

(2022) 05 J&K CK 0057

In the Jammu And Kashmir High Court

Case No : Letters Patent Appeal (LPA) No. 40 Of 2022

Javaid Ahmad Najar

APPELLANT

Vs

UT Of J&K And Anr

RESPONDENT

Date of Decision : 23-05-2022

Acts Referred:

Constitution Of India, 1950 — Article 22(3), 22(5)
Jammu And Kashmir Public Safety Act, 1978 — Section 8
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 147, 148, 149, 307, 336, 353, 427
Unlawful Activities (Prevention) Act, 1967 — Section 13

Citation : (2022) 05 J&K CK 0057

Hon'ble Judges : Ali Mohammad Magrey, J;Puneet Gupta, J

Bench : Division Bench

Advocate : M.A Qayoom, Sajad Ashraf

Final Decision : Dismissed

Judgement

Ali Mohammad Magrey, J

1. The present appeal has been preferred by the detenu, Javaid Ahmad Najar, through his brother, Manzoor Ahmad Najar, against the judgment and order dated 03.02.2022, delivered by a Single Bench of this Court in WP(Crl) No. 91/2021 in which the detention order No. DMS/PSA/26/2021 dated 24.06.2021, issued by the District Magistrate, Srinagar, was challenged. By virtue of the said detention order, the appellant/detenu was placed under preventive detention in exercise of powers under Section 8 of the J&K Public Safety Act, 1978. The said appellant/detenu was ordered to be lodged at Central Jail, Srinagar.

2. Mr. M.A Qayoom, learned Counsel for the Appellant, submitted that the learned Writ Court, while passing the impugned Judgment, has not appreciated the legal position governing the subject in its true and correct perspective and in tune with the facts of the case. While reiterating the grounds urged in the memo of appeal, the learned Counsel submitted that the detention Order was, primarily,

bad in law on the ground that there was no compelling circumstance for the detaining authority to pass the impugned Order of detention when the detenu was already in custody in FIR 73/2019 registered in Police Station, Soura, for the commission of offences punishable under Sections 147, 148, 149, 336, 427, 353 and 307 RPC 13 ULA(P) Act. It is pleaded that the learned Writ Court has brushed aside the aforesaid important aspect of the matter urged by the Appellant in the Writ Petition seeking quashing of the impugned detention Order dated 26.06.2021 passed by the Respondent No.2 and has dismissed the Petition filed by the petitioner (therein).

3. Mr Sajjad Ashraf Mir, the learned Government Advocate, representing the Respondents, has vehemently supported the impugned Judgment passed by the learned Writ Court.

4. The learned counsel for the appellant has raised primarily three issues before the Court questioning the validity of the detention. The first point taken by the learned counsel for the appellant/detenu is that the detention order was passed while the detenu was already in custody in the aforesaid FIR. In these circumstances, it was submitted by the learned counsel for the appellant/detenu, the detaining authority ought to have satisfied himself with the fact that there was imminent likelihood of release of the detenu in the case and that it was necessary to detain the detenu in order to prevent him from indulging in prejudicial activities. According to the learned counsel for the appellant-detenu, there is no such satisfaction recorded in the grounds of detention. He placed reliance on the decision of the Supreme Court in the case of "Surya Prakash Sharma v. State of U.P. and others: 1994 SCC (Cri) 1691" to submit that since the said satisfaction was not recorded, the detention order was vitiated.

5. The second point taken by the learned counsel for the appellant was that non-supply of relevant material/ documents also vitiated the detention order. In this context, it was the case of the appellant that no documents at all were supplied to the appellant/detenu. The non-supply of relevant documents seriously undermines the capacity of a detenu to make an effective representation against the detention and that in itself would be a ground to declare the detention void. This right flows from the Constitution of India. In support, he referred to the decision of the Supreme Court in the case of "Sophia Gulam Mohd. Bham v. State of Maharashtra: AIR 1999 SC 3051".

6. The third point raised by the learned counsel for the appellant-detenu was based on vagueness in grounds of detention.

7. The learned counsel for appellant (detenu) further submits that the detenu has not been provided the material referred to in the grounds of detention resultantly the right of making effective representation against the impugned order of detention, as enshrined under Article 22(3) of the Constitution, has been violated.

