

(2023) 02 J&K CK 0009

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 132 Of 2022

Khalid Nazir Wagay

APPELLANT

Vs

Union Territory Of J&K &Ors

RESPONDENT

Date of Decision : 09-02-2023

Acts Referred:

Constitution Of India, 1950 — Article 22(5)

Citation : (2023) 02 J&K CK 0009

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Ashiq Hussain, Usman Gani

Final Decision : Allowed

Judgement

Sanjay Dhar, J

1) By the instant petition, the petitioner has sought quashment of order No.07/DMK/PSA/2022 dated 29.03.2022, issued by District Kulgam, (for brevity "Detaining Authority"). In terms of the aforesaid order, Khalid Nair Wagay(for short "the detenu") has been placed under preventive detention in order to prevent him from acting in any manner prejudicial to the security, sovereignty and integrity of the State.

2) The petitioner has contended that the Detaining Authority has passed the impugned detention order mechanically without application of mind, inasmuch as the grounds of detention are mere reproduction of the dossier. It has been further contended that the Statutory procedural safeguards have not been complied with in the instant case as whole of the material that formed basis of the grounds of detention and the consequent order of detention has not been provided to the detenu and that there has been total non-application of mind on the part of the detaining authority while passing the impugned detention order.

3) Upon being put to notice, the respondents appeared through their counsel and filed their reply affidavit, wherein they have disputed the averments made in the

petition and insisted that the activities of the detainee are highly prejudicial to the security of the State. It is pleaded that the detention order and grounds of detention along with the material relied upon by the detaining authority were handed over to the detainee and the same were read over and explained to him. It is contended that the grounds urged by the petitioner are legally misconceived, factually untenable and without any merit. That the detainee was informed that he can make a representation to the government as well as to the detaining authority against his detention. It is further claimed in the reply affidavit that all the statutory and constitutional requirements have been fulfilled and complied with by the detaining authority and that the order has been issued validly and legally. The respondents have placed reliance on the judgments of the Supreme Court in *Hardhan Saha v. State of W.B* (1975) 3 SCC 198, *The Secretary to Govt. Public Law and Order-F and anr. vs. Nabia and another*, (2015) 12 SCC 127, *Gautam Jain vs. Union of India*, 2017 (1) Jammu Kashmir Law Times Vol. 1 (SC) 1, *Debu Mahato vs. State of WB*, AIR 1974 SC 816 and *Ashok Kumar vs. Delhi Administration and others*, AIR 1982 SC 1143. In order to buttress the contentions raised in the counter affidavit, the respondents have produced the detention record.

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

5) Learned counsel for the petitioner, while seeking quashment of the impugned order, projected various grounds but his main thrust during the course of arguments was on the following grounds:

(I) That the petitioner's right of making an effective representation against his detention has been violated as whole of the material, on the basis of which the grounds of detention have been formulated, has not been supplied to him.

(II) That the impugned order of detention is based upon stale incidents having no proximate link to the activities alleged to be prejudicial to the maintenance of public order.

6) Per contra, the learned counsel for the respondents has made an attempt to justify the passing of the order impugned by contending that the detainee was a habitual criminal, inasmuch as there were various FIRs pending against him and on this basis, the Detaining Authority was well within its jurisdiction to pass the impugned order of detention as there was every likelihood of the detainee indulging in similar activities. It has been further contended that all the documents relied upon by the Detaining Authority were provided to the detainee and in token of having received the same, the detainee has signed the receipt. It is also urged that the contents of the documents were read over and explained to the detainee in the language understood by him.

7) While going through the detention records, as produced, the first ground projected by the learned counsel for the petitioner gets support from the material on record. A perusal of the detention record produced by learned counsel for the respondents reveals that the material has been received by the

petitioner on 13.04.2022. Report of Executing Officer in this regard forms part of the detention record, a perusal whereof reveals that it bears the signature of petitioner and according to it, the petitioner has received copy of detention order (01 leaf), Notice of detention (01 leaf), grounds of detention (03 leaves), dossier of detention (Nil), Copies of FIR, statements of witnesses and other related relevant documents (Nil) (total 05 leaves).

