

(2021) 12 J&K CK 0065

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 44 Of 2021

Bashir Ahmad Sheikh

APPELLANT

Vs

Union Territory Of J&K And Another

RESPONDENT

Date of Decision : 29-12-2021

Acts Referred:

Constitution Of India, 1950 — Article 22(5)
Arms Act, 1959 — Section 7, 25
Unlawful Activities (Prevention) Act, 1967 — Section 13, 16, 18, 39
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 21
Jammu And Kashmir Public Safety Act, 1978 — Section 8, 13(1)

Citation : (2021) 12 J&K CK 0065

Hon'ble Judges : Vinod Chatterji Koul, J

Bench : Single Bench

Advocate : Sheikh Manzoor, Sajad Ashraf

Final Decision : Dismissed

Judgement

Vinod Chatterji Koul, J

1. The order no.05-DMK/PSA OF 2021 dated 2.02.2021, passed by District Magistrate, Kupwara (for brevity "detaining authority") placing one, Bashir Ahmad Sheikh S/o Gh Ahmad Sheikh R/o Dildar Batpora Karnah District Kupwara (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 precisely challenged on the following grounds:

i) that detention of detenu has mainly been ordered for his alleged involvement under NDPS Act and order of detention has been passed by detaining authority, which on the face of it is without jurisdiction;

ii) that grounds of detention are replica of dossier of activities submitted by police authorities and detaining authority while passing order of detention is required to apply its own mind and has to derive independent subjective

satisfaction on the basis of dossier placed before him, which is completely lacking and, therefore, detention order has been passed in a routine and casual manner;

iii) that order of detention has been passed in hot haste by respondent no.2 since fact of dismissal of regular bail application filed by detenu as also dismissal of default bail application by the learned designated court was neither brought into the notice of detaining authority nor the same has been reflected either in police dossier or in grounds of detention and, therefore, detention order has been passed on false, flimsy and vague grounds which cannot stand judicial scrutiny of this Court;

iv) that allegations/grounds of detention are vague, ambiguous and have no close proximity and nexus with the slapping of the detention order under public Safety Act. The grounds of detention the make a mention that if the subject (detenu) is permitted to remain at large, he will continue to indulge in terrorist activities which will prove detrimental to security of the State and it has been said that normal laws have not proved sufficient to deter subject/detenu from indulging in such activities. The detaining authority has prepared grounds of detention as if the detenu was at large and not in custody in connection with FIR 57/2020. The detaining authority has failed to record not only subjective satisfaction but compelling reasons as well to order detention of an individual. The order of detention has been passed in a routine manner without application of mind;

v) that the documents, statement of witnesses and other relevant material referred to and relied upon in grounds of detention by detaining authority in arriving at its subjective satisfaction, have not been supplied to detenu and as a necessary corollary thereof, he could not make an early representation against detention.

2. Respondents have resisted the petition by filing reply affidavit in which they have denied contentions contained in the petition and have submitted that there is no illegality in the order of detention as it was necessary to place detenu under preventive detention so as to prevent him from acting in any manner prejudicial to security of the State. Detaining authority has, in its affidavit, justified the grounds of detention as well as impugned detention order while denying 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. Learned counsel for petitioner has stated 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 in the petition that in the month of July 2020 registered an FIR and booked detenu in the said FIR and arrested him during intervening night of 27/27th July 2020, when he was on his way to Srinagar from Karnah to buy bricks for construction of his house and

cloths for children for the occasion of upcoming Id-ul-Azha. It is averred that detenu is serving a master by profession, having rendered more than 24 years' service in the department of Education and highly qualified, can never think of committing of any offence as detenu is a law-abiding citizen and that he has been falsely implicated in FIR registered in police station Karnah. According to learned counsel for petitioner, the documents, statement of witnesses and other relevant material referred to and relied upon in grounds of detention by detaining authority have not been supplied to detenu and, as such, he could not make a representation against detention.

In view of above submission, I have gone through the detention record produced by learned counsel for respondents, which reveals that grounds of detention, detention order and all other material, relied upon by detaining authority while passing impugned order of detention, were provided to detenu. Perusal of acknowledgement of receipt of material reveals that Executing Officer, SI Abdul Rehman 136/KP, EXK-962181, has executed the detention warrant, and 36 leaves, comprising of order of detention, grounds of detention, notice to detenu, copy of dossier of activities, copy of FIR, copies of seizure memo/ arrest memo, copies of statement of witnesses under different provisions of law, translated copies of order of detention, grounds of detention and notice in Urdu version. It also reveals that detenu was informed to make a representation against his detention both to the Government as well as detaining authority. In that view of matter, the contention of learned counsel for petitioner that detenu has not been provided material relied upon by detaining authority, has no substance and is, therefore, misconceived.

