

(2023) 08 J&K CK 0009

In the Jammu And Kashmir High Court

Case No : Latters Patent Appeal No. 88 Of 2023

Ghulam Nabi

APPELLANT

Vs

UT Of J&K And Others

RESPONDENT

Date of Decision : 01-08-2023

Acts Referred:

Constitution Of India, 1950 — Article 21, 22(3), 22(3)(b), 22(5)
Jammu And Kashmir Public Safety Act, 1978 — Section 8, 9, 13
Indian Penal Code, 1860 — Section 34, 201, 354C, 376, 506
Information Technology Act, 2000 — Section 67A, 84B
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 21, 22
Code Of Criminal Procedure, 1973 — Section 161

Citation : (2023) 08 J&K CK 0009

Hon'ble Judges : Tashi Rabstan, J;Mohan Lal, J

Bench : Division Bench

Advocate : Waheed Choudhary, Monika Kohli

Final Decision : Disposed Of

Judgement

Tashi Rabstan, J

1. This Letters Patent Appeal is directed against the judgment dated 29.05.2023 passed by the learned Single Judge, whereby the appellant's Writ Petition i.e. WP(CrI) No.15/2023 titled 'Ghulam Nabi v. UT of J&K and Ors.' seeking quashment of detention order No.23/PSA of 2022 dated 03.10.2022, issued by District Magistrate, Ramban, was dismissed.

2. Learned counsel for the appellant has assailed the impugned judgment passed by the learned Single Judge dated 29.05.2023, inter alia, on the following grounds:

" a. That the bare perusal of the judgment impugned makes it amply clear that the same has been passed by the writ court in a casual and mechanical manner without proper appreciation to the peculiar facts and circumstances of the present case. On this ground alone, the judgment impugned required to be set

aside and writ petition be allowed by this Hon'ble Court.

b. That it was brought to the kind notice of the writ court that the order of detention is based on the dossier forwarded to the respondent no.2 by the respondent no.3 where by the reference has been made alleged three (03) FIRs out of which one FIR's at Police Station Banihal and Two FIRs at Police Station Ramssoo. The precise status of these FIRs were not considered by the detaining authority in the right perspective. The respondents had failed to take into consideration the fact that all these FIRs are stale in nature. Moreover, the petitioner has been bailed out in all these FIRs which matter has again not been taken into consideration while passing the detention order. All these facts are overlooked in the right manner.

c. That the learned writ court failed to appreciate that the provision for execution of detention order as provided under Section 9 of the J&K Public Safety Act has not been complied with the order of detention was never been read over and explained to the appellant in the language in the language that he understands. Furthermore the incriminating documents on the basis of which the order of detention has been passed were not supplied to the appellant. This fact has been admitted by the respondents in the execution report dated 06.10.2022 filed by the respondent no.2 along with objections to the writ petition.

d. That the learned writ court failed to appreciate that the ground of detention are verbatim of the dossier which clearly reflects the non application of mind of respondent no.2 but the learned writ court did not appreciate the same and rejected the contention of the appellant.

e. That the learned writ court did not appreciate that the translated version of documents has not been provided to the detainee and were never explained in the language which he understands. On this ground alone the judgment impugned deserves to be satisfied.

f. That the learned writ court erred in holding that the detainee has not availed the alternate remedy of filing review before the advisory board whereas the fact remains that he has not been provided with the translated version of the incriminating documents relied upon by the detaining authority, once he is not in possession of relevant documents there is no question of filing of any representation before the advisory board.

g. That the learned writ court failed to appreciate that the order of detention has been passed in a mechanical manner and did not meet the requirement of Public Safety Act.

h. That the Hon'ble writ court failed to appreciate that mere apprehension of breach of law and order is not sufficient to meet the standard of provision of law to detain the appellant. Mere surmise of the detaining authority especially when there are no reports of unrest since the detainee was released on bail cannot be subverted to restrict and hamper the personal liberty of the accused by way of

order of detention passed against him. The order impugned, therefore, cannot sustain and deserves to be quashed.

i. That the learned writ court further overlooked the fact and did not appreciate that the order of detention has been passed without application of mind. The subjective satisfaction of the detaining authority simply is based on the dossier and not substantiated on the basis of record. The order is an arbitrary exercise of the power and has been passed without application of mind. Its consequence are the deprivation to petitioner's fundamental right to life and liberty as guaranteed to him under Article 21 of the Constitution of India. On this ground the judgment deserves to be set aside.

j. That the learned writ court did not appreciate the personal liberty of an individual cannot be permitted to be observed in breach. By virtue of the powers vested with the respondents, the petitioner has been detained. There is no material to show that the detenu would act in any manner prejudicial to the maintenance of public peace and order. The provision of Public Safety Act cannot be pressed into aid for the purpose of passing the order of detention without any basis and without any appreciation of mind.

k. That the judgment impugned cannot be justified on the touch stone of any principle of law. It is further more submitted that the ground of detention are replica of the dossier as such there is not application of mind by the detaining authority. Therefore, the same is not sustainable and deserves to be set aside."

