

(2020) 03 J&K CK 0072
In the Jammu And Kashmir High Court
Case No : Writ Petition (C) No. 155 Of 2019

Firdous Ahmad Wani

APPELLANT

Vs

State Of J&K And Others

RESPONDENT

Date of Decision : 19-03-2020

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 19
General Clauses Act, 1897 — Section 3, 11(1), 11(1)(a), 11(1)(b), 11(2), 21
Constitution Of India, 1950 — Article 22(5), 226

Citation : (2020) 03 J&K CK 0072

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Advocate : M. Ashraf, Asif Maqbool

Final Decision : Disposed Off

Judgement

Ali Mohammad Magrey, J

1. Impugned in this Habeas Corpus petition with a prayer for quashment thereof is the detention order no. 141/DMB/PSA/2019 dated 30.03.2019, purporting to have been passed by District Magistrate Baramulla, whereunder detenu namely Firdous Ahmad Wani s/o Late Ghulam Mohammad Wani R/o Mohalla Bazar Seri Warpora, Pattan District Baramulla, is under detention.

2. Grounds pleaded in support of prayer are that after having been quashed the earlier detention order no. 66/DMB/PSA/2018 dated 20th August 2018, the detenu was again detained in terms of the detention order impugned in this petition on the so called "dossier" placed before respondent no.2, on the same and similar grounds. It is submitted that his further detention was necessary to prevent him from indulging in activities prejudicial to the maintenance of the security of the State and national law, accordingly while in police custody he was ordered to be detained in preventive custody vide impugned detention order passed by District Magistrate, Baramulla. The earlier detention order was challenged in H.C. Petition No. 239/2018 which was allowed vide judgment dated

11th Dec. 2018, but instead of releasing him from custody, the detaining authority again passed the detention order impugned in the instant petition. During arguments the learned counsel has further elucidated the contents of petition with reference to annexures placed on record, and contended that neither the detention in question was legal nor were grounds thereof duly communicated to the detenu even though quite vague and unfounded.

3. In his counter affidavit, respondent no.2 has stated that the detenu's activities being prejudicial to security of the State, his further detention was necessary to prevent him from indulging in such acts, which was also approved by the Government and the State Advisory Board constituted u/s 14 of P.S. Act. During course of his submissions the respondents counsel besides reiterating the contents of counter affidavit has contended that in circumstances of the case the impugned detention is well founded in fact and law.

4. I have heard learned counsel and considered the matter. As per pleadings and contentions raised at bar the main ground of attack projected by petitioner against the detention in question is, that grounds of detention were not duly communicated to him, which prevented him from making an effective representation against the same and thereby he was deprived of an important constitutional right, and that the detaining authority did not apply mind while passing the detention order and has not revealed as to on what materials he assumed subjective satisfaction regarding necessity of having the subject detained even while he was already ordered to be set at liberty under court order passed in HCP no. 239/2018, particularly while the second detention vide impugned order was affected on the basis of facts and circumstances alleged in earlier detention order, as is evident from the dossiers prepared by police in respect of both the detention orders as also the grounds of detentions served upon the detenu in respect of two orders passed against him.

5. So far as the first ground taken i.e non communication of the grounds of detention is concerned, perusal of file reveals, that there is nothing to show or suggest that the grounds of detention couched in English language were explained to the detenu in a language understood by her, as there is no material to that effect on record. This according to the view taken by Hon'ble Apex Court in "Lallubhai Jogibhai Patel v. Union of India, (1981) 2 SCC 427"; the detenu did not know English, while the grounds of detention were drawn up in English and an affidavit filed on behalf of the detaining authority stated that while serving the grounds of detention were fully explained to the detenu, but the Apex Court held that, was not a sufficient compliance with the mandate of Article 22(5) which requires that the grounds of detention must be communicated to the detenu. The Apex Court observed as under:

"Communicate" is a strong word which means that sufficient knowledge of the basic facts constituting the 'grounds' should be imparted effectively and fully to the detenu in writing in a language which he understands. The whole purpose of communicating the 'grounds' to the detenu is to enable him to make a purposeful

and effective representation. If the 'grounds' are only verbally explained to the detenu and nothing in writing is left with him in a language which he understands, then that purpose is not served, and the constitutional mandate in Article 22(5) is infringed."

6. In view of the law laid down by the Apex Court in case titled *Lallubhai Jogibhai Patel v. Union of India* (supra) vitiates the detention order, as not amounting to effect communication of grounds, and resultant deprivation of the right to make representation against the same.

