

(2022) 07 J&K CK 0003

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 64 Of 2021 (O&M)

Kamaljeet Singh

APPELLANT

Vs

UT Of J&K And Ors

RESPONDENT

Date of Decision : 06-07-2022

Acts Referred:

Defence Of India Rules, 1962 — Rule 30, 30(1)(b)
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 21, 22, 29
Indian Penal Code, 1860 — Section 188, 269, 270, 425
Jammu And Kashmir Excise Act, 1958 — Section 48A, 50
Arms Act, 1959 — Section 3, 25
Delhi Municipal Corporation Act, 1957 — Section 51
Jammu And Kashmir Public Safety Act, 1978 — Section 8(1), 8(3)
Telangana Prevention Of Dangerous Activities Of Boot-Leggings, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders Land-Grabbers, Spurious Seed Offenders, Insecticide Offenders, Fertiliser Offenders, Food Adulteration Offenders, Fake Document Offenders, Scheduled Commodities Offenders, Forest Offenders, Gaming Offenders, Sexual Offenders, Explosive Substances Offenders, Arms Offenders, Cyber Crime Offenders And White Collar Or Financial Offenders Act, 1986 — Section 2(a), 2(x)

Citation : (2022) 07 J&K CK 0003

Hon'ble Judges : Rajnesh Oswal, J

Bench : Single Bench

Advocate : M. I. Khan, Amit Gupta

Final Decision : Allowed

Judgement

Rajnesh Oswal, J

1. Through the medium of this writ petition, the petitioner has questioned the detention order No. 12 of 2021 dated 06.10.2021 passed by the District Magistrate, Jammu-respondent No. 3, whereby the petitioner has been detained under the Public Safety Act.

2. The petitioner has assailed the aforesaid detention order on the following grounds:

(i) That the respondent No. 3 has passed the order impugned without application of mind as there was no material placed along with the recommendation of the Sr. Superintendent of Police, Jammu for detention of the petitioner.

(ii) That the detention order, dossier and other connected material has not been read over and explained to the petitioner in the language which the petitioner understands.

(iii) That the petitioner has not been informed by the Detaining Authority of his right to make representation to the detaining authority itself in addition to his right to make representation against his detention to the Government.

(iv) That the Additional Sessions Judge, Jammu has rejected the remand application of the petitioner, therefore, it is apparent that the petitioner has been falsely implicated in the said case.

3. Counter affidavit has been filed by the respondent Nos. 3 & 4. Respondent No. 3 in his reply has stated that the Sr. Superintendent of Police Jammu vide its dossier dated 30.09.2021 has brought to his notice that the petitioner is a hard-core criminal and his criminal record reveals his addiction to heinous crimes of stabbing, drug dealing, buying and selling illegal liquor etc. The activities of the petitioner are very prejudicial to the maintenance of public order and warrants immediate preventive measures. It is also stated that the petitioner is a history sheeteer of Police Station, Gandhi Nagar, whose history sheet was opened on 25.11.2019 and thereafter, he was under constant surveillance, as he has close links with other notorious criminals. It is further stated that FIR No. 200/2017 under Section 8/21/22 of NDPS Act at Police Station, Gandhi Nagar, Jammu, FIR No. 124/2019 under section 8/21/22/29 NDPS Act at Police Station, Gangyal, Jammu, FIR No. 35/2021 under section 188 IPC at Police Station, Gandhi Nagar, Jammu, FIR No. 60/2021 under section 8/21 NDPS Act, 48-A, 48F/Excise Act 3/25 Arms Act, 51 DMC Act at Police Station, Miran Sahib Jammu and FIR No. 171/2021 under section 188, 269, 270 of IPC, 48-A/50 Excise Act at Police Station, Gandhi Nagar, Jammu have been registered against the petitioner. It was also stated that ordinary law has not proved adequate in order to deter the petitioner from indulging in repeated illegal acts, as such, detention order was passed by the respondent No. 3. It is also stated that detention order was executed on 07.10.2021. The detention order and grounds of detention were read over to the petitioner by the Executing Agency concerned in English, Hindi and Dogri languages. It is also stated that the material on the basis of which, the grounds of detention were formed by the respondent No. 3, was also supplied to the petitioner. To the same extent, reply has been filed by the respondent No. 4.