8. On the other hand, Mr Sajjad Ashraf Mir, learned GA, defended the order of

detention, and he responded to each of the points. With regard to the first point he submitted that there is a mention in the grounds of detention about the arrest of the detenu with reference to the FIR 73/2019. Therefore, according to him, the detaining authority was aware of the fact that the detenu was already in custody when the detention order was passed. He, therefore, submitted that the point raised by the learned counsel for the appellant on this score was untenable.

9. With regard to the plea of non-supply of material/ documents, Mr. Sajjad Ashraf Mir, learned GA, placed before us the record pertaining to the detention. On going through the same, we find that there is a signed document said to have been signed by the detenu, Javaid Ahmad Najar. The said document is titled "Receipt of Detention Papers" on which the detenu has also put his signatures having been acknowledged to have received ten leaves.

10. Based upon the said receipt, Mr Sajjad Ashraf Mir, learned GA submits that the grounds of detention had been supplied along with other relevant documents and, therefore, the Appellant-detenu cannot make any grievance on this ground.

11. Mr Sajjad Ashraf Mir, learned GA, submits that insufficiency of supply of material shall not form a ground for vitiating the detention of the detenu. He further submits that the detenu was required to file representation on the material whatever supplied and could have projected the grounds of non-supply of the material before the detaining authority, which he has failed, therefore, non-supply of material vitiates the detention, has no substance. He further averred that there is no non-application of mind or vagueness in grounds. He has referred to and relied upon the Judgment reported as "AIR 2001 Supreme Court 301 titled R. Keshava Vs. M. B. Prakash and Ors".

12. Mr Sajjad Ashraf Mir, GA further, submits that the impugned order of detention is well founded and there is nothing bad about it. He submits that the detenu has been provided the material relied upon by the detaining authority while the detenu was under custody in the aforesaid FIR. He further submits that the detenu has also been informed about his right of making representation against his detention. He submitted that the detaining authority has fully applied its mind while issuing the detention order and there is nothing on record to controvert it. Learned State Counsel referred to and relied upon the law laid down in 1981 (4) SCC 216; AIR (SC) 1975 1143; 2002 (6) SCC 735 ; AIR 2000 SC 301.

13. We have heard the learned Counsel for the parties and perused the record. We have also gone through the relevant detention records as made available before the Court by the learned Government Advocate.

14. We shall take up the first point with regard to the ground of satisfaction that has to be recorded by the detaining authority in case the detenu is already in custody in connection with some other case. In this context we need to refer to the decision of the Supreme Court in Surya Prakash Sharma (supra). The relevant paras are extracted herein below:

“. The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in custody has had been engaging the attention of this Court since it first came up for consideration before a Constitution Bench in *Rameshwar Shaw v. District Magistrate, Burdwan*. To eschew prolixity we refrain from detailing all those cases except that of *Dharmendra Suganchand Chelawat v. Union of India*, wherein a three Judge Bench, after considering all the earlier relevant decisions including *Rameshwar Shaw* answered the question in the following words:

The decisions referred to above lead to the conclusion that an order for 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 (i) the detaining authority was aware of the fact that the detenu is already in detention: and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be sustained. Though the grounds of detention indicate the detaining authority's awareness of the fact that the detenu was in custody at the time of making the order of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of the averment made in grounds of detention that if the aforesaid *Surya Prakash Sharma* is released on bail "he may again indulge in serious offences causing threat to public order". (emphasis supplied) To put it differently, the satisfaction of the detaining authority that the detenu might indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified.

On the conclusions as above we quash the order of detention."

16. From the above decision, it is evident that for an order of detention to be valid in respect of a person in custody, it is necessary that the grounds of detention must show that; (i) the detaining authority was aware of the fact that the detenu is already in custody; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression 'compelling reasons' has also been explained by the Supreme Court as signifying that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release

from custody he would indulge in prejudicial activities and that it was necessary to detain him in order to prevent him from engaging in such activities.

