
(2023) 11 J&K CK 0050

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 43 Of 2023

Mohammad Rafi

APPELLANT

Vs

Union Territory Of Jammu & Kashmir And Others

RESPONDENT

Date of Decision : 22-11-2023

Acts Referred:

Constitution Of India, 1950 — Article 226 Jammu And Kashmir Public Safety Act, 1978
— Section 8

Citation : (2023) 11 J&K CK 0050

Hon'ble Judges : Rahul Bharti, J

Bench : Single Bench

Advocate : Monika Kohli, F. S. Butt

Final Decision : Allowed

Judgement

Rahul Bharti, J

1. Heard the learned counsel for the parties. Perused the pleadings and the record attended therewith. Also perused the detention record produced in reference to the case.

2. The petitioner has invoked writ jurisdiction of this Court under article 226 of the Constitution of India for seeking a writ of habeas corpus for quashment of his preventive detention and for consequent restoration of his personal liberty which has come to suffer denial on account of preventive detention order no. 1st/DM/K/PSA of 2023 dated 15.04.2023 passed by the respondent no. 2 – District Magistrate, Kishtwar.

3. A course of event which led the respondent no. 2- District Magistrate, Kishtwar in coming forward with the petitioners' aforesaid detention order relates to the respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar preparing a dossier no. CS/PSA/2023/3109-12/C dated 27.02.2023 with respect to the petitioner on the basis of which a case came to be submitted to the respondent no. 3- District Magistrate, Kishtwar for getting preventive detention slapped upon

the petition in order to deprive of his personal liberty reckoning him to be a case warranting application of J&K Public Safety Act, 1978.

4. The aforesaid dossier no. CS/PSA/2023/3109-12/C dated 27.02.2023 at its own did not result desired outcome sought from the end of the respondent no. 2 – District Magistrate, Kishtwar. The respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar, thus, came forward with another dossier communication no. CS/PSA/2023/4534-36/C dated 06.04.2023 addressed to the respondent no. 2- District Magistrate, Kishtwar.

5. Acting upon the said two dossiers from the end of the respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar, the respondent no. 2 – District Magistrate, Kishtwar came to consider the matter by framing grounds of detention enabling himself to pass the impugned detention order no. 1st/DM/K/PSA of 2023 dated 15.04.2023.

6. In the dossier which came to be submitted by the respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar at the first instance to the respondent no. 2- District Magistrate, Kishtwar the facts allegedly related to the petitioner came to be spelled out stating therein that the petitioner was a government employee, serving as a Junior Assistant in PWD Department, who was highly influenced by the separatist mindset having remained affiliated with banned organization of HM and was even declared as OGW in the year 2019. With this background introduction, the petitioner was alleged to be acting in furtherance of criminal intention to wage a war against the lawfully established Govt., supporting the terrorists by providing logistics, transport and shelter which resulted in costing the petitioner his government employment.

7. It is by reference to an FIR no. 67/2019 registered by the Police Station Kishtwar that the case was conceived to fetch the preventive detention of the petitioner so as to prevent him from indulging in activities prejudicial to the security of the UT of J&K, detrimental to the maintenance of the public order considering that the substantive laws of the land have failed to desist the petitioner from carrying out the objectionable activities. By reference to said FIR, the arrest of the petitioner on 26.09.2019 came to be mentioned in the dossier with a corresponding mention that he was also let out on bail by the order of the court without divulging anything further on this count as to vide which order and on what basis the petitioner was able to earn bail from the competent Court of law.

8. The dossier so served by the respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar was not acted upon by the respondent no. 2 – District Magistrate, Kishtwar until the respondent no. 3- Sr. Superintendent of Police (SSP), Kishtwar came forward with second dossier no. CS/PSA/2023/4534-36/C dated 06.04.2023.

9. From the detention record of the case, it comes out that in response to the dossier submitted at the first instance by the respondent no. 3- Sr.