5. It is also stated by learned counsel for petitioner 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.

The above submission is misconceived, for, perusal of grounds of detention clearly reveals compelling and cogent reasons given by detaining authority to pass order of detention. In this regard it would be profitable to reproduce relevant portion of grounds of detention hereunder:

"...that on 26.07.2020, Police Station Karnah received a written complaint from Major A. Ranjan C. Coy 7 RR Camp Sadna Gali through Sgct Majeed-ur-Rehman No. 797/KP of Police station Karnah deployed at Sadna Gali for registration of FIR to the effect that on 26th July 2020 approximately 23.00 hours to 0130 hours at the joint check post of Army and Kupwara Police at Sadna Gali NC Pass during unloading followed by details search of Pick-up vehicle bearing registration No.JK01AJ-0219 driven by Abdul Ameer Sheikh S/o Mohammad Amin Sheikh R/o Hajinar, Karnah and Santro Car bearing registration No.JK05B/4571 driven by Bashir Ahmad the following WLS and Narco drug were recovered (1) Rifle AK

56=01 (2) Mag Ak 56=2 (3) Pistol =02 (4) Pistol Mag = 04 (5) Rds Ak=76 (6) Pistol Rds=90 (7) Chinese Grenades=06 Nos (8) Plastic Grenade=14 Nos, (9) Narcotic drug=10 pockets weighting approximately 10 Kgs (10) Liquor=02 bottles (11) Smart Phone=03 Nos, (12) sim card Idea=01 No. were recovered from their possession and a criminal case Fir No.57/2020 U/Sec 7/25 A.Act, 13, 16, 18, 19, 39 ULA (P) Act, 8/21 NDPS Act stands registered in Police station Karnah and the investigation of the case was set into motion. During the course of investigation, I/O visited the scene of crime, prepared site plan, recorded the statement of witnesses. During the course of investigation prima facie offences punishable U/Sec 7/25 A Act, 13, 16, 18, 39 ULA (P) Act, 8/21, 29 NDPS Act have been made out against the accused (1) Abdul Ameer Sheikh S/o Mohammad Amin Sheikh R/o Hajinar, Karnah (2) Bashir Ahmad Sheikh S/o Gh. Ahmad Sheikh R/o Batpora Dildar kamah who were arrested in the instant case on 26-07-2020. During the course of investigation, the actual registration No. of vehicle Santro was found JK05B/547 1 instead of JK05B/4571.

3. The Dossier further reveals that the during the course of investigation, the said accused persons have been put under sustained questioning. During the questioning, the subject Bashir Ahmad Sheik disclosed that he has a friend namely Molvi Saleem in PAK/POK and the subject Bashir Ahmad was in constant touch with him on mobile phone No +61432640288. Besides, he has also a friend Zahoor Ahmad Mir S/O Ghulam Rasool Mir R/O Mirgund Baramulla working in Health Department, who too is also in contact with one Aqib Rasool from POK/PAK on phone NO +923068940178. The accused persons namely Bashir Ahmad Sheikh, Zahoor Ahmad Mir and their two friends namely Molvi Saleem and Aqib Rasool who are putting at POK/PAK were devising a plan to procure illegal arms ammunition/ narcotic drugs (Brown sugar) from across the border and transport it to the different parts of Kashmir Valley/Indian territory for use of militancy as well as by youth in order to make a huge money. All the four persons hatched a criminal conspiracy that Molvi Saleem and Aqib Rasool will procure the same from across the border and bring it to Saidapora Karnah near LOC fence and thereafter the subject Bashir Ahmad Sheikh will collect the same from Saidpota near LOC fence and will bring it to Mirgund and handover to the accused namely Zahoor Ahmad Mir of Mirgund. Thereafter, the subject Bashir Ahmad Sheikh informed/briefed two persons of his locality namely (1) Abdul Ameer Sheikh S/O Mohammad Amin Sheikh R/O Hajinar Karnah and (2) Zahoor Ahmad Shah S/O Mohammad Akbar R/O Panjtara Kamah about the whole story. Besides, he has also assured them that they will be provided a good share if they accompany and help him for collection and transportation of the consignment from the Saidpota LOC up to Srinagar. Before few days, the subject Bashir Ahmad Sheikh and Zahoor Ahmad Mir were informed by their friends namely Molvi Saleem and Aqib Rasool, who are putting up at POK/PAK that they have procured contraband narcotics and Arms ammunition and will bring it to Saidapora Karnah near LOC fence and the subject Bashir Ahmad Sheikh was asked to collect the same from village Saidpota near Fence and handover it to Zahoor Ahmad Mir of Mirgund