7. Regarding other ground urged at bar relating to passing of second detention order the question that needs consideration is whether such course was permissible in terms of section 19 of the Public Safety Act 1978. This section permits passing of second detention order where the earlier order passed in respect to a person is revoked or modified by the government or is not legal on account of any technical defect. In the instant case the first detention had been quashed by the court and, therefore, the authorities were not competent to pass fresh detention order on basis of same facts and circumstances as indicated above. As noticed there is neither any fresh material nor new activity attributable to the detenu of his continuous lodgment in Jail and his second detention is thus liable to be set aside on this ground alone.

8. In view of the settled legal position, fresh order of detention on the selfsame grounds is vitiated in the law and therefore could not sustain. I am supported by three Judge Judgement of the Supreme Court rendered in the case of *Ibrahim Bachu Bafan vs. State of Gujarat* (1985) 2 SCC 24. While noticing similar provision of Conservation of Foreign Exchange and provisions of Smuggling Activities Act 1974 (COFEPOSA), Supreme Court in paragraph 10 has held thus:-

" ...The power conferred under clauses (a) and (b) of sub-section (1) of Section 11 is in fact extension of the power recognized under Section 21 of the General Clauses Act and while under the General Clauses Act, the power is exercisable by the authority making the order, the named authorities under clauses (a) and (b) of Section 11 (1) of the Act are also entitled to exercise the power of revocation. When the High Court exercises jurisdiction under Article 226 of the Constitution it does not make an order of revocation. By issuing a high prerogative writ like habeas corpus or certiorari it quashes the order impugned before it and by declaring the order to be void and striking down the same it nullifies the order. The ultimate effect of cancellation of an order by revocation and quashing of the same in exercise of the high prerogative jurisdiction vested in the High Court may be the same but the manner in which the situation is obtained is patently different and while one process is covered by Section 11(1) of the Act, the other is not known to the statute and is exercised by an authority beyond the purview of sub-section (1) of Section 11 of the Act. It is, therefore, our clear opinion that in a situation where the order of detention has been quashed by the High Court, subsection (2) of Section 11 is not applicable and the detaining authority is not entitled to make another order under Section 3 of the Act on the same grounds".

9. This judgement was subsequently followed by the Supreme Court in the case of Chhagan Bagwan Kahar vs. N. L. Kalna & Ors, 1989 AIR 1234. Referring to earlier judgement of the Supreme Court in the case Ghulam Nabi Zaki vs. State of Jammu and Kashmir, 1970 (3) SCR 35: 1971 CriLJ (N) 24 which was rendered in the context of State PSA and also taking note of Constitution Bench Judgement in the case of Hadibandhu Dass vs. District Magistrate Cuttak (1969) 1 SCR 227, the Supreme Court in the case supra concluded thus:-

"... It emerges from the above authoritative judicial pronouncements that even if the order of detention come to an end either by revocation or by expiry of the period of detention there must be fresh facts of passing a subsequent order. A fortiori when a detention order is quashed by the Court issuing a high prerogative writ like habeas corpus or certiorari the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the Court strikes down an earlier order by issuing rule it nullifies the entire order. In the present case, no doubt, the order of detention contains fresh facts. In addition to that the detaining authority has referred to the earlier detention order and the judgement of the High Court quashing it, presumably for the purpose of showing that the detenu in spite of earlier detention order was continuing his bootlegging activities".

10. It is thus seen that detaining authority while arriving at subjective satisfaction has not only taken into consideration the future prospectus of the detenu indulging in similar activities but has also taken into consideration the grounds on which the earlier order of detention had been passed. The judgement referred to above lend support to the contention of the learned counsel for the petitioner-detenu that the detention order without fresh material was not sustainable.

11. That being so the grounds of challenge set up by petitioner, succeed and the detention stands vitiated.

12. The petition is accordingly, allowed and detention order no. 141/DMB/PSA/2019 dated 30.03.2019 purporting to have been passed by District Magistrate Baramulla, under which the detenu namely Firdous Ahmad Wani s/o Late Ghulam Mohammad Wani R/o Mohalla Bazar Seri Warpora, Pattan, District Baramulla, is under detention, is quashed with direction for his release forthwith.

13. The petition stands accordingly disposed of. Records of the case be returned to concerned Deputy Advocate General. No order as to the costs.