Superintendent of Police (SSP), Kishtwar vide no.CS/PSA/2023/3109-12/C dated 27.02.2023, the respondent no.2 –District Magistrate, Kishtwar had addressed a letter no. DM/K/23/58-59 dated 05.04.2023 to the respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar pointing out that, in the course of examination of the dossier, no further input is available as to whether any charge-sheet qua said FIR no. 67/2019 has been filed or not, as a result whereof the respondent no. 2 – District Magistrate, Kishtwar reckoned himself to be in a state of disability to reach to a logical conclusion and as such a copy of the charge-sheet concerning the FIR was solicited.

10. Upon receiving the so-called second dossier related communication no. CS/PSA/2023/4534-36/C dated 06.04.2023 of the respondent no. 3-Sr. Superintendent of Police (SSP), Kishtwar, the respondent no. 2- District Magistrate, Kishtwar came to convince himself that the material supplied by the respondent no. 3-Sr. Superintendent of Police (SSP), Kishtwar was rendering him stuffed with subjective satisfaction good enough to subject the petitioner to suffer loss of his personal liberty by a preventive detention mode. Thus, in this course of events, the impugned Order no. 1st/DM/K/PSA of 2023 dated 15.04.2023 subjecting the petitioner to a preventive detention came to be passed.

11. In the said impugned detention order no. 1st/DM/K/PSA of 2023 dated 15.04.2023, the respondent no. 2- District Magistrate, Kishtwar came to register his purported satisfaction that in order to prevent the petitioner from indulging in activities which are harmful and prejudicial to the maintenance of public order and in the interest of public safety, sovereignty and security of the State, the preventive detention of the petitioner is warranted under section 8 of the Jammu & Kashmir Public Safety Act, 1978 and recommending detention for a maximum period and place of detention of the petitioner to be in District Jail, Kathua.

12. The impugned detention order no. 1st/DM/K/PSA of 2023 dated 15.04.2023 rests upon the grounds of detention as comprehended and formulated by the respondent no. 2 – District Magistrate, Kishtwar. In the grounds of detention so formulated, the respondent no. 2 – District Magistrate, Kishtwar came to observe that in view of the fact/factual report submitted by the respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar, the substantive laws have failed to desist the petitioner from carrying criminal activities and, as such, preventive detention of the petitioner was warranted in order to prevent him from indulging in such type of activities and misdeeds in future and also to ensure the maintenance of public order, public safety, peace and tranquility in district and in the interest of sovereignty and security of the State.

13. After issuance of the impugned preventive detention order no. 1st/DM/K/PSA of 2023 dated 15.04.2023, the respondent no. 2- District Magistrate, Kishtwar came forward with a corrigendum no. DM/K/23/151-58 dated 19.04.2023 with respect to said preventive detention order no. 1st/DM/K/PSA of 2023 dated 15.04.2023.

14. Vide this corrigendum, the respondent no. 2 – District Magistrate, Kishtwar meant to incorporate the words “prejudicial to the security of the State” to replace the words “harmful/prejudicial to the maintenance of public order in any manner and in the interest of public safety, sovereignty and security of State” obtaining in the impugned preventive detention order no. 1st/DM/K/PSA of 2023 dated 15.04.2023.

15. Thus, by said corrigendum no.DM/K/23/151-58 dated 19.04.2023, the respondent no. 2- District Magistrate, Kishtwar came to carry out the editing of the text of the impugned detention order no. 1st/DM/K/PSA of 2023 dated 15.04.2023, but the grounds of detention, on which the impugned preventive detention order no. 1st/DM/K/PSA of 2023 dated 15.04.2023, was passed, remained resting as originally texted, meaning thereby that the text of the grounds of detention order was at variance with the edited text version of the impugned order of preventive detention of the petitioner.