17. In the present case we find that although there is mention of the fact that the detenu had been arrested in connection with FIR 73 of 2019 but, it is not clear as to whether the detaining authority was aware of the fact that the detenu continued to be in custody. Furthermore, assume that the detaining authority was aware that the detenu was in custody in respect of FIR No. 73/2019, the compelling reasons, referred to above, have not been indicated in the grounds of detention. In other words, the grounds of detention nowhere make a mention or indicate satisfaction that the detenu was being likely to be released from custody in near future. Therefore, in view of the decision of the Supreme Court in *Surya Prakash Sharma*, this alone would vitiate the detention order.

18. Now move to the second point which pertains to the non-supply of relevant material in order that the detenu could make an effective representation against his detention. According to the learned GA, only 10 leaves along with dossier have been provided to the detenu. On examination of the records there are as many as 21 leaves on the record file, which demonstrates that full material has not been furnished to the Detenu for making an effective representation, on this ground also would vitiate the detention order as well.

19. We may refer to Judgment of Apex Court in case "*Ibrahim Ahmad Batti V. State of Gujarat*, (1982) 3 SCC 440, the Apex Court, relying on its earlier Judgments in *Khudiram Das v. State of W. B.*, (1975) 2 SCR 81; *Ichhu Devi Choraria v. Union of India*, (1980) 4 SCC 531. Para 10 of the Judgment being relevant is extracted as under:-

" Two propositions having a bearing on the points at issue in the case before us, clearly emerge from the aforesaid resume of decided cases: (a) all documents, statements and other materials incorporated in the grounds by reference and which had influenced the mind of the detaining authority in arriving at the requisite subjective satisfaction must be furnished to the detenu along with the grounds or in any event not later than 5 days ordinarily and in exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of his detention, and (b) all such material must be furnished to him in a script or language which he understands and failure to do either of the two things would amount to a breach of the two duties cast on the detaining authority under Article 22(5) of the Constitution."

20. In *Khudiram's* case (*supra*), the Apex Court has explained what is meant by 'grounds on which the order is made' in context of the duties cast upon the detaining authority and the corresponding rights accruing to the detenu under Article 22(5).

21. In *Smt. Ichhu Deve's Case* (*Supra*), the Supreme Court has taken the view that documents, statements and other materials referred to or relied upon in the grounds of detention by the detaining authority in arriving at its subjective

satisfaction get incorporated and become part of the grounds of detention by reference and the right of the detenu to be supplied copies of such documents, statements and other materials flows directly as a necessary corollary from the right conferred on the detenu to be afforded the earliest opportunity of making a representation against the detention, because unless the former right is available the latter cannot be meaningfully exercised.

22. The third point which was urged by the learned counsel for the appellant was that translated copies of the detention order/ grounds of detention were not supplied and this can itself invalidate the detention of the detenu. Reliance was placed on the decision of the Supreme Court in the case "Razia Umar Bakshi v. Union of India and others: AIR 1980 SC 1751". In that decision, the Supreme Court had observed that where the detaining authority is satisfied that the grounds are couched in a language which is not known to the detenu, it must see to it that the grounds are explained to the detenu, a translated script is given to him and the grounds bear some sort of a certificate to show that the grounds have been explained to the detenu in the language which he understands. In the present case, it is an admitted fact that the grounds of detention were not furnished to the detenu, in a language, which he understands, is yet another ground for invalidating the detention order.

23. We have also considered the submissions of Mr. Sajjad Ashraf, learned GA, in so far as non-supply of complete material is concerned. As per the constitutional and statutory mandate, the detaining authority is under obligation to supply the material/documents forming the basis for detention of the detenu. The judgments referred to and relied upon by Mr. Sajjad Ashraf, learned GA, are not relevant being not connected with the issues raised by the appellant, therefore, distinguishable.

24. For all these reasons, the impugned judgment dated 03.02.2022 passed by the learned Single Judge in WP CrI No. 91/2021 is set-aside and the detention order No. DMS/PSA/26/2021 of 2021 dated 24.06.2021 is quashed. The appellant/detenu namely Javaid Ahmad Najar s/o Ghulam Qadir Najar r/o Pathar Masjid, Zaina Kadal, Srinagar, is directed to be released forthwith, if he is not, otherwise in custody in connection with some other case(s).

25. Records be returned to learned Govt Advocate.