
(2021) 11 J&K CK 0003
In the Jammu And Kashmir High Court
Case No : Writ Petition (Crl) No. 25 Of 2020

Latief Ahmad Rather

APPELLANT

Vs

Union Territory Of J&K & Anr

RESPONDENT

Date of Decision : 02-11-2021

Acts Referred:

Constitution Of India, 1950 — Article 22(5)
General Clauses Act, 1897 — Section 21
Jammu And Kashmir Public Safety Act, 1978 — Section 13

Citation : (2021) 11 J&K CK 0003

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : S. T. Hussain, Nida Nazir, B. A. Dar

Final Decision : Allowed

Judgement

Sanjay Dhar, J

1) By the instant petition, quashment of order No.DMBA/PSA/01 of 2020 dated 27.01.2020, issued by District Magistrate, Budgam (for brevity "Detaining Authority") is sought. In terms of the aforesaid order, Latief Ahmad Rather son of Habibullah Rather resident of Badipora Rather Mohalla, Chadoora, Budgam (for short "detenu") has been placed under preventive detention and lodged in Kotbhalwal Jail, Jammu.

2) 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 Constitutional and Statutory procedural safeguards have not been complied with in the instant case. It has been further urged that the material which formed basis of the grounds of detention and the consequent order of detention has not been provided to the detenu.

3) The respondents, in their counter affidavit, have disputed the averments made

in the petition and insisted that the activities of detainee are highly prejudicial to the security of the State. It is pleaded that the detention order and grounds of detention were handed over to the detainee and same were read over and explained to him. The grounds taken by the petitioner are legally misconceived, factually untenable and without any merit.

4) Despite several opportunities, the respondents have not produced the detention records in order to buttress the contentions raised in the counter affidavit.

5) I have heard learned counsel for parties and perused the material on record.

6) 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 detainee's right of making an effective representation against his detention has been violated as 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.

(III) That the petitioner was not informed about his right to make a representation against the order of detention before the detaining authority.

7) The first ground projected by the learned counsel for the petitioner that the detainee has been disabled from making an effective representation against the order of detention as the material, which formed base of the grounds of detention and the consequent order of detention, has not been furnished to him, appears to have substance. The respondents have along with their counter affidavit placed on record a copy of the execution report according to which the detainee has been provided copy of detention warrant (01 leaf), grounds of detention (04 leaves), copy of dossier (05 leaves) and other related documents (06 leaves). If we have a look at the grounds of detention, it bears reference to five FIRs Viz. FIR Nos.132/2012, 228/2012, 150/2013, 448/2013 and 263/2017. It was incumbent upon respondents to furnish not only the copies 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 these FIRs is shown. All this material would run in dozens of pages and it is impossible that all this material would be covered in only six leaves. Thus, contention of the petitioner that whole which those facts or conclusions which 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.

8) In the cases of preventive detention, a detainee has the right under Article 22(5) of the Constitution to be furnished with particulars of the grounds of his detention. The Supreme Court has in Ram Krishan Bhardwaj v. State of Delhi,

AIR 1953 SC 318, while interpreting Article 22(5) of the Constitution, observed that furnishing of grounds of detention means material sufficient to enable the petitioner to make an effective representation.

9) In *Shalini Soni v. Union of India*, (1980) 4 SC 544, the Supreme Court has observed that 'grounds' in Article 22(5) do not mean mere factual inferences but means factual inferences plus factual material which led to such factual inferences. The Court further clarified that copies of the documents to which reference is made in the grounds must be supplied to the detainee as part of the grounds.

10) Thus, the detaining authority is required to communicate to the detainee, (i) grounds of detention; (ii) all the documents referred to in the grounds of detention; (iii) all the documents and material which the detaining authority considers while framing his subjective satisfaction; (iv) detention order and also the police report or dossier if any.