16. The preventive detention order so passed by the respondent no. 2 – District Magistrate, Kishtwar came to be executed upon the petitioner by the Executing Officer – PSI Rahul Sharma, PID no. EXJ196673 of P/S Kishtwar. The execution of the detention warrant came to be reported by the Executing Officer – PSI Rahul Sharma in terms of Execution Report of 25.04.2023. Said report does not reveal as to where from the petitioner came to be picked up for being taken into custody. However, as per the execution report, the contents of the detention warrant, grounds of detention and other documents (14 leaves) were read over to the petitioner in English and explain in Urdu/Hindi and Kashmiri Languages followed by handing over of copy of detention warrant, copy of grounds of detention and other documents (14 leaves) to the petitioner for enabling him to make a representation to the Govt. against the order of his detention.

17. The execution of the detention warrant by PSI Rahul Sharma on 25.04.2023 came to take place on the basis of communication no. Conf/ Detention/23/5256-69/C dated 23.04.2023 from the respondent no. 3- Sr. Superintendent of Police (SSP), Kishtwar to PSI Rahul Sharma. In this communication, the respondent no. 3- Sr. Superintendent of Police (SSP), Kishtwar came to apprise and authorize the PSI Rahul Sharma about the assignment of carrying out the execution of detention warrant in respect of the petitioner with a direction to hand over a copy of the detention order along with the grounds of detention and other relevant documents to the petitioner against the receipt with a further direction to apprise the petitioner that he was having a right to appeal against the detention order to the Govt.

18. The respondent no. 2 – District Magistrate, Kishtwar, upon issuance of impugned preventive detention order no. 1st/DM/K/PSA of 2023 dated 15.04.2023, had simultaneously addressed a letter no. DM/K/23/140-141 15.04.2023 to the Financial Commissioner (Addl. Chief Secretary), Home Department, Govt. UT of Jammu & Kashmir submitting the case for confirming the detention of the petitioner, as is born out from the detention record.

19. By this communication dated 15.04.2023, addressed for the purpose of submitting the case for approval/conformation of the detention of the petitioner, a fact gets self evident that the Corrigendum no. DM/K/23/151-58 dated 19.04.2023 was not yet born to be submitted/forwarded to the Financial Commissioner (Addl. Chief Secretary), Home Department, Govt. of UT of Jammu & Kashmir but seems to have somehow, later on, been forwarded to the Govt., for enabling issuance of Govt. Order no. HOME/PV-V/885 of 2023 dated 20.04.2023.

20. Now, at the time when the Home Department, Govt. of UT of Jammu & Kashmir came to lend its approval to the detention order no. 1st/DM/K/PSA of 2023 dated 15.04.2023 passed by the respondent no. 2-District Magistrate, Kishtwar, the execution of the detention warrant upon the petitioner had not taken place which otherwise came to take place after four days i.e. on 25.04.2023.

21. After availing the purported opinion from the Advisory Board, conveyed in terms of communication dated 23.05.2023, the Home Department, Govt. of UT of Jammu & Kashmir came forward with Govt. Order no. HOME/PB-V/1154 of 2023 dated 26.05.2023 directing preventive detention of the petitioner for a period of six months at the first instance and lodgment in the District Jail, Kathua. Said period of six months is still in its currency with effect from 26.05.2023.

22. It is in the aforesaid facts and circumstances of the case that the petitioner is assailing his preventive detention, terming it as a serious abuse of process of preventive detention law at the end of all the concerned right from the respondent no. 3- Sr. Superintendent of Police (SSP), Kishtwar to the end of Govt. of UT of J&K acting through its Home Department for the reasons stated in the grounds of challenge settled in the writ petition.

23. From the facts and circumstances of the case, this Court cannot escape from arriving at a conclusion that the preventive detention slapped upon the petitioner is an outcome of sheer, casual and non-serious bent of mind at the end of the respondent no. 3- Sr. Superintendent of Police (SSP), Kishtwar followed by the respondent no. 2- District Magistrate, Kishtwar.