4. Mr. M. I. Khan, learned counsel for the petitioner vehemently submitted that a bare perusal of the order of detention would reveal that the respondent No. 3 has not applied his mind as he has mentioned that the petitioner is involved in crimes of stabbing and drug dealing. He further submitted that there is no allegation of stabbing against the petitioner. He further argued that the petitioner

could not have been detained on the pretext of maintenance of public order as the FIRs registered against the petitioner, nowhere demonstrate that the petitioner at any point of time has disturbed the public order.

5. On the other hand, Mr. Amit Gupta, learned AAG vehemently argued that the petitioner is a habitual offender and all the constitutional and procedural safeguards have been followed by the respondents while passing and executing the detention order.

6. Heard and perusal the record.

7. From the record, it is evident that the petitioner has been supplied with all the material relied upon by the detaining authority while passing order of detention against proper receipt as is evident from the receipt of grounds of detention dated 07.10.2021. From the receipt, it is also evident that the petitioner was read over the detention order as also the other documents. Similarly, it is also evident that the petitioner was also informed about his right of making the representation to the Government as well as to the detaining authority.

8. The contention raised by the learned counsel for the petitioner is that the respondent No. 3 has not applied his mind with regard to the material placed along with the dossier, as perusal of the order of detention dated 06.10.2021 reveals that the respondent No. 3 has mentioned that the petitioner was addicted to commission of heinous crimes of stabbing drug dealing etc. A perusal of all the FIRs as mentioned above reveal that there is no allegation that the petitioner at any point of time was involved in any stabbing incident. The satisfaction recorded by the respondent No. 3 that the petitioner is a drug dealer is also not forthcoming from the record. So far as FIR No. 200/2017 under Section 8/21/22 of NDPS Act of Police Station, Gandhi Nagar and FIR No. 124/2019 under section 8/21/22/29 NDPS Act of Police Station, Gangyal are concerned, there are no allegations that the petitioner was involved in the illicit dealing of drugs. In these FIRs, the allegations are with regard to the possession of the contraband and there is nothing on record that the petitioner was selling the said contraband to anyone. Rather in FIR No. 60/2021 under section 8/21 NDPS Act, 48-A, 48F/Excise Act 3/25 Arms Act, 51 DMC Act of Police Station, Miran Sahib Jammu, the petitioner was not even named in the FIR and even nothing was recovered from his possession. So far as, FIR No. 35/2021 under section 188 IPC at Police Station, Gandhi Nagar, Jammu is concerned, the allegation is with regard to the non-compliance of direction of the Police Officer. Likewise, the allegation in FIR No. 171/2021 under section 188, 269, 270 of IPC, 48-A/50 Excise Act registered with Police Station, Gandhi Nagar, Jammu is that the petitioner was selling liquor to the customers at his residence, but the petitioner fled away from the spot.

9. Now, it is to be seen as to whether on the basis of FIRs mentioned above, it can be said that the detention of the petitioner was necessary for maintenance of public order. Under section 8 (1) of the Jammu and Kashmir Public Safety Act, the government may detain any person if the government is satisfied that the

detention is necessary with a view to prevent such person from acting in any manner prejudicial to the maintenance of public order. Section 8(3) of the Act defines the activities those are considered as prejudicial to the maintenance of public order and the same is reproduced as under:

(3) For the purposes of sub-section (1),

[(a) Omitted]

(b) "acting in any manner prejudicial to the maintenance of public order" means-

(i) promoting, propagating, or attempting to create feelings of enmity or hatred or disharmony on the ground of religion, race, caste, community, or region;

(ii) attempting to commit, or committing, or instigating, inciting, provoking or otherwise abetting the commission of mischief within the meaning of section 425 of the Indian Penal Code where the commission of such mischief disturbs or is likely to disturb public order;

(iii) attempting to commit or committing or instigating, inciting, provoking or otherwise abetting the commission of an offence punishable with death or imprisonment for life or imprisonment of a term extending to 7 years or more where the commission of such offence disturbs or is likely to disturb public order;

10. In *Vijay Narain Singh v. State of Bihar* reported in (1984) 3 SCC 14, the Apex Court has observed as under:

"32. ... It is well settled that the law of preventive detention is a hard law and therefore it should be strictly construed. Care should be taken that the liberty of a person is not jeopardised unless his case falls squarely within the four corners of the relevant law. The law of preventive detention should not be used merely to clip the wings of an accused who is involved in a criminal prosecution. It is not intended for the purpose of keeping a man under detention when under ordinary criminal law it may not be possible to resist the issue of orders of bail, unless the material available is such as would satisfy the requirements of the legal provisions authorising such detention. When a person is enlarged on bail by a competent criminal court, great caution should be exercised in scrutinising the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal court."

