

(2023) 02 J&K CK 0043

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 397 Of 2022

Mohammad Irfan Bhat

APPELLANT

Vs

Union Territory Of J&K &Ors

RESPONDENT

Date of Decision : 16-02-2023

Acts Referred:

Constitution Of India, 1950 — Article 22(5)

General Clauses Act, 1977 — Section 21

Jammu And Kashmir Public Safety Act, 1978 — Section 13

Citation : (2023) 02 J&K CK 0043

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Aasif Wani, Faheem Nisar Shah

Final Decision : Disposed Of

Judgement

Sanjay Dhar, J

1) By the instant petition, quashment of order No.DMB/PSA/17 of 2022 dated 02.06.2022, issued by District Magistrate, Budgam (for brevity

"Detaining Authority") is sought. In terms of the aforesaid order, Shi Mohammad Irfan Bhat son of Mohammad Maqbool Bhat resident of Takiya Wagoora Kreeri Baramulla (for short "detenu") has been placed under preventive detention and lodged in Kotbhalwal Jail, Jammu.

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 detainee and that there has been total non-application of mind on the part of the detaining authority while passing the impugned detention order.

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 maintenance of public order. 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. It has been urged that the grounds urged by the petitioner are legally misconceived, factually untenable and without any merit. The respondents have produced the detention records in order to buttress the contentions raised in the counter affidavit.

4) I have heard learned counsel for parties and perused the material on 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 detainee'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 petitioner was not informed about his right to make a representation against the order of detention before the detaining authority.

(III) That the grounds of detention are verbatim copy of the dossier, which shows that the detaining authority has not applied its mind while formulating the grounds of detention which is a pre-requisite for passing an order of detention.

6) 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. A perusal of the detention record reveals that the petitioner has been provided copy of detention order (01 leaf), notice of detention (01 leaf), grounds of detention (03 leaves), dossier of detention (03 leaves), copies of FIR, statements of witnesses and other related documents (04 leaves) in total (12) leaves.

7) If we have a look at the grounds of detention, it bears reference to a video alleged to have been uploaded by the detainee on his YouTube channel whereby the detainee is alleged to have shamed the activities of slain singer and artist Amreena Bhat. It is also alleged in the grounds of detention that the detainee is uploading anti social videos on his YouTube channel. It was incumbent upon respondents to furnish soft copies of these video clips but the same has not been done by the respondents.

8) The 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.

9) 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.

10) 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.

11) A perusal of the Annexure-II appended to the writ petition reveals that the detaining authority vide its communication dated 02.06.2022, informed the petitioner that he has a statutory right to make representation against the said detention order to the Government but it does not make any reference to his right to make representation to the detaining authority. This clearly shows that the detaining authority has failed to inform the detainee 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.

12) As already noted, the impugned detention order was passed on 02.06.2022 and as per reply affidavit filed by the respondents, the same was confirmed by the Government on 25.07.2022. Thus, until the said date i.e., 25.07.2022, 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/detainee 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. 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 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."

13) 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.

14) Next it is contended that the grounds of detention are verbatim copy of the dossier, which shows that the detaining authority has not applied its mind while formulating the grounds of detention. While going through the detention records, as produced, the ground projected gets support from the material on record. The grounds of detention are replica of dossier with interplay of some words here and there, which exhibits non-application of mind on the part of detaining authority. In the process, the deriving of subjective satisfaction has become a causality. While formulating the grounds of detention, the Detaining Authority has to apply its own mind. It cannot simply reiterate whatever is written in the police dossier. In my aforesaid view, I am supported by the judgment of the Supreme Court in the case of Jai Singh and ors vs. State of J&K (AIR 1985 SC 764).

15. The grounds of detention and the dossier, if in similar language, go on to show that there has been non-application of mind on the part of the Detaining Authority. The similarity of contents of grounds of detention and police dossier in the instant case clearly exhibits mechanical functioning of the detaining authority, thereby making the impugned order of detention unsustainable in law.

16) Viewed thus, the petition is allowed and the impugned order of detention bearing No.DMB/PSA/17 of 2022 dated 02.06.2022, issued by respondent No.2-District Magistrate, Budgam, is quashed. The detenue is directed to be released from the preventive custody forthwith provided he is not required in connection

with any other case.

17) The detention record be returned to the learned counsel for the respondents.