

(2021) 11 J&K CK 0039
In the Jammu And Kashmir High Court
Case No : Writ Petition (Crl) No. 163 Of 2021

Bashir Ahmad Wani

APPELLANT

Vs

UT Of J&K & Anr

RESPONDENT

Date of Decision : 16-11-2021

Acts Referred:

Constitution Of India, 1950 — Article 22(5)
Jammu And Kashmir Public Safety Act, 1978 — Section 8(1)(a)(i), 8(2)(ii)
Unlawful Activities (Prevention) Act, 1967 — Section 13, 18, 20
Arms Act, 1959 — Section 7, 25
Code Of Criminal Procedure, 1973 — Section 161, 164A

Citation : (2021) 11 J&K CK 0039

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : I. Sofi, Sajad Ashraf

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

1) Petitioner has challenged the detention order No.09-DMK/PSA of 2020 dated 29.09.2020, passed by District Magistrate, Kupwara (respondent No.2) whereby he has been taken into preventive custody with a view to prevent him from acting in any manner prejudicial to the security of the State. The said order has been passed by respondent No.2 in exercise of his powers under Section 8(1)(a) (i) read with Clause (ii) of sub-section (2) of Section 8 of the Jammu & Kashmir Public Safety Act, 1978.

2) The petitioner has challenged the impugned order of detention on the grounds that at the time when the impugned order of detention was passed, he was already in custody in connection with FIR No.16/2020 for offences under Section 13, 18, 20 UL A (P) Act and Section 7/25 of Arms Act of Police Station, Kralgund, Handwara and, as such, there were no compelling reasons for the detaining authority to pass the detention order. It is also contended that the petitioner is

an illiterate labourer and, as such, he was not in a position to understand the grounds of detention and the material forming the basis of grounds of detention because translated version of the same was not provided to him thereby violating his constitutional right guaranteed under Article 22(5) of the Constitution. Lastly, it has been contended the detaining authority has not prepared the grounds of detention itself, which is a pre-requisite before passing any of detention.

3) Respondent No. 2 (District Magistrate, Kupwara) has filed counter affidavit on behalf of the respondents. In the said affidavit respondents have submitted that they have followed all the constitutional and statutory safeguards while passing the impugned order of detention. It is contended that the petitioner has remained active in anti-national activities and he is an active Over Ground Worker of terrorist organisation Lashkar-e-Toiba and, as such, the detaining authority with a view to prevent him from acting in any manner prejudicial to the security of the state was compelled to pass the impugned order of detention. Respondents have submitted that all the material which formed basis of the impugned detention order and the grounds of detention were furnished to the detainee and that the detaining authority has applied its mind while passing the impugned order of detention. To support its contentions, the detaining authority has produced the detention record.

4) I have heard learned counsel for the parties and perused the record.

5) The first contention that has been raised by the petitioner is that there were no compelling circumstances for the detaining authority to pass the impugned order of detention when the detainee was already in custody in connection with case FIR No. 16/2020. In this regard, it is to be noted that the detaining authority in the grounds of detention has mentioned that the detainee has acquired right of default bail and is presently free from custody. The detaining authority has further mentioned in the grounds of detention that there is an apprehension that the petitioner after getting default bail shall actively participate and abet unlawful activities and he shall also persuade the young educated youth of the area to join militant ranks so as to increase and strengthen the presence of terrorism in the area. Thus, from the grounds of detention it is clear that the detaining authority has been alive to the fact that the petitioner has acquired right of default bail and has expressed apprehension on the basis of antecedents of the petitioner that he may indulge in unlawful activities.

6) It is well settled that the order of detention can be validly passed against a person in custody and for that purpose, it is necessary that the grounds of detention must show that the detaining authority was aware of the fact that the detainee was already in custody. The detaining authority must be further satisfied that the detainee is likely to be released from custody and the nature of activities of the detainee indicate that if he is released, he is likely to indulge in such prejudicial activities and therefore, it is necessary to detain him in order to prevent him from engaging in such activities. The above ratio has been laid down

by the Supreme Court in the case of Union of India vs Dimple Happy Dhakad, (2019) 20 SCC 609.