3. The detenu (Ghulam Nabi) was detained under detention order No.23/PAS of 2022 dated 03.10.2022, issued by the District Magistrate, Ramban, in purported exercise of powers conferred by Section 8 of the Jammu and Kashmir Public Safety Act, 1978.

4. The District Magistrate, Ramban issued the detention order against the detenu, inter alia, alleging that the activities of the detenu are highly prejudicial to the maintenance of public order and these activities are posing serious threat to the public peace and tranquility as he is habitual of indulging in the act of smuggling of narcotic substances. Besides being an influential hardcore criminal, the detenu is alleged to be notorious drug peddler and involved in number of cases, details whereof is as under:

i) FIR No. 133/2021 under Sections 354C/376/506/34/201 IPC 67A/84-B IT Act registered at Police Station Banihal.

ii) FIR No.115/2019 under Sections 8/21 NDPS Act registered at Police Station, Ramsoo.

iii) FIR No.68/2022 under Sections 8/21/22 NPDS Act registered at Police Station, Ramsoo.

5. Being aggrieved of the order of detention dated 03.10.2022 issued by the District Magistrate, Ramban, the detenu filed writ petition being WP(CrI)

No.15/2023, on various grounds, including the star ground that the writ petitioner has allegedly not been supplied with the relevant material relied upon by the detaining authority, as such, he was prevented from making an effective representation against the impugned order of detention.

6. Learned counsel for the writ petitioner/appellant submitted that the learned writ court has not properly addressed the plea raised by the detainee that he was not supplied the relevant material relied upon by the detaining authority while issuing the detention order.

7. On the other hand, learned Sr. AAG submitted that the entire material like detention order, dossier of detention, grounds of detention and copies of FIRs and other relevant documents have been handed over to the detainee at Central Jail, Jammu. She further submitted that the learned Single Judge has passed a very detailed and reasoned judgment which calls for no interference from this court and the appeal filed by the writ petitioner/appellant deserves dismissal as the same sans any merit and substance.

8. Heard learned counsel for the parties, perused the impugned judgment as well as the detention record produced by learned Sr. AAG.

9. A perusal of the grounds of detention would show that basis for issuance of detention order is the lodging of three FIRs viz. FIR No. 133/2021 under Sections 354C/376/506/34/201 IPC 67A/84-B IT Act registered at Police Station Banihal, FIR No.115/2019 under Sections 8/21 NDPS Act registered at

Police Station, Ramsoo and FIR No.68/2022 under Sections 8/21/22 NPDS Act registered at Police Station, Ramsoo.

10. Also, a bare perusal of the Execution Report would show that the following material was handed over to the detainee at Central Jail Jammu: the detention order (01 leaf), Notice of detention (01 leaf) grounds of detention (03 leaves), Dossier of detention (Nil), Copies of FIRs, Statements of Witnesses and other related relevant documents (Nil). Hence, the execution report itself makes it amply clear that the detainee was not provided with relevant material which prevented him to have an effective representation against the detention order.

11. Preventive detention as held in *A. K. Gopalan v. State of Madras* [1950SCR 88] and reiterated in *Rekha v. State of Tamil Nadu* [AIR2011 SCW 2262] is by its very nature repugnant to democratic ideals and an anathema to the rule of law. The Supreme Court in *Rekha's* case (supra), while emphasizing that Article 22(3) (b), Constitution of India, is to be read as an exception to Article 21, Constitution of India and not allowed to nullify the right to personal liberty guaranteed under the later, observed:

'Since however, Article 22 (3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal, but we must confine the power of preventive detention to very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of Constitution of India, which was won after

long arduous, historic struggle. It follows therefore that if law of land (Indian Penal Code and other penal statutes) can deal with the situation, recourse to the preventive detention law will be illegal.'

12. The Court further observed:

"It must be remembered that in case of preventive detention no offence is proved and the justification of such detention case is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as jurisdiction of suspicion. The Detaining Authority passes the order of detention on subjective satisfaction. Since Clause (3) of Article 22 specifically excludes the applicability of Clauses(1) and (2), the detenu is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however, technical, is, in our opinion, mandatory and vital.'

13. In Kamleshwar Ishwar Das Patel V. Union of India and (1995) 4 SCC 51 the Supreme court observed:

'The history of liberty is the history of procedural safeguards. These procedural safeguards are required to be zealously watched and enforced by the Court and their rigour cannot be allowed to be diluted on the basis of the nature of alleged activities of the detainee.'

14. Law on the subject was succinctly laid down by the Apex Court in Abdul Latif Abdul Wahab Sheikh v. B. K. Jha and another [(1987) 2 SCC

22] in following words:

'The procedural requirements are the only safeguards available to a detainee since the court is not expected to go behind the subjective satisfaction of the Detaining Authority. The procedural requirements are, therefore to be strictly complied with if any value is to be attached to the liberty of the subject and the Constitutional rights guaranteed to him in that regard.'

