

(2022) 11 J&K CK 0011

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 68 Of 2022

Mohammad Rafiq Rather @ Setha

APPELLANT

Vs

Ut Of J&K & Anr

RESPONDENT

Date of Decision : 07-11-2022

Acts Referred:

Constitution Of India, 1950 — Article 22(5)

Jammu And Kashmir Public Safety Act, 1978 — Section 8, 10A, 13(1)

Citation : (2022) 11 J&K CK 0011

Hon'ble Judges : M.A.Chowdhary, J

Bench : Single Bench

Advocate : G.N.Shaheen, Asif Maqbool, Sajad Ashraf

Final Decision : Disposed Of

Judgement

M.A.Chowdhary, J

1. District Magistrate, Srinagar (hereinafter called 'Detaining Authority?') in exercise of powers under Section 8 of the Jammu & Kashmir Public Safety Act, 1978, passed the detention Order No. DMS/PSA/114/2021 (for short 'impugned order') on 29.01.2022, in terms whereof the petitioner namely Mohammad Rafiq Rather @ Setha S/O Ghulam Mohammad Rather R/O Abi Gurpora Rainwari, Srinagar (for short 'detenue') was ordered to be detained and lodged in District Jail Kupwara.

2. The impugned detention order has been challenged through the medium of the instant petition, being in breach of the provisions of Article 22(5) of the Constitution of India read with Section 13(1) of the J&K Public Safety Act, 1978.

3. 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 submitted by the Senior Superintendent of Police concerned. It has been further contended that the Constitutional and Statutory procedural safeguards have not been complied

with in the instant case. It has been also urged that the allegations made against the detainee in the grounds of detention are vague and that the translated version of the documents/grounds of detention in the language understood by him, has not been provided to the detainee. It has also been contended that the petitioner has not been informed before whom he had to make a representation against his detention. Further it is contended that the material which formed basis of the grounds of detention has not been provided to the detainee.

4. The respondents, in their counter affidavit, have disputed the averments made in the petition and stated that they have followed the provisions of J&K Public Safety Act. It is contended that the detainee has been detained only after following due procedure; that the grounds of detention were read over to the detainee in the language which he fully understood; that there has been proper application of mind for detaining the detainee and that the detainee has been provided all the material. The learned counsel for the respondents also produced the detention record to lend support to the stand taken in the counter affidavit.

5. Heard learned counsel for both the sides at length, perused the record and considered.

6. Learned counsel for the petitioner, while seeking quashment of the impugned order, projected various grounds but the main ground that has prevailed during arguments is that the detainee has been disabled from making an effective representation against his detention as the material forming basis of the grounds of detention has not been supplied to him.

7. On perusal of the detention record produced by learned counsel for the respondents, the ground regarding non-supply of relevant material appears to have substance as there is nothing in the said record to show that the whole of the relevant material has been supplied to the detainee. The execution report in the record reveals that the detainee has been supplied only grounds of detention, notice, copy of FIR and detention warrant. It appears that the detainee has not been provided dossier, Statement of witnesses and other relevant material. Thus, 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. Obviously, the petitioner has been hampered by non-supply of the relevant material in making an effective and meaningful representation against his detention before the concerned authority/ Government.

8. The requirement of law is that whole of the record, on which the detention order is based, has to be made available to the detainee in the language that he understands. There is nothing like execution report/Receipt of grounds of detention on the record to suggest that the whole material relied upon to base detention has been furnished to the detenu, so as to make an effective representation. The failure on the part of the detaining authority to supply material renders detention illegal and unsustainable.

9. The Hon^{ble} Apex Court in the judgment rendered in the case of "Sophia Gulam Mohd. Bham V. State of Maharashtra & Ors. (AIR 1999 SC 3051), has held as under:

"The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the grounds are based flows from the right given to the detenu to make a representation against the order of detention. A representation can be made and the order of detention can be assailed only when all the grounds on which the order is based are communicated to the detenu and the material on which those grounds are based are also disclosed and copies thereof are supplied to the person detained, in his own language."

10. Learned counsel for the petitioner has also placed reliance on cases of Thahira Haris Etc. Etc. v. Government of Karnataka, AIR 2009 SC 2184; Union of India v. Ranu Bhandari, 2008, CrLJ 4567; Dhannajoy Dass v. District Magistrate, AIR 1982 SC 1315; and Syed Aasiya Indrabi v. State of J&K & Ors, 2009 (I) SLJ 219, to buttress his arguments.