11. Also in *Union of India v. Yumnam Anand M.* reported in (2007) 10 SCC 190, Apex Court has observed as under:

"In case of preventive detention no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. But at the same time, a person's greatest of human freedoms i.e. personal liberty is deprived, and, therefore, the laws of preventive detention are strictly construed, and a meticulous compliance with the

procedural safeguard, however technical, is mandatory. The compulsions of the primordial need to maintain order in society, without which enjoyment of all rights, including the right of personal liberty would lose all their meanings, are the true justifications for the laws of preventive detention. This jurisdiction has been described as a "jurisdiction of suspicion", and the compulsions to preserve the values of freedom of a democratic society and social order sometimes merit the curtailment of the individual liberty. To lose our country by a scrupulous adherence to the written law, said Thomas Jefferson, would be to lose the law, absurdly sacrificing the end to the means. No law is an end itself and the curtailment of liberty for reasons of State's security and national economic discipline as a necessary evil has to be administered under strict constitutional restrictions. No carte blanche is given to any organ of the State to be the sole arbiter in such matters."

12. Thus, in view of the aforesaid judgements, a person may be detained under preventive detention laws provided the case falls within the parameters of law laid down under the Act. The perusal of detention order reveals that in all the FIRs, the allegations against the petitioner are with regard to the commission of offences those do not fall within the realm of "public order" as defined by section 8(3) of the Act as there are no allegations against the petitioner regarding his activities affecting public at large. The allegations may amount to law and order issue but in no manner can be said to have disturbed the public order. In *Mallada K Sri Ram v. State of Telangana*, 2022 SCC OnLine SC 424, Apex Court has considered the distinction between "law and order" and "public order" and observed as under:

12. The distinction between a disturbance to law and order and a disturbance to public order has been clearly settled by a Constitution Bench in *Ram Manohar Lohia v. State of Bihar*. The Court has held that every disorder does not meet the threshold of a disturbance to public order, unless it affects the community at large. The Constitution Bench held:

"51. We have here a case of detention under Rule 30 of the Defence of India Rules which permits apprehension and detention of a person likely to act in a manner prejudicial to the maintenance of public order. It follows that if such a person is not detained public disorder is the apprehended result. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. Does the expression "public order" take in every kind of disorders or only some of them? The answer to this serves to distinguish "public order" from "law and order" because the latter undoubtedly takes in all of them. Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival

communities and one of them tried to raise communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances which subvert the public order are. A District Magistrate is entitled to take action under Rule 30(1)(b) to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances.

52. It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. By using the expression "maintenance of law and order" the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules."

(emphasis supplied)

13. In *Banka Sneha Sheela v. State of Telangana* reported in 2021(9) SCC 415, Apex Court held as under:

"9. ...learned counsel appearing on behalf of the petitioner has raised three points before us. First and foremost, he said there is no proximate or live connection between the acts complained of and the date of the detention order, as the last act that was complained of, which is discernible from the first 3 FIRs (FIRs dated 12-12-2019, 12-12-2019 and 14-12-2019), was in December 2019 whereas the detention order was passed 9 months later on 28-9-2020. He then argued, without conceding, that at best only a "law and order" problem if at all would arise on the facts of these cases and not a "public order" problem, and referred to certain judgments of this Court to buttress the same. He also argued that the detention order was totally perverse in that it was passed only because anticipatory bail/bail applications were granted. The correct course of action would have been for the State to move to cancel the bail that has been granted if any further untoward incident were to take place.

12. While it cannot seriously be disputed that the detenu may be a "white collar offender" as defined under Section 2(x) of the Telangana Prevention of Dangerous Activities Act, yet a preventive detention order can only be passed if his activities adversely affect or are likely to adversely affect the maintenance of public order. "Public order" is defined in the Explanation to Section 2(a) of the Telangana Prevention of Dangerous Activities Act to be a harm, danger or alarm or a feeling of insecurity among the general public or any section thereof or a

grave widespread danger to life or public health.