11) The word 'grounds' used in clause (5) of Article 22 of the Constitution means not only the narrations or conclusions of facts, but also all materials on which grounds are based. Such material has to be supplied to the detainee so as to enable him to make an effective and meaningful representation. The detaining authority is obliged to mention in the grounds as to on which material it has based its satisfaction. Failure to do so renders the detention illegal. To communicate the bare grounds of detention to the detainee will not be sufficient unless grounds are accompanied by material which the detaining authority has considered and relied upon. For this, support can be had from the judgment of this Court in the case of *Nazeer Ahmad Sheikh vs. Additional Chief Secretary Home*, 1999 SLJ 241.

12) As already noted, the petitioner has not been furnished the material which formed the basis of the grounds of detention. It appears that the material showing involvement of petitioner in the five FIRs which formed basis for the grounds of detention has not been furnished to the petitioner. 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.

13) 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 maintenance of public order.

14) A perusal of the grounds of detention reveals that the incidents referred therein pertain to the years 2012, 2013 and 2017, that is more than three years 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.DMB/PSA/02 of 2018 dated 09.01.2018, a copy whereof has been placed on record by the petitioner. There is no rebuttal to the contention of the petitioner that he was detained previously under the aforesaid order. 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.

15) 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 security of the state. 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.

16) Next it has been contended that the petitioner has not been informed about his independent right to make a representation against his detention to the detaining authority as well.

17) A perusal of the Annexure-II appended to the writ petition reveals that the detaining authority vide its communication dated 27.01.2020, informed the petitioner that he has a statutory right to make representation against the said detention order to the Government. This clearly shows that the detaining authority has failed to inform the detenu about his independent right to file representation against his detention to the detaining authority while informing him about his right to file a representation against the detention order to the Government.

18) As already noted, the impugned detention order was passed on 27.01.2020 and as per reply affidavit filed by the respondents, the same was approved by the Government on 28.02.2020. Thus, until the said date i.e., 28.02.2020, the detaining authority, in terms of Section 21 of the General Clauses Act, was empowered to revoke the order of detention but because the petitioner/detenu was not informed by the respondents about his right to make a representation to the detaining authority, obviously he could not make a representation to the detaining authority, thereby depriving him of a vital constitutional/statutory right.

19) In my aforesaid view, I am fortified by the judgment of this Court in *Tariq Ahmad Dar v. State of J&K & Ors.* LPA No. 43/2017, 2017 (II) S.L.J 665 (HC), wherein a Hon'ble Division Bench of this Court has, while relying upon the *Kamlesh Kumar Ishwardas Patel v. Union of India*, (1995) 4 SCC 51, observed as under:

"15. From a reading of the said decision, it is abundantly clear that non-communication of the fact that the detenu can make a representation to the Detaining Authority, till the detention order is not approved by the Government, would constitute an infraction of a valuable Constitutional right guaranteed under Article 22(5) of the Constitution of India as also of the right under Section 13 of the Jammu and Kashmir Public Safety Act, 1978. Failure of such non-communication would invalidate the order of detention.

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17. In view of the foregoing, we need not to consider any of the other pleas sought to be raised by the learned counsel for the appellant, inasmuch as the detention order has been invalidated because of non-communication of the fact that the detenu could make a representation to the Detaining Authority. The detention order having become invalid, the detenu is liable to be released forthwith insofar as this detention order is concerned."

11. The aforesaid ratio is applicable to the facts of the instant case on all fours. Thus, it can safely be stated that the respondents by not informing the petitioner about his right to make a representation to the detaining authority against the impugned order of detention, are guilty of committing infraction of a Constitutional right guaranteed to the petitioner under Article 22(5) of the Constitution and the statutory right guaranteed to him under Section 13 of the J&K Public Safety Act. The impugned order of detention is, therefore, rendered invalid and unsustainable in the eyes of law.

20) Viewed thus, the petition is allowed and the impugned order of detention bearing No.DMB/PSA/01 of 2020 dated 27.01.2020, issued by respondent No.2-District Magistrate, Budgam, 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.