

(2019) 03 J&K CK 0126

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 396 Of 2018

Mohammad Hussain Wani

APPELLANT

Vs

State Of Jammu & Kashmir And Others

RESPONDENT

Date of Decision : 20-03-2019

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8(a), 9, 13
Code Of Criminal Procedure, 1973 — Section 161, 164A
Unlawful Activities (Prevention) Act, 1967 — Section 13, 18, 38
Constitution Of India, 1950 — Article 22, 22(5)

Citation : (2019) 03 J&K CK 0126

Hon'ble Judges : Sanjay Kumar Gupta, J

Bench : Single Bench

Advocate : Mir Shafaqat, S.H. Naqashbandi

Judgement

1. Challenge in this petition has been thrown to detention order bearing no. 23/DMK/PSA/2018 dated 17/10/2018 passed by respondent no. 2- District Magistrate, Kulgam, against petitioner herein.

2. In the petition it has been stated that the detainee was arrested by security forces in the month of May, 2018 and was taken to police station D.H. Pora where he was implicated in Case FIR No.47/2018. That while being in the custody of aforementioned case, the detainee was shifted to Central Jail Kotebalwal Jammu to be detained under preventive custody in terms of the impugned order.

3. The order impugned has been challenged in the petition inter alia on the grounds that the allegations/grounds of detention are vague and mere assertions of the detaining authority and no prudent man can make an effective representation against these allegations and can only be defended in a court of law. The detaining authority has not given any reasonable justification to pass the detention order on the single alleged activity nor has the detaining authority given the specific allegations/details regarding the cases mentioned in the

grounds of detention and as such the impugned order of detention suffers for complete non application of mind on the part of detaining authority. That the detainee was already in custody in case FIR No.47/2018, however, this important fact has not been reflected in the grounds of detention as there were no compelling reasons to pass the detention order as there was no likelihood of detainee getting bail in the case as the offences involved in the case were falling under Chapter IV of the Unlawful Activities Act and grant of bail is excepted in terms of 43-D of the said Act. Photostat copy of the police report of Case FIR no.47/2018 is annexed herewith as "Annexure P4" to the instant writ petition.

4. That in terms of Public Safety Act a person can be detained under Section 8 for the security of State or Public order and if an order is passed for twin activity then the order becomes bad in law and suffers from non-application of mind on part of detaining authority. That the detention order suffers from unexplained delay of five months in passing from the date single alleged activity has been attributed to the detainee. The delay between the alleged activity and the passing of detention order have no proximity and hence the detention order is an afterthought, unjustified and hence bad in law and deserves to be quashed.

5. That the detaining authority has not prepared the grounds of detention by itself, which is a pre-requisite for him before passing any detention order. It is stated that detaining authority has acted as signing authority of the grounds prepared by the police authorities and has not applied its mind independently while passing the impugned detention order.

6. That the respondent no.2, has not furnished the relevant material, like copy of FIR, Statement under Section 161, 164-A Cr. P.C, Seizure memos of the cases mentioned in the grounds of detention, to the detainee to enable him to make an effective representation by giving his version of facts attributed to him and make an attempt to dispel the apprehensions nurtured by the detaining authority concerning alleged involvement of the detainee in the alleged activities, against the said order to the competent authority since filing of an effective representation is a constitutional right and to enable the detainee to file such a representation it is necessary to provide him the copies of the dossier, connecting documents and the material and as in the instant case respondent no.2 has not provided any such material to the detainee therefore, the constitutional rights guaranteed to the detainee under article 22(5) of the constitution of India stands infringed.

7. That the detainee is not an English literate and understands only Kashmiri/ Urdu language but the order of detention, communication letter and grounds of detention are in English language and no translated script in Kashmiri or Urdu was furnished to the detainee nor were the aforementioned documents read over and explained to him in the language he understands so that he could have known about his rights and that he could make effective representation. That the detainee was not informed that he has a right to make a representation against the detention order before the detaining authority nor the respondents have

disclosed to him before whom authority of Government he can make the representation, which is in total violation of the rights of the detainee as guaranteed under Article 22 of the Constitution and Section 13 of the Public Safety Act.