15. There can be no doubt that what is alleged in the five FIRs pertain to the realm of "law and order" in that various acts of cheating are ascribed to the detenu which are punishable under the three sections of the Penal Code set out in the five FIRs. A close reading of the detention order would make it clear that the reason for the said order is not any apprehension of widespread public harm, danger or alarm but is only because the detenu was successful in obtaining anticipatory bail/bail from the courts in each of the five FIRs. If a person is granted anticipatory bail/bail wrongly, there are well-known remedies in the ordinary law to take care of the situation. The State can always appeal against the bail order granted and/or apply for cancellation of bail. The mere successful obtaining of anticipatory bail/bail orders being the real ground for detaining the detenu, there can be no doubt that the harm, danger or alarm or feeling of insecurity among the general public spoken of in Section 2(a) of the Telangana Prevention of Dangerous Activities Act is make-believe and totally absent in the facts of the present case.

32. On the facts of this case, as has been pointed out by us, it is clear that at the highest, a possible apprehension of breach of law and order can be said to be made out if it is apprehended that the detenu, if set free, will continue to cheat gullible persons. This may be a good ground to appeal against the bail orders granted and/or to cancel bail but certainly cannot provide the springboard to move under a preventive detention statute. We, therefore, quash the detention order on this ground...."

14. Both the above mentioned decisions have been followed by Hon'ble Apex Court in case titled " Shaik Nazneen vs. The State of Telangana and Ors." bearing no. Criminal Appeal NO. 908 OF 2022 (@ SLP (CRL.) NO. 4260 OF 2022, decided on 22.06.2022, wherein it has been held that in two recent decisions, this Court had set aside the detention orders which were passed, under the same Act, i.e., the present Telangana Act, primarily relying upon the decision in Dr. Ram Manohar Lohia case (supra) and holding that the detention orders were not justified as they were dealing with a law and order situation and not a public order situation.

15. Further, respondent No. 3 while passing the detention order has observed that the petitioner is involved in heinous crimes of stabbing whereas the fact remains that in none of the FIRs there is any allegation that the petitioner has stabbed anyone. Thus, this Court is of the considered view that the order of detention suffers from the vice of non-application of mind and is arbitrary in nature.

16. The order impugned is not sustainable on yet another ground as the order of detention is the verbatim reproduction of the Dossier submitted by the respondent No. 4 to the respondent No. 3. The detaining authority was required to apply its mind independently with regard to the material placed before it so as

to derive satisfaction that it has become necessary to detain the petitioner. But the same has not been done in the instant case. This too renders the detention order illegal. Reliance is placed upon the decision of Apex Court in case titled *Jai Singh v. State of J & K*, reported in (1985) 1 SCC 561 and the relevant portion is reproduced s under:

"-----First taking up the case of Jai Singh, the first of the petitioners before us, a perusal of the grounds of detention shows that it is a verbatim reproduction of the dossier submitted by the senior Superintendent of Police, Udhampur to the District Magistrate requesting that a detention order may kindly be issued. At the top of the dossier, the name is mentioned as Sardar Jai Singh, father's name is mentioned as Sardar Ram Singh and the address is given as Village Bharakh, Tehsil Reasi. Thereafter it is recited "The subject is an important member of...." Thereafter follow various allegations against Jai Singh, paragraph by paragraph. In the grounds of detention, all that the District Magistrate has done is to change the first three words "the subject is" into "you Jai Singh, s/o Ram Singh, resident of Village Bharakh, Tehsil Reasi". Thereafter word for word the police dossier is repeated and the word "he" wherever it occurs referring to Jai Singh in the dossier is changed into "you" in the grounds of detention. We are afraid it is difficult to find greater proof of non-application of mind. The liberty of a subject is a serious matter and it is not to be trifled with in this casual, indifferent and routine manner."

17. In view of the above, this petition is allowed. Detention order No. 12 of 2021 dated 06.10.2021 passed by the District Magistrate, Jammu-respondent No. 3 is quashed. Petitioner (detenue) be set free from the preventive custody, provided his custody is not required in any other case.