24. To begin with the dossier no. CS/PSA/2023/3109-12/C dated 27.02.2023, in which the petitioner was being branded in the manner as stated therein, the respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar brought FIR no. 67/2019 registered with Police Station Kishtwar in play to connect the petitioner's involvement in relation to the offences as stated in the said FIR and those being 302/307/392/109 of the Ranbir Penal Code, 7/27 of the Indian Arms Act, 1959, 13/17/20/23 of the Unlawful Activities (Prevention) Act, 1967. For the reasons which exhibit sheer lack of bona fide, the respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar did not bother himself to deem it fit to divulge the full details with respect to the manner in which the petitioner had

come to be granted bail by the Court of competent jurisdiction but kept it very cryptic that the bail has been granted to the petitioner.

25. In this regard, it is worth mentioning here that as being the head of the Police Administration of the District Kishtwar, it cannot lie at the end of the respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar to suggest that he was unaware of the manner in which the petitioner had come to be admitted to bail qua said FIR and the order passed in relation thereto, when in the dossier so submitted, the respondent no. 3- Sr. Superintendent of Police (SSP), Kishtwar himself was making a reference that the petitioner has been granted bail which itself meant that the full detail of the facts and circumstances in which the petitioner had been granted bail were fully known to the respondents no. 3 – Sr. Superintendent of Police (SSP), Kishtwar but despite that the respondent no. 3- Sr. Superintendent of Police (SSP), Kishtwar chose to withhold the said factual aspect of the case pertaining to the petitioner from being disclosed to the respondent no. 2 – District Magistrate, Kishtwar.

26. The Sponsoring Authority is nobody to sit upon the factual information concerning a person, against whom it is indenting to prepare a case for the purpose of seeking his/her preventive detention to be passed on to the detention order making authority but in the present case the respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar took the liberty of acting as if it were a censor authority, which was the first vitiating factor set into effect to weaken the prospective preventive detention of the petitioner.

27. The petitioner came to be granted default bail in reference to the aforesaid FIR by the court of 3rd Additional Sessions Judge, Jammu in terms of an order dated 26.03.2020, as the National Investigation Agency (NIA), which was seized of the investigation in the FIR, had failed to present final report/charge-sheet against the petitioner within a stipulated period of 180 days during which the petitioner had remained in custody, police as well as judicial. Thus, when order dated 26.03.2020 of the Court of 3rd Additional Sessions Judge, Jammu granting in default bail in favour of the petitioner was very much in existence, there was no occasion for the respondent no. 3- Sr. Superintendent of Police (SSP), Kishtwar to stay ignorant of said fact at the time of framing the dossier against the petitioner while bearing a specific reference to alleged involvement of the petitioner in FIR no. 67/2019. It, thus means that the respondent no. 3 –Sr. Superintendent of Police (SSP), Kishtwar was deliberately intending not to apprise the respondent no. 2 – District Magistrate, Kishtwar with full state of facts.

28. The respondent no. 2 – District Magistrate, Kishtwar also seems to have acted like a Post-office to serve the call of the respondent no. 3- Sr. Superintendent of Police (SSP), Kishtwar. Vide his communication no. DM/K/23/58-59 dated 05.04.2023, the respondent no. 2-District Magistrate, Kishtwar sought information pertaining to filing of charge-sheet qua FIR no. 67/2019 from the respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar. The

communication received in response from the end of the respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar vide communication no. CS/PSA/2023/4534-36/C dated 06.04.2023 was that the status of charge-sheet qua FIR no. 67/2019 registered with the Police Station Kishtwar was not available as the investigation qua said FIR was being done by the National Investigation Agency (NIA) and challan to said effect presented before the 3rd Additional Sessions Judge, Jammu. Despite this categoric information that the status of challan qua FIR no. 67/2019 was not available with the respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar, the respondent no. 2 – District Magistrate, Kishtwar did not deem it fit to direct the respondent no. 3 – Sr. Superintendent of Police (SSP), Kishtwar to get the details of the said case itself from the Court wherein the police report/challan came to be presented qua FIR no. 67/2019 and instead the respondent no. 2 – District Magistrate, Kishtwar went on to pass the impugned order of detention as if the factual input sought qua FIR no. 67/2019 was of no interest or value to the respondent non. 2 – District Magistrate, Kishtwar for the purpose of enabling subjective satisfaction making at his end.