8. In the counter affidavit, the District Magistrate Anantnag, respondent no. 2 herein, has stated that the detainee namely Mohammad Hussain Wani S/o Abdul Aziz Wani detained vide order No.23/DMK/PSA/2018 dated 17.10.2018 is a native of village Shalipora who has studied up to 2nd Year. Due to poor financial conditions of the family, the detainee left studies and started leading prayers. The detainee has been found involved in case FIR No.47/2018 under Sections 13 18,38 ULA (P) Act registered in Police Station D.H. Pora for anti-national/unlawful activities. Finding the activities of the detainee prejudicial to security, sovereignty and integrity of the State, District Magistrate Kulgam ordered for his preventive detention to deter him from his nefarious activities. Satisfied with the fact that releasing the detainee may pose threat to security, sovereignty and integrity of the state, District Magistrate Kulgam ordered for his prevention detention vide order No.23/DMK/PSA/2018 dated 17.10.2018 and accordingly his lodgement in Central Jail Kot Bhalwal, Jammu was ordered. The said warrant was forwarded to SP Kulgam in duplicate for execution under Section 9 of J&K Public Safety Act, 1978. It is stated that the detention order along with grounds of detention was read over and explained to the detainee in the language understood by him. Copies of the detention order, detention notice and grounds of detention were also provided to the detainee vide communication bearing No.DMK/JC/2018-19/317-22 dated 17.10.2018. At the same time, he was also informed of his right of representation against the detention order. That, detention of the detainee has been ordered strictly in accordance with the provisions of J&K Public Safety Act, 1978. The procedural safeguards prescribed under the provisions of the Act and the rights guaranteed to the detainee under the constitution have strictly been followed in the case. That, the grounds of detention sufficiently connect the detainee with the activities, which on the face of it are highly prejudicial to the maintenance of a peaceful atmosphere in the area. That the grounds taken by the petitioner are untenable and without any merit, therefore deserve to be reject.

9. I have heard the learned counsel for the parties and gone through the record produced by state /respondents.

10. The detention order reads as under:-

Government of Jammu & Kashmir

Office of the District Magistrate Kulgam

Subject:- Detention under J&K Public Safety Act, 1978.

ORDER NO.23/DMK/PSA/2018

Dated.17/10/2018

Whereas on the basis of grounds of detention placed before me by the Sr. Superintendent of Police Kulgam vide his No. Legal/PSA/2018/6387-90 dated 16.10.2018, I am satisfied that with a view to prevent Mohd Hussain Wani S/o Abdul Aziz Wani R/o Shalipora District Kulgam from acting in any manner prejudicial to security, sovereignty and integrity of the State, it is necessary to do so;

Now, therefore, in exercise of powers conferred by clause (a) of Section 8 of J&K Public Safety Act, 1978, I, District Magistrate Kulgam hereby direct that Mohd Hussain Wani S/o Abdul Aziz Wani R/o Shalipora District Kulgam be detained under the provisions of Public Safety Act-1978 and lodged in District Jail, Kot-Bhalwal (Jammu).

District Magistrate

Pulwama

Copy to the:-

- 1) Principal Secretary to Government, Home Department J&K Srinagar for favor of information.
- 2) ADGP CID J&K Srinagar for favor of information.
- 3) SSP CID CIK Srinagar for information.
- 4) Superintendent of Police, Kulgam in duplicate for execution of the order as provided under Section 9 of J&K Public Safety Act 1978. Notice of the order be given to the said detainee by reading over and explaining the same to him in the language he understands fully and by providing him copy of all relevant documents. However, he should be got examined by the Medical Practitioner of the respective jurisdiction at the time on effectuating the warrant and simultaneously the legal heirs of the detainee informed about his detention which factum should have supportive records. A copy of this order duly executed in accordance with the stipulations in the endorsement and with law is returned to this office for onward submission to the concerned quarters.
- 5) Superintendent, Central Jail, Kot-Bhalwal (Jammu) for information and necessary action.
- 6) Office order file.
- 7) PSA Detainee.