7) Again in Kamarunnissa vs. Union of India, (1991) 1 SCC 128, the Supreme Court, after considering the ratio laid down in its earlier judgments, observed as under:

"(13) From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and

(b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition, to question it before a higher court. What this court stated in the case of Ramesh Yadav was that ordinarily a detention order should not be passed merely to pre-empt or circumvent enlargement on bail in cases which are essentially criminal in nature and can be dealt with under the ordinary law. It seems to us well settled that even in a case where a person is in custody, if the facts and circumstances of the case so demand resort can be had to the law of preventive detention. This seems to be quite clear from the case law discussed above and there is no need to refer to the High Court decisions to which our attention was drawn since they do not hold otherwise. We, therefore, find it difficult to accept the contention of the counsel for the petitioners that there was no valid and compelling reason for passing the impugned orders of detention because the detenus were in custody."

8) From the aforesaid enunciation of the law on the subject, it is clear that a detaining authority would be justified to pass an order of detention even in respect of a person who is already in custody provided the authority is satisfied that the detinue is likely to be released on bail and that there is apprehension that upon release of the detinue, he is likely to indulge in activities which are prejudicial to the security of the State. This satisfaction has to be on the basis of the material which is available before the detaining authority.

9) In the instant case, the petitioner had already acquired the right of default bail and, in fact, he had already been released on bail as is noted in the grounds of detention. Thus, it is not a case where the detinue was likely to be released on bail but it is a case where he was actually released and, as such, there was no requirement for the detaining authority to record a satisfaction in this regard. There was material before the detaining authority in the shape of antecedents of the petitioner and the intelligence report, to which reference is made in the grounds of detention, on the basis of which the authority derived subjective

satisfaction that there is likelihood of petitioner acting in a manner which would be prejudicial to the security of the State.

10) The Supreme Court in the case of *Senthamilselvi vs State of Tamil Nadu*, (2006) 5 SCC 676, has clearly laid down that subjective satisfaction of detaining authority is not to be interfered with. The aforesaid ratio has been reiterated and reaffirmed by the Supreme Court in the case of *Happy Dhakad's case* (Supra) by observing that the Court must be conscious that satisfaction of the detaining authority is "subjective" in nature and the Court cannot substitute its opinion for the subjective satisfaction of the detaining authority and interfere with the order of detention.

11) Therefore, the question whether petitioner after getting bail would have actually indulged in unlawful activities cannot be gone into these proceedings particularly keeping in view the background and antecedents of the petitioner. Thus, it cannot be stated that there were no compelling circumstances for the detaining authority to pass the order of detention against the petitioner. The argument of the petitioner in this regard is without any merit.

12) It has also been contended by the petitioner that he is, admittedly, an illiterate person and, as such, it was incumbent upon the detaining authority to provide him the translated version of the material which formed the basis of his detention. As already noted, ASI Mushtaq Ahmad, the executing officer, has sworn an affidavit which forms part of the detention record. As per this affidavit the executing officer has explained the grounds of detention to the detainee in his mother tongue in presence of Superintendent, District Jail, Kupwara. Thus, there is material on record to show that the petitioner has been explained the grounds of detention in his mother tongue.

13) As per petitioner's own case, he is an illiterate person and, as such, providing of translated version of the material relied upon by the detaining authority would not have served any purpose as he would not have been able to read it. The only available option for the respondents in such circumstances was to explain the grounds of detention to the petitioner in his mother tongue which they have done through the executing officer. The argument of learned counsel for petitioner in this regard is, therefore, without any merit.

14) Lastly, it has been argued by learned counsel for petitioner that the detaining authority has not prepared the grounds of detention itself, which is a pre-requisite before passing any order of detention. Having gone through the police dossier as well as the grounds of detention, it becomes clear that the same are not identical. The detaining authority while framing grounds of detention has relied upon police dossier but while doing so it has recorded its own satisfaction without actually reproducing the contents of the police dossier. In para (5) of the grounds of detention, the detaining authority has clearly stated that it has analysed in detail the police dossier as also the other facts and circumstances which have been elaborated in the grounds of detention and the documents

annexed with the grounds of detention. It is on this basis that the detaining authority has come to a conclusion that the petitioner is involved in activities inimical to the security of the State and, as such, it has become imperative to detain him under the provisions of Public Safety Act. The argument of learned counsel for the petitioner in this regard is without any merit and deserves to be rejected.

15) For the foregoing reasons, I do not find any merit in this petition. The same is, accordingly, dismissed.

16) The detention record be returned back to the learned counsel for the respondents.