29. It is very relevant to mention herein that in the said charge-sheet presented by the National Investigation Agency (NIA) qua FIR no. 67/2019 which came to be re-registered as FIR no. RC-06/2019/NIA/JMU dated 02.11.2019 along with charge-sheet no. 03/2020, a certified copy of which is produced by the petitioner through the medium of CMP no. 1570/2023 reveals that the petitioner has not been produced as an accused in the said case as he figures in the list of the persons against whom the charge-sheet is not being filed.

30. From the aforesaid situation, the position becomes very evident that FIR no. 67/2019, which later on came to be FIR no. RC-06/2019/NIA/JMU dated 02.11.2019 was used as a pretext to portray the petitioner in the light as set out in the dossier for the consumption of the respondent no. 2 – District Magistrate, Kishtwar but for the same very FIR, the final police report/challan born out of investigation carried out by the National Investigation Agency (NIA) in re-numbered FIR no. RC-06/2019/NIA/JMU dated 02.11.2019 did not name the petitioner as an accused person, yet the petitioner was made to suffer loss of his personal liberty just by reference to the said FIR and his alleged complicity in the FIR. Thus, there cannot be more serious misuse/abuse of preventive detention law at the hands of the sponsoring authority in the present case and compounded by the casualness at the end of the respondent no. 2 – District Magistrate, Kishtwar.

31. The position of law as settled by the Hon'ble Supreme Court of India in the case of Sushanta Kumar Banik vs The State Of Tripura, 2022 AIR SC 4715 is relevant to be taken note of in the context of adjudication of this writ petition. This case was also a case of preventive detention under the prevention of illicit trafficking in Narcotic Drugs & Psychotropic Substances (NDPS) Act, 1985. The detinue in this case was not successful in seeking quashment of his preventive

detention through the medium of writ petition before the High Court of Tripura, which resulted in the matter of reaching upto the Hon'ble Supreme Court of India. In paragraph 11 of this judgement, the Hon'ble Supreme Court of India tested the preventive detention of the petitioner on two grounds i.e. (i) delay in passing the order of detention from the date of proposal thereby snatching the "live & proximate link" between the prejudicial activities and the purpose of detention and failure on the part of the detaining authority in explaining such delay in any manner & (ii) the detaining authority remaining oblivious with respect to the material and vital fact pertaining to detenue on account of being suppressed or rather not brought to the notice of the detaining authority by the sponsoring authority at the time of forwarding the proposal to pass the preventive detention order.

32. The facts and circumstances of the present case attract with full vigor the said two tests and on both counts the preventive detention of the petitioner so effected by virtue of the impugned detention Order no. 1st/DM/K/PSA of 2023 dated 15.04.2023 passed by the respondent no. 2 – District Magistrate, Kishtwar fails to pass through, thereby rendering the said preventive detention of the petitioner bad and illegal deserving to be quashed.

33. Accordingly, the writ petition is allowed and the preventive detention of the petitioner effected in terms of Order no. 1st/DM/K/PSA of 2023 dated 15.04.2023 read with confirming Order no. HOME/PB-V/1154 of 2023 dated 26.05.2023 are hereby set aside by holding the said two orders as being illegal which are also, consequently, quashed.

34. The petitioner be restored to his personal liberty by the Superintendent, District Jail Kathua. In case the petitioner was suffering custody in connection with any pending criminal case, when the petitioner came to be taken into preventive detention custody, then the authorities concerned shall be entitled to take over the physical custody of the petitioner from the Superintendent, District Jail Kathua.

35. Detenue record to be returned.

Disposed of.