A docket in this regard for informing the petitioner in terms of section 13 of PSA Act dated 17.10.2018 was also issued with direction to Superintendent Jail Kote Bhalwal for communicating the petitioner along with grounds of detention.

11. This docket reads as under:-

Government of Jammu & Kashmir

Office of the District Magistrate Kulgam

Name: Mohd Hussain Wani

S/o: Abdul Aziz Wani

R/o: Shalipora, Kulgam

Subject: - Detention under J&K Preventive Safety Act, 1978.

Reference: - Dossier under No.Legal/PSA/2018/6387-90

dated 16.10.2018.

1. Whereas you have been detained vide order No.23/DMK/PSA/2018 dated 17/10/2018 made by me under Section 8 of J&K Public Safety Act, 1978.

2. Now, therefore, in pursuance of Section 13 of the Said Act, you are hereby informed that your detention has been ordered on the grounds specified in the annexure hereto along with the material based for framing the said grounds:

i) You may make a representation to the undersigned against the said detention order, if you so desire within 12 days of passing of this order.

ii) You may inform the Home Department early if you would like to be heard in person by the Advisory Board.

iii) You may make a representation to the Government against the said detention order, if you so desire.

No.DMK/JC/2019-19/317-22

Dated.17/10/2018

District Magistrate

Kulgam

Copy to the: -

1. Principal Secretary to Government, Home Department J&K Srinagar for favor of information.

2. ADGP CID J&K Srinagar for favor of information.

3. Superintendent of Police Kulgam for information and necessary action.

4. Superintendent, Central Jail, Kot-Bhalwal (Jammu) with two copies of the grounds of detention with the request that one copy of grounds of detention order may be communicated and delivered to detainee within stipulated period of five days from the date of his detention except in case covered under Section 13 of PSA for which reasons are to be recorded in writing and time frame extendable by another five days against proper receipt under intimation to this office along with confirmation of factum as to whether the detainee was informed about para

3 of the letter and whether he chose to not to make representation to the Government against the detention order.

District Magistrate

Kulgam

12. The grounds of detention reads as under: -

Government of Jammu & Kashmir

Office of the District Magistrate Kulgam

Name

Mohd Hussain Wani

S/o

Abdul Aziz Wani

Resident of

Shalipora, Kulgam

Age

28 years (as certified by District Police Kulgam)

Occupation

Private Teacher at Dar-ul-Uloom

Status

Over Ground Worker (Hizbul Mujahideen Outfit)

After perusal of the dossier submitted by Sr. Superintendent of Police Kulgam vide his letter No.Legal/PSA//2018/6387-90 dated 16/10/2018, it has come to fore that you are the resident of village Shalipora Kulgam and have studied BA 2nd Year. Due to weak financial conditions of your family, you left your studies. You opted the profession of Molvi and indulged in delivering objectionable speeches during Friday prayers at village Parigam and have also played key role in instigating the youth of the area to carry out un-lawful procession against State. In the meantime, you developed association with active militants of the area on whose instance you started to work with them as Active Over Ground Worker. You have been involved in facilitating shelter for the militants of the area in order to carry out unlawful activities in the area. Also, you have been found involved in motivating the youth of the area to join militant ranks whose aims is to secede the state of Jammu and Kashmir from rest of Country.

The perusal of the said dossier reveals your involvement in case FIR No.47/2018 U/S 13,18, 38 ULA (P) Act of Police Station D.H. Pora. The said case reveals that you along-with other associates are working for banned terrorist outfit

organization (HM) and are trying to join the terrorist ranks in order to carry out anti national/unlawful activities in District Kulgam especially in the area of D.H. Pora. The said banned outfit helps anti national elements to cross over to Pakistan by way of managing documents in coordination with separatist elements. On returning back, they try to secede the State of Jammu and Kashmir from rest of the country.

