
(2021) 02 J&K CK 0099
In the Jammu And Kashmir High Court
Case No : Writ Petition (Crl) No. 626 Of 2019

Danish Habib Wani

APPELLANT

Vs

Ut Of J&K And Anr

RESPONDENT

Date of Decision : 18-02-2021

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 164A
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 307
Arms Act, 1959 — Section 7, 27

Citation : (2021) 02 J&K CK 0099

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : G. N. Shaheen, Asifa Padroo

Final Decision : Dismissed

Judgement

1) Impugned in this petition is order of detention bearing No.74/DMB/PSA/2019 dated 21.10.2019 (the detaining authority), whereby one Danish

Habib Wani S/o Habibullah Wani R/o Hygam Sopore District Baramulla (the detainee) has been detained with a view to prevent him from acting, in

any manner, prejudicial to the security of the State.

2) It is claimed that the detainee was arrested by police on 11.09.2019, and was booked in case FIR No.220/2019 and while the detainee was in

custody of police in the aforesaid FIR, he was shifted to Central Jail, Srinagar, where he was detained in the preventive custody in terms of the

impugned order. The detainee, by the medium of this petition filed through his father, has assailed the impugned order of detention, inter alia, on the

following grounds:

(I) That the allegations made in the grounds of detention are vague and non-

existent and on the basis of thereof no prudent person can make a representation against his detention;

(II) That the detainee was already in custody in FIR No.220/2019 when he was detained pursuant to impugned order of detention. He had neither

applied for bail nor was same otherwise due to him given the fact that the case registered against him involved commission of substantive offences

under Unlawful Activities (Prevention) Act. The detaining authority has not shown any awareness about the aforesaid fact nor has it indicated any

compelling reasons to pass the detention order when the detainee was already with the police in connection with supra FIR;

(III) That the detainee is an illiterate person, as such, it was incumbent upon the detaining authority to serve the translated version of the grounds of

detention upon him which has not been done in the instant case;

(IV) That the detainee was not furnished the relevant material like copy of dossier, statement of witnesses recorded under Section 161 and 164-A Cr.

P. C, seizure memo, recovery memo etc. etc. to enable the detainee to make an effective representation;

3) The detaining authority has filed the reply affidavit, wherein it is submitted that the petitioner was detained on 21.10.2019, under the provisions of

J&K Public Safety Act, 1978, and was directed to be lodged in Central Jail, Srinagar. The detention was necessitated because of involvement of the

detainee in very serious offences against the State as mentioned in the FIRs registered against him. The detainee was informed that he can make a

representation to the government as well as the detaining authority against his detention. It is further claimed in the reply affidavit that all statutory

requirements and constitutional guarantees have been fulfilled and complied with by the detaining authority. The order has been issued validly and

legally. The respondents have placed reliance on the judgment of the Supreme Court in Haradhan Saha v. State of W.B (1975) 3 SCC 198.

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

5) So far as the first ground of challenge is concerned, it is the contention of learned counsel for the petitioner that the grounds of detention are vague,

as such, it is difficult for any person to make an effective representation against such kind of grounds. A perusal of the grounds of detention reveals

that the detaining authority has taken pains to not only mention the dates of

incidents but also the names of the militants with whom the detainee had developed contacts. The grounds of detention contain the names of the organizations with which detainee has been found involved. Specific names of the places where the detainee is stated to have participated in the meetings with militants and also the exact role of the detainee in different incidents is specified in the grounds of detention. Therefore, by no stretch of imagination it can be stated that the grounds of detention are vague, as has been contended by learned counsel for the petitioner.

6) Next it has been vehemently contended by learned counsel for the petitioner that the detainee was already in custody in FIR No.220/2019 when he was detained pursuant to the impugned detention order but in the grounds of detention, the detaining authority has not mentioned this fact which shows non-application of mind on its part. In this regard, the petitioner has placed on record copy of remand order dated 11.09.2019 passed by Chief Judicial Magistrate, Sopore, according to which the detainee was remanded to ten days police custody with effect from 11.09.2019 to 20.09.2019 in FIR No.220/2019.

7) In the grounds of detention it has been mentioned that the petitioner is presently in police remand in FIR No.33/2019 for offences under Section 307 RPC and 7/27 Arms Act and not in FIR No.220/2019.

8) A perusal of the detention record shows that the custody of the detainee was changed from FIR No.220/2019 to FIR No.33/2019 on 06.10.2019.

This makes clear that as on date of passing of order of detention, the detainee was not in custody in connection with FIR No.220/2019 but he was in custody in connection with FIR No.33/2019 which fact finds mention in the grounds of detention. Thus, it cannot be stated that there has been any non-application of mind on the part of the detaining authority.

9) Next it has been contended that the detainee was already in custody in substantive offences at the time of passing of impugned order of detention and there were no compelling reasons for the detaining authority to detain the detainee under preventive detention laws. It has been argued that the detainee was booked for offences under Unlawful Activities (Prevention) Act and, as such, there were remote chances of his getting bail.

10) It is a settled law that pendency of prosecution in a substantive offence is no bar to an order of preventive detention. Preventive detention and

prosecution are two different areas. In a prosecution, an accused is sought to be punished for past acts whereas in preventive detention, the past

conduct of a person becomes a material for inferring about his future course of probable conduct.