8) It is clear from the execution report, which forms part of the detention record, that copy of the police dossier has not at all been supplied to the detainee. If we have a look at the grounds of detention, it bears reference to three FIRs, i.e., FIR Nos.183/2016, 191/2016 and 313/2017. It was incumbent upon respondents to furnish not only the copy of these FIRs but also the statements of witnesses recorded during investigation of these FIRs and other material on the basis of which petitioner's involvement in the said FIRs is shown.

9) Thus, contention of the petitioner that whole of the material relied upon by the detaining authority, while framing the grounds of detention has not been supplied to him, appears to be well-founded. Rather the record produced by the respondents corroborates the fact that whole of the material relied upon by the detaining authority and transmitted to him by the concerned sponsoring agency has not been furnished to the detainee. Obviously, the petitioner has been hampered by non-supply of these vital documents in making an effective representation before the Advisory Board, as a result whereof his case has been considered by the Advisory Board in the absence of his representation, as is clear from the detention record. Thus, vital safeguards against arbitrary use of law of preventive detention have been observed in breach by the respondents in this case rendering the impugned order of detention unsustainable in law.

10) It needs no emphasis that the detainee cannot be expected to make an effective and purposeful representation which is his constitutional right guaranteed under Article 22(5) of the Constitution of India, unless and until the material, on which the detention is based, is supplied to the detainee. The failure on the part of detaining authority to supply the material renders the detention order illegal and unsustainable. While holding so, I am fortified by the judgments rendered in *Sophia Ghulam Mohd. Bham V. State of Maharashtra and others* (AIR 1999 SC 3051), *Thahira Haris Etc. Etc. V. Government of Karnataka & Ors.* (AIR 2009 SC 2184), *Ram Krishan Bhardwaj v. State of Delhi*, AIR 1953 SC 318, *Shalini Soni v. Union of India*, (1980) 4 SC 544, and *Nazeer Ahmad Sheikh vs. Additional Chief Secretary Home*, 1999 SLJ 241.

11) It has been further contended by learned counsel for the petitioner that the impugned order of detention has been passed on the basis of stale incidents having no proximate link with the activities alleged to be prejudicial to the security, sovereignty and integrity of the State.

12) A perusal of the grounds of detention reveals that the incidents referred therein pertain to the year 2016, 2017 and 2018, that is more than six years,

five years and four years respectively prior to the passing of impugned order of detention. There is no reference to any recent incident involving the petitioner in the grounds of detention. Thus, it is clear that the order of detention has been based on past and stale incidents. In fact, the incidents and FIRs which formed basis of the grounds of detention have been the basis of earlier detention of petitioner which was made in terms of order No.19/DMK/PSA/2018 dated 04.10.2018, which has been quashed by this Court while disposing of HCP No.363/2018. Thus, using the same grounds and material for passing subsequent detention order without actually mentioning that the petitioner had been previously detained on the basis of this very material not only amounts to an illegality but also shows lack of application of mind on the part of the detaining authority.

13) The Supreme Court in the case of *Sama Aruna v. State of Telengana and &anr*, (2018) 12 SCC 150, while holding that the incidents which are said to have taken place long back, cannot form basis for being satisfied that the detenu is going to engage in similar activities, observed as under:

"17. We are, therefore, satisfied that the aforesaid detention order was passed on grounds which are stale and which could not have been considered as relevant for arriving at the subjective satisfaction that the detenu must be detained. The detention order must be based on a reasonable prognosis of the future behavior of a person based on his past conduct in light of the surrounding circumstances. The live and proximate link that must exist between the past conduct of a person and the imperative need to detain him must be taken to have been snapped in this case. A detention order which is founded on stale incidents, must be regarded as an order of punishment for a crime, passed without a trial, though purporting to be an order of preventive detention. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it."

From the aforesaid enunciation of the law on the subject, it is clear that there has to be a live and proximate link between the past conduct of the detenu and the activities alleged to be prejudicial to the maintenance of public order. In the instant case, the said link is completely missing as the time between the order of detention and the incidents referred to in the grounds of detention is far too large to presume such a link. The impugned order of detention, therefore, cannot be sustained.

14) Viewed thus, the petition is allowed and the impugned order of detention bearing No. 07/DMK/PSA/2022 dated 29.03.2022, issued by respondent No.2-District Magistrate, Kulgam, is quashed. The detenu is directed to be released from the preventive custody forthwith provided he is not required in connection with any other case.

15) The record, as produced, be returned to the learned counsel for the respondents.