

(2023) 04 J&K CK 0034

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 285 Of 2021

Mohd Younis Ganie

APPELLANT

Vs

UT Of J&K & Ors

RESPONDENT

Date of Decision : 20-04-2023

Acts Referred:

Constitution Of India, 1950 — Article 22, 22(5)
Jammu And Kashmir Public Safety Act, 1978 — Section 8

Citation : (2023) 04 J&K CK 0034

Hon'ble Judges : Sindhu Sharma, J

Bench : Single Bench

Advocate : G. N. Shaheen, Asif Nabi, Zahid Noor

Final Decision : Allowed

Judgement

Sindhu Sharma, J

1. The detention Order no. 20/DMK/PSA/2021 dated 14.11.2021 passed by the District Magistrate, Kulgam, under Section 8(a) of the Jammu and Kashmir Public Safety Act, 1978 has been assailed in this petition by the detinue-Mohd. Younis Ganie S/o Gh. Hassan Ganie R/o Daderkote Behibagh, Kulgam, District Kulgam through his father Gh. Hassan Ganie.

2. The detinue has challenged the legality and validity of the order on the grounds that (i) the same has been passed mechanically without application of mind; (ii) the material forming basis of the grounds of detention has not been supplied to him, thus, infringing upon his right to make an effective representation; (iii) the detinue was already in custody in connection with FIR no. 57/2020 under Sections 147,148,149,336,307 IPC and 13 (UAPA) Unlawful Activities (Prevention) Act and the detaining authority has not shown any awareness to this fact; (iv) though the detention order has been passed by the detaining authority for preventing the detinue from acting in any manner prejudicial to the maintenance of public order but in the grounds of detention the

involvement of the detainee is considered threat to the security of the State which reflects total non-application of mind by the detaining authority, as such, the detention order is liable to be quashed.

3. In their counter affidavit the respondents have disputed the contentions of the detainee. It is submitted that the detainee was detained by the District Magistrate, Kulgam in accordance with the provisions of Public Safety Act. The detaining authority has followed all the procedural safeguards while detaining the detainee. The order of detention was passed by the detaining authority after arriving at its subjective satisfaction and after considering all the material. The grounds of detention and all the material relied upon by the detaining authority was furnished to the detainee and the detaining authority had complied with all the statutory and Constitutional safeguards as provided under the law.

4. Heard learned counsel for the parties and perused the record.

5. The specific contention raised by the detainee is that the detainee was in police custody at the time of passing of the aforesaid order of detention in connection with the FIR no. 57/2020 under Section 147, 148, 149, 336, 307 IPC and 13 ULAP Act, P/S Yaripora, Kulgam registered against him, as such, there was no compelling reason in the grounds of detention to pass the impugned order. It is apparent from the record that the detainee at the time of passing of the impugned order, was in custody. This aspect has not been reflected in the grounds of detention, and the detaining authority has not shown any awareness to this effect. Reliance is placed on AIR 2000 SC 3675, *Amrit Lal v. Union Government through Secretary and ors* in which the Hon'ble Supreme Court has held as under:-

"4. In *Agustin's* decision (*supra*) this Court also placed strong reliance on an earlier but oft-cited decision of this Court in *Binod Singh v. District Magistrate, Dhanbad* (MANU/SC/0164/1986: 1986 Cri LJ 1959 wherein it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. This Court held that there must be cogent materials before the Officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention."

6. It is well settled that the person who is involved in criminal case can be detained under the provisions of preventive law provided there are compelling circumstances for doing so, otherwise, the order would be vitiated. Since the detainee was already in custody at the time of passing of the detention order, yet no such cogent reasons have been given by the respondents while passing the order of detention.

7. The detainee has submitted that immediately after his detention order he has filed a representation against his detention. This representation has not been considered by the detaining authority and has resulted in infraction of his rights.

The representation submitted by the detainee must be considered at an earliest. Apparently, this has not been done.

8. The Hon'ble Apex Court in "Sarabjeet Singh Mokha vs. The District Magistrate, Jabalpur and others", SCC Online SC 1019, has held as under:

"....Article 22(5) reflects a keen awareness of the framers of the Constitution that preventive detention leads to the detention of a person without trial and hence, it incorporates procedural safeguards which mandate an immediacy in terms of time. The significance of Article 22 is that the representation which has been submitted by the detenu must be disposed of at an early date. The communication of the grounds of detention, as soon as may be, and the affording of the earliest opportunity to submit a representation against the order of detention will have no constitutional significance unless the detaining authority deals with the representation and communicates its decision with expedition."

9. In "KundanbhaiDulabhai Shaikh vs District Magistrate, Ahmedabad and others", 1996 Cr.LJ 1981, the Court has quashed the detention order only on the ground of delay in disposal of the representation. It was held as under:

"...it was provided that inordinate and unexplained delay in the disposal of representation would make the continued detention of a person, illegal and unconstitutional. In Devi Lal Mahto v. State of Bihar &Anr., AIR (1982) SC 1548, the continued detention was held to have become bad on account of the indifferent attitude of the Government in not attending to the representation for about 10 days."

10. Perusal of the record reveals that the petitioner has not been supplied all the material relied upon by the detaining authority while arriving at its subjective satisfaction while passing the order of detention. The execution report reflects that the petitioner has only been supplied copies of detention order notice of detention and letter addressed to the detainee but all the other relevant material like FIR, statement of witnesses etc. relied upon by the detaining authority have not been furnished to him. This has resulted in infraction of constitutional and statutory safeguards guaranteed to him under Article 22(5) of the Constitution of India and Section 13 of the J&K Public Safety Act for making an effective and purposeful representation.

11. In view of the aforesaid discussion, there is no need to advert to other grounds raised in this petition.

12. Keeping in view the aforesaid facts and circumstances, the law as laid down by the Apex Court and the fact that the respondents have not adhered to legal and Constitutional safeguards, this petition is allowed and the detention order No. 20/DMK/PSA/2021 dated 14.11.2021 passed by the District Magistrate, Kulgam,, under which the detainee-Mohd. Younis Ganie S/o Gh. Hassan Ganie is under detention is quashed. The respondents are directed to release the detainee from the custody forthwith, provided he is not arrested or detained in any other

case.

13. Detention record be returned to learned counsel for the respondents by the Registry forthwith.