11) A Constitution Bench of the Supreme Court in the case of Haradhan Saha v. State of W. B, (1975) 3 SCC 198, while considering various aspects

concerning preventive detention, has observed as under:

32. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a

precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not

overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of

preventive detention, may be made before or during prosecution. An order of preventive detention 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.

33. Article 14 is inapplicable because preventive detention and prosecution are not synonymous. The purposes are different. The authorities

are different. The nature of proceedings is different. In a prosecution an accused is sought to be punished for a past act. In preventive

detention, the past act is merely the material for inference about the future course of probable conduct on the part of the detenu.

34. The recent decisions of this Court on this subject are many. The decisions in *Borjahan Gorey v. The State of West Bengal* reported in

A.I.R. 1972 S.C. 2256, *Ashim Kumar Ray v. State of West Bengal* reported in A.I.R. 1972 S.C. 2561, *Abdul Aziz v. The Distt. Magistrate,*

Burdwan & Ors. reported in A.I.R. 1973 S.C. 770 and *Debu Mahto v. The State of West Bengal* reported in A.I.R. 1974 S C. 816 correctly

lay down the principles to be followed as to whether a detention order is valid or not. The, decision in *Biram Chand v. State of Uttar*

Pradesh & Ors. reported in A.I.R. 1974 S.C. 1161 Which is a Division Bench decision of two learned Judges is contrary to the other Bench

decisions consisting in each case of three learned Judges. The principles which

can be broadly stated are these. First merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act. Second, the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the Code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate, issuing an order under the preventive detention. Third, where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardize the security of the State or the public order. Fourth, the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order. Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances.â??

12) From the afore-quoted enunciation of law on the subject, it is clear that the mere fact that a person has been in custody in a substantive offence does not act a bar for a detaining authority to detain him under preventive detention laws if the circumstances warrant so.

13) It is true that in the instant case the detenue has been booked in substantive offences under Prevention of Unlawful Activities Act but then not in every case an accused booked for such offences is refused the concession of bail. It all depends upon facts and circumstances of each case. The apprehension of the detaining authority that there is likelihood of detenue being admitted to bail cannot, be interfered with by the Court.

14) In Ahmad Nassar v. State of Tamil Nadu, (1999) 8 SCC 473, the Supreme Court was dealing with a case where there was an order of rejection of bail application before the detaining authority. The Court, taking a view that the detaining authority can draw an inference that there is likelihood of

detenu being released on bail, observed as under:

So before the detaining authority, there existed not only order dated 12.4.1999 rejecting his bail application but the contents of the bail

application dated 1.4.1999. The averments made therein are relevant material on which subjective satisfaction could legitimately be drawn

either way. Thus in spite of rejection of the bail application by a court, it is open to the detaining authority to come to his own satisfaction

based on the contents of the bail application keeping in mind the circumstance that there is likelihood of detenu being released on bail.

Merely because no bail application was then pending is no premise to hold that there was no likelihood of his being released on bail. The

words "likely to be released" connote chances of being bailed out, in case there be pending bail application or in case, if it is moved in

future, is decided. The word "likely" shows it can be either way. So without taking any such risk if on the facts and circumstances of each

case, the type of crime to be dealt with under the criminal law, including contents of the bail application, each separately or all this

compositely, all would constitute to be relevant material for arriving at any conclusion. The contents of bail application would vary from

one case to the other, coupled with the different set of circumstances in each case, it may be legitimately possible in a given case for a

detaining authority to draw an inference that there is likelihood of detenu being released on bail.

15) From the ratio laid down by the Supreme Court in the aforesaid case, it is clear that this Court cannot interfere with the inference drawn by the

detaining authority that there is likelihood of the detenu being admitted to bail. The contention of learned counsel for the petitioner is this regard is,

therefore, without any merit.

16) It has also been urged by the learned counsel for the petitioner that the petitioner is an illiterate person and he understands only Kashmiri and Urdu

language. According to the learned counsel, no translated scripts of the grounds of detention were furnished to the detenu, as such, he was unable to

make an effective representation against the same.

17) A perusal of the record shows that the detenu has qualified 12th class and, in fact, during the pendency of this petition, the detenu has sought

permission to appear in B.A. examination which means that the detainee is a sufficiently educated person. The documents produced by the petitioner

belies his own contention that he is an illiterate person. Even otherwise, there is an affidavit of the Executing Officer available in the detention record,

wherein he has specifically deposed that he has explained the grounds of detention to the detainee in the language he understands. Therefore, the

contention of the petitioner in this regard is without any substance.

18) Lastly, it has been argued by the learned counsel for the petitioner that the detainee in the instant case has not been furnished the material,

particularly the material which formed the basis of the grounds of detention, as a result of which he has been hampered from making an effective

representation against the order of detention.

19) The record produced by the respondents before this Court shows that the petitioner has been provided not only the detention order, grounds of

detention, police dossier but also the copies of FIRs and the statements of witnesses recorded under Section 161 Cr. P. C, reference whereof is made

in the grounds of detention. In fact, these documents form annexures to the grounds of detention and the petitioner has executed a receipt token of

having received those documents which is available in the detention record. The contention of learned counsel for the petitioner in this regard is,

therefore, not substantiated from the available record.

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