Baramulla for further disposal. Accordingly Zahoor Ahmad Shah S/O Mohammad Akbar R/O Panjtara Karnah who was asked by the subject Bashir Ahmad Sheikh to collect the consignment from the LOC, upon which said Zahoor Ahmad collected the consignment from Saidapora and brought the same to the house of the subject Bashir Ahmad Sheikh. Thereafter on 25/26-07-2020, the subject Bashir Ahmad Sheikh loaded the consignment in two vehicles viz Load carrier bearing Registration No JK01AJ-0219 driven by Abdul Ameer Sheikh S/O Mohammad Amin Sheikh R/O Hajinar and his own Santro Car bearing Registration No JK05B/5471 driven by the subject personally for transporting it to Mirgund Baramulla. However on reaching Sadna Gali, both the vehicles were spotted along with the consignment by the police and Army 7 RR. Accordingly the disclosure statements of the accused has been prepared and placed on file. While as the disclosure statement of the accused Ameer sheikh has also been prepared who corroborated the story and placed on file.

4. the dossier also reveals that during the course of investigation, the subject disclosed that he is an active Over Ground Worker of banned militant organization HM and is in close contact with militant commanders. During the course of investigation, prima-facie offences punishable U/S 8/21, 29 NDPS Act 13, 16, 18, 29 UL(P) Act 7/25 Arms Act were made out against the subject and other accused persons. The subject was formally arrested in the case on 26-07-2020 and is on judicial remand under the orders of the Hon'ble Court. The investigation of the case has been closed as challan against the subject, however some legal formalities are yet to be done. There is an apprehension that the subject may be admitted to default bail. As such, his preventive detention is necessitated."

It is evident from grounds of detention that detenu is a close associate and overground worker of banned militant organisation HM and is in close contact with militant commanders. It is mentioned in grounds of detention that on 26.07.2020, a joint check post of Army and Kupwara police at Sadna Gali NC Pass during unloading, searched pickup vehicle, bearing registration no.JK01AJ-0219, driven by Abdul Ameer Sheikh S/o Mohammad Amin Sheikh R/o Hajinar, Karnah and Santro Car bearing registration nno.JK05B/4571, driven by Bashir Ahmad, certain arms and ammunition were recovered from their possession, including (1) Rifle AK 56 = 01; (2) Mag Ak 56=2; (3) Pistol =02; (4) Pistol Mag = 04; (5) Rds Ak=76; (6) Pistol Rds=90; (7) Chinese Grenades=06 nos; (8) Plastic Grenade=14 nos; (9) Narcotic drug=10 pockets weighting approximately 10 Kgs; (10) Liquor=02 bottles; (11) Smartphone=03 nos etc., and in this regard FIR no.57/2020 under Section 7/25 A. Act, 13, 16,18,39 ULA(P) Act, 8/21 NDPS Act was registered in police station Karnah. It is also mentioned in grounds of detention that detenu being a hardcore associate of militants and harbouring strong desire to join militant ranks, exhibits that he is hell bent on challenging the security of the State by indulging in terrorist activities and if he is permitted to remain at large, he will continue to indulge in terrorist activities which will prove detrimental to the security of the State.

Perusal of the record also reveals that detenu has been informed to make representation against his detention before the Government as well as detaining authority. 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 concerned Senior Superintendent of Police.

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. Perusal of detention record reveals that detenu has been informed that he can make a representation against his detention to the Government as well as to detaining authority. The grounds of detention are definite, proximate and free from any ambiguity. The detenu has been informed with sufficient clarity what actually weighed with detaining authority while passing the detention order. 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 22.02.2021, which was approved by the Government vide Order no.HOME/ PB-V/161 of 2021 dated 26.02.2021. The Advisory Board gave its opinion on 18.03.2021, 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/228 of 2021 dated 23.03.2021 confirmed the impugned order of detention.

8. In examining the question whether ordinary laws of 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 suggest 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 *Sama Aruna v. State of Telangana*, AIR 2017 SC 2662; *Surya Prakash Sharma v. State of U.P.*, 199 SCC (Cri) 1691; *T. P. Moideen Koya v. Govt of Kerala*, 2004 (8) SCC 106; SLJ 2017 (Vol II) 681, in view of the distinguishable facts and circumstances of the present case, will not give any aid or assistance to the case of petitioner.

10. It is useful to make mention of here 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 not impertinent 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 deduced from the provisions of Section 8, 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).