15. The Constitutional and Statutory safeguards guaranteed to a person detained under preventive detention law are meaningless unless and until the detenu is made aware of and furnished all the material that weighed with the detaining authority while making detention order. In the present case the Detention order makes mention of the material record such as dossier and other connecting documents relied upon by the Detaining Authority while making detention order. The grounds of detention make reference to case - FIR No. 133/2021 under Sections 354C/376/506/34/201 IPC 67A/84-B IT Act registered at Police Station Banihal, FIR No.115/2019 under Sections 8/21 NDPS Act registered at Police Station, Ramsoo and FIR No.68/2022 under Sections 8/21/22 NPDS Act registered at Police Station, Ramsoo, claimed to have been registered against the detenu. The involvement of detenu in the said cases appears to have weighed

with Detaining Authority while making detention order. The detention record indicates that no copies of above First Information Reports, statements recorded under section 161 Cr. P.C. and other material collected in connection with investigation of aforesaid cases, were ever supplied to detenu. The material, mentioned above thus assumes significance in the facts and circumstances of the case. It needs no emphasis, that the detenu cannot be expected to make a meaningful exercise of his Constitutional and Statutory rights guaranteed under Article 22(5) of Constitution of India and Section 13 of J&K Public Safety Act, 1978, unless and until the material on which the detention order is based, is supplied to detenu. It is only after the detenu has all said material available that he can make an effort to convince the Detaining Authority and there after Government that their apprehension concerning activities of detenu are baseless and misplaced. If the detenu is not supplied material, on which the detention order is based, he cannot be in a position to make an effective representation against his detention order. The failure on the part of the Detaining Authority to supply the material relied at the time of making detention order to the detenu, renders detention order illegal and unsustainable. While holding so, reference may be made to law laid down in *Thahira Haris Etc. Etc. v. Government of Karnataka* [AIR 2009 SC 2184]; *Union of India v. Ranu Bhandari* [2008, Cr. L. J. 4567]; *Dhannajoy Dass v. District Magistrate* [AIR, 1982 SC 1315]; *Sofia Ghulam Mohammad Bam v. State of Maharashtra & ors* [AIR, 1999, SC 3051]; and *Syed Aasiya Indrabi v. State of J&K & ors* [2009 (I) S.L.J 219].

16. Article 22(5) of Constitution provides a precious and valuable right to a person detained under preventive detention law - J&K Public Safety Act 1978, to make a representation against his detention. It needs no emphasis that a detenu, on whom preventive detention order is slapped, is held in custody without a formal charge and trial. The detenu is held in custody on a mere suspicion that his apprehended activities may be prejudicial to the security of the State or maintenance of public order. Article 22(5) of the Constitution and Section 13 of the Act, thus make it obligatory for Detaining Authority to provide detenu earliest opportunity of making an effective and meaningful representation against his detention. The object is to enable the detenu to convince the Detaining Authority and the Government, as the case may be, that all apprehensions regarding his activities are grossly misplaced and his detention is unwarranted. To make the Constitutional and Statutory right available to detenu meaningful, it is necessary that detenu be informed with all possible clarity what is/are apprehended activities that persuaded Detaining Authority to make detention order. In case grounds of detention are vague, ambiguous and confusing, the detenu cannot be expected to make a representation against his detention.

17. The baseline, that emerges from the above overview of case law on the subject of preventive detention is that whenever preventive detention is called in question in a court of law, the first and foremost task before the Court is to see whether the procedural safeguards, guaranteed under Article 22(5) Constitution

of India and Preventive Detention Law pressed into service to slap the detention, are adhered to.

18. The detainee in his writ petition specifically averred that the petitioner has not been supplied the relevant documents. However, the learned writ court has not satisfactorily addressed this plea of the detainee and only observed that the respondents have disputed the same by asserting that the entire material like detention order, dossier of detention, grounds of detention and copies of FIRs and other relevant have been handed over to the detainee at Central Jail, Jammu. The fact of the matter remains that the execution report shows that he has not been supplied with the Dossier of detention, Copies of the FIRs, Statements of Witnesses and other relevant documents. This aspect of the matter has been overlooked by the learned writ court.

19. For the foregoing reasons and the law laid down as above, this appeal is allowed. We set aside the judgment passed by the learned single Judge dated 29.05.2023. Impugned order of detention No. 23/PSA of 2022 dated 03.10.2022, passed by the District Magistrate, Ramban is, as such, quashed. The detainee namely Ghulam Nabi Gujjar S/o Khuda Baksh, R/o Amkoot, Tehsil Banihal District Ramban, is ordered to be released from the preventive custody forthwith provided he is not required in connection with any other case(s).

20. Detention record, as produced, be returned to the learned Sr. AAG.

21. Disposed of, accordingly.