention(01 leaf), grounds of detention (02 leaves) dossier (05 leaves) and copies of FIR, statements of witnesses and other related relevant documents (07 leaves) in English and explained in Urdu/Kashmiri languages. Detaining Authority has, however, not communicated in the detention order he passed to the detenu his right of making representation against the detention order to the Detaining Authority and the Government as was required.

The Detaining Authority has thus flagrantly contravened and trampled the detainee's right of making an effective and meaningful representation against divesting of his liberty.

11. Therefore, in the considered opinion of this Court, the detention order, other than not following the constitutional safeguards also suffers on merit as well, as the case made basis to invoke the preventive detention has no live and proximate link to the detention order.

12. For the foregoing reasons, this petition is allowed and detention Order No.44/DMA/PSA/DET/2021 dated 19.10.2021, passed by District Magistrate, Anantnag, is quashed. Respondents, including Jail Superintendent concerned, are directed to release the detainee forthwith, provided he is not required in any other case(s).

13. Xerox copy of the Detention record, as produced, be returned to the Learned GA.

14. Disposed of.