11. While going through the detention record, I also deemed it proper to go through dossier prepared by police, which forms part of detention record. While comparing grounds of detention with dossier, it comes to fore that grounds of detention are ditto copy of dossier. It may be made clear here that detaining authority may get inputs from different agencies, including Senior Superintendent of Police of the concerned District, but the responsibility to formulate grounds of detention, however, exclusively rests with detaining authority. It is detaining authority, who has to go through the reports and other inputs received by him from concerned police and other agencies and on such perusal arrive at a subjective satisfaction that a person is to be placed under preventive detention. It is, thus, for detaining authority to formulate grounds of detention and satisfy itself that grounds of detention so formulated warrant passing of order of preventive detention. Perusal of grounds of detention, in the present case, would show that it is a verbatim copy of dossier of Senior Superintendent of Police, submitted by him to the concerned Magistrate.

12. This Court as regards the verbatim reproduction of the Dossier in the grounds of detention, in case of Naba Lone v. District Magistrate 1988 SLJ 300, while dealing with a case where a similar situation arose, has observed:

"The grounds of detention supplied to the detenu is a copy of the police dossier, which was placed before the District Magistrate for his subjective satisfaction in order to detain the detenu. This shows total non-application of mind on the part of the detaining authority. He has dittoed the Police direction without applying his mind to the facts of the case."

13. This Court again in the case of Noor-ud-Din Shah v. State of J&K & Ors (1989 SLJ 1), quashed the detention order, which was only a reproduction of the Dossier supplied to the detaining authority on the ground that it amounted to

non-application of mind holding as under:

"I have thoroughly examined the dossier submitted by the Superintendent of Police, Anantnag, to District Magistrate, Anantnag as also the grounds of detention formulated by the latter for the detention of the detainee in the present case, and I find the said grounds of detention are nothing but the verbatim reproduction of the dossier as forwarded by the Police to the detaining authority. He has only changed the number of paragraphs, trying in vain to give it a different shape. This is in fact a case of non-application of mind on the detaining authority. Without applying his own mind to the facts of the case, he has acted as an agent of the police. It was his legal duty to find out if the allegations leveled by the police against the detainee in the dossier were really going to effect the maintenance of public order, as a result of the activities, allegedly, committed by him. He had also to find out whether such activities were going to affect the public order in future also as a result of which it was necessary to detain the detainee, so as to prevent him from doing so. After all, the preventive detention envisaged under the Act is in fact only to prevent a person from acting in any manner which may be prejudicial to the maintenance of public order, and not to punish him for his past penal acts. The learned District Magistrate appears to have passed the impugned order in a routine manner being indifferent to the import of preventive detention as or detailed in the Act. Passing of an order without application of mind goes to the root of its validity, and in that case, the question of going into the genuineness or otherwise of the grounds does not arise. Having found that the detaining authority has not applied his mind to the facts of the case while passing the impugned order, it is not necessary to go to the merits of the grounds of detention, as mandated by Section 10-A of the Act."

14. A similar situation arose in the case of *Jai Singh and Ors. v. State of Jammu & Kashmir* AIR 1985 SC 764, before the Supreme Court. The Hon^{ble} Apex Court quashed the detention as it found that there cannot be a greater proof of non-application of mind and that the liberty of a subject being a serious matter is not to be trampled with in this casual, indifferent and routine manner. The Court observed:

"First taking up the case of Jai Singh, the first of the petitioners before us, a perusal of the grounds of detention shows that it is a verbatim reproduction of the dossier submitted by the Senior Superintendent of Police, Udhampur to the District Magistrate requesting that a detention order may kindly be issued. At the top of the dossier, the name is mentioned as Sardar Jail Singh, father's name is mentioned as Sardar Ram Singh and the address is given as village Bharakh, Tehsil Reasi. Thereafter it is recited "The subject is an important member of..."

Thereafter follow various allegations against Jai Singh, paragraph by paragraph. In the grounds of detention, all that the District Magistrate has done is to change the first three words "the subject is" into "you Jai Singh, S/o Ram Singh, resident of village Bharakh, S/o Ram Singh, resident of village Bharakh, Tehsil Reasi". Thereafter word for word the police dossier is repeated and the word "he"

wherever it occurs referring to Jail Singh in the dossier is changed into 'you' in the grounds of detention. We are afraid it is difficult to find greater proof of non-application of mind. The liberty of a subject is a serious matter and it is not to be trifled with in this casual, indifferent and routine manner."

15. As observed and noticed hereinabove, the detaining authority while detaining the detainee has been negligent in observing the safeguards as are available constitutionally and statutorily, by not furnishing whole of the material/record, on which detention order was based, incapacitated the detainee to make an effective and meaningful representation, the detention order being verbatim of the Police dossier and not informing the detainee of his right to make representation. The impugned order thus suffers from non-application of mind by the authority is not sustainable and is liable to be quashed.

16. For the foregoing reasons and the law stated hereinabove, this petition is allowed and Detention Order No. DMS/PSA/114/2021 dated 29.01.2022, passed by District Magistrate Srinagar, is quashed. Respondents, including Jail Superintendent concerned, are directed to release the detainee forthwith, provided he is not required in any other case(s). Xerox copy of the Detention record, as produced, be returned to the learned Dy.AG.

17. Disposed of.