Besides the above mentioned case, the dossier also reveals that you had played a key role in disturbing the peaceful atmosphere by way of organizing stone pelting programs and violent protests against the State during the unrest of 2016.

Keeping in view your involvement in aforementioned criminal activities, it is clear that you are a great threat to the Security, Sovereignty and Integrity of State. You, being an active Over Ground Worker of banned Hizbul Mujahadeen, are instrumental in instigating the youth of the area to join militants ranks in order to carry out un-lawful activities in the area. Therefore, in order to prevent you from indulging in such activities it has become imperative to detain you under the relevant provisions of J&K Public Safety Act 1978 as your activities are quite prejudicial to the Security, Sovereignty and Integrity of State.

It is manifest from factual position as mentioned above that your activities are highly prejudicial to the Security, Sovereignty and Integrity of the State and to prevent/deter you from indulging in unlawful activities, you are hereby detained under the relevant provisions of J&K Public Safety Act, 1978.

You have a right of representation against your detention, if you choose so.

District Magistrate

Kulgam

13. From bare perusal of grounds of detention it is evident that petitioner has been detained as his activities were prejudicial to security of state. As per record the order was executed on 19.10.2018 by ASI Mohd. Issaq on petitioner after the reading over its contents and translating the same in Kashmiri Language. The receipt annexed in record would reveal that petitioner has put his signature in English. The Government has also approved the order of detention on 22.10.2018; record further reveals that advisory board has also opinioned/observed on 13.11.2018 that there was sufficient cause for detention of petitioner. So in this way all the legal procedure as PSA Act has been followed by authorities. The grounds taken in petition that petitioner does not know English is not tenable as he has put his signature

14. But facts remain same that accused was already in custody in FIR No.47/2018 U/S 13,18, 38 ULA (P) Act of Police Station D.H. Pora. As the petitioner was already in custody at the time of passing of detention order; so as per counsel for petitioner grounds of detentions should have mentioned that there were compelling reason to keep the petitioner in preventive detention in case he released on bail. Preventive detention is resorted to, to thwart future

action. If the detainee is already in jail charged with some offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made. There is nothing to indicate the awareness of the detaining authority that detainee was already in jail and yet the impugned order is required to be made.

15. In SLJ (11) 2017 page 650 , it has been held as under:-

Relevant para- 11.

11/ 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 detainee is already in custody in connection with some other case. In this context the need to refer to the decision of the Supreme Court in Surya Prakash Sharma (supra). Paragraphs 5,6 & 7 are relevant and they are extracted herein below:

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

"The decisions referred to above led 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 detainee is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detainee 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 detainee is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detainee, 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."

6. 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 detainee was in judicial 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

the 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 detainee 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.

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

12/ 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 detainee is already in custody; and (ii) there were compelling reasons justifying such detention despite the fact that the detainee 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 detainee is likely to be released from the custody in the near future and (b) taking into account the nature of the antecedent activities 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.

13/ In the present case we find that although there is mention of the fact that the detainee had been arrested in connection with F.I.R No. 100/2016 but, it is not clear as to whether the detaining authority was aware of fact that the detainee continued to be in custody. Furthermore, if we assume that the detaining authority was aware that the detainee was in custody in respect of FIR No. 100/2016, 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 detainee was being likely to be released from custody in near future. Therefore, in view of the decision of Supreme Court in Surya Prakash Sharma, this alone vitiates the detention order."

16. Respondents have thus not complied with cardinal principle of law while passing the detention order against petitioner in this regard. In view of what has been discussed above detention order bearing no. 23/DMK/PSA/2018 dated 17/10/2018 passed by respondent no. 2- District Magistrate, Kulgam, is quashed. Detainee to be set free if not required in any other case.