

(2022) 04 J&K CK 0043

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No 287 Of 2021

Mubarik Ahmad Thoker

APPELLANT

Vs

UT Of J&K And Anor

RESPONDENT

Date of Decision : 11-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 22, 22(5)

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

Unlawful Activities (Prevention) Act, 1967 — Section 13(2), 18, 16, 18, 19, 20, 38, 39

Investment Advisers Act of 1940 — Section 7, 27, 307

Citation : (2022) 04 J&K CK 0043

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

Bench : Single Bench

Advocate : G.N.Shaheen, Asifa Padroo

Final Decision : Disposed Of

Judgement

M.A.Chowdhary, J

1. District Magistrate, Kulgam (hereinafter called "Detaining Authority") in exercise of powers under Section 8 of the Jammu & Kashmir Public Safety Act, 1978, passed the detention Order No. 08/DMK/PSA/2021 dated 18.10.2021 (for short "impugned order"), in terms whereof the detenue namely Mubarik Ahmed Thoker S/O Ab. Rashid Thoker R/o Sopat Tangpora Tehsil Dsevsar Kulgam Districut Kulgam (for short "detenue") has been detained and accordingly his lodgment in Central Jail, Srinagar was ordered.

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. It is being pleaded in the petition that the detaining authority-respondent No.2 has not attributed any specific allegation against the detenue. Furthermore, it is stated that the detenue has been incapacitated in filing a representation as the

grounds of detention are not in a language which could be understood by the detainee. It is also being stated that the detainee is not an English literate person and he understands only Urdu/Kashmiri language but the order of detention is in English and it is not possible for him to understand such a hyper technical language. It is also the submission of learned counsel for the detainee that the order of detention and the connected documents annexed with the petition clearly show violation of rights of the detainee guaranteed in terms of the Article 22(5) of the Constitution of India.

4. Respondents in their counter affidavit have stated that the detainee was ordered to be detained for maintenance of "Security of the State " and had he been let free there would have been every likelihood of his re-indulging in anti-national/anti-social activities. It is also being stated that the detaining authority has passed order of detention after deriving subjective satisfaction in the matter. Grounds of detention, order of detention as well as entire material relied upon by the detaining authority came to be furnished to the detainee well within statutory period provided under Section 13 of the Act. It is further stated that the contentions of the detention order/warrant and the grounds of detention were read over and explained to the detainee in the language which he fully understood and in lieu whereof the detainee subscribed his signatures on the execution report.

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

6. Learned counsel for the detainee, while being heard, makes reference to the grounds of the detention and states that on a cursory look on the same it is manifest that same are vague. It is also submitted that the Detaining Authority on the basis of dossier submitted by Senior Superintendent of Police, Kulgam , without application of mind and without evaluating the allegations alleged against the detainee in the said dossier proceeded to pass impugned detention order whereby the detainee has been detained and directed to be lodged at Central Jail, Srinagar. In addition, learned counsel submitted that the allegations leveled against the detenu are totally vague as nothing specific has been stated in the grounds of detention.

7. In rebuttal, learned AAG submits that the record reveals that the grounds of detention are explicitly clear. The procedural safeguards prescribed under the provisions of Public Safety Act and the rights guaranteed to the detainee under the Constitution have strictly been followed in the instant case. The detainee has been furnished all the material, as was required, and was also made aware of his right to make representation to the detaining authority as well as to the government, against his detention.

8. Personal liberty is one of the most cherished freedoms, perhaps more important than the other freedoms guaranteed under the Constitution. It was for this reason that the Founding Fathers enacted the safeguards in Article 22 in the

Constitution so as to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by humanizing the harsh authority over individual liberty. In a democracy governed by the rule of law, the drastic power to detain a person without trial for security of the State and/or maintenance of public order, must be strictly construed. However, where individual liberty comes into conflict with an interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation.

9. Before appreciating the rival contentions of the parties, it would be appropriate to note that the procedural requirements are the only safeguards available to the detainee since the Court cannot go behind the subjective satisfaction of the detaining authority as has been laid down by Hon^{ble} Apex Court in a case titled Abdul Latif Abdul Wahab Sheikh Vs B.K. Jha & Anr., reported as (1987) 2 SCC 22. The procedural requirements are, therefore, to be strictly complied with, if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard.

10. The detention record, as produced, reveals that the detainee was involved in following cases registered at Police Stations, Devsar and Achabal vide:-

(i) FIR No. 57/2018; U/Ss 13 (2) 18,19,38 & 39 ULAP Act.

(ii) FIR No. 84/2018; U/Ss 307,7/27 I.A.Act, 16,18,19,20, 38 ULAP Act .

Involvement of the detainee in the aforementioned cases appears to have heavily weighed with the detaining authority while passing detention order. 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. As per the execution report, he has been furnished copies of contents of PSA Warrant (1) leaf, notice (1) leaf, grounds of detention (02) leaves, dossier (03) leaves , and copy of FIR (1) leaf, in total (08) eight leaves. However, he has not been provided with copies, of charge- sheets and statements of witnesses besides copy of one FIR. The detainee, thus cannot be said to be provided with whole of the record which based his detention, so as to make an effective representation. The failure on the part of the Detaining Authority to supply material renders detention illegal and unsustainable.

11. The detention order passed on 18.10,.2021 by the detaining authority was executed through SI Mohammad Amin of DPL Kulgam on 22.10.2021 in Central Jail Srinagar. As per execution report the material/record was explained to the detainee in Urdu/Kashmiri, the languages he understood. The detainee, however, is not stated to have been furnished the material on which detention order was based in those languages.

12. Hon^{ble} the Supreme Court in a case titled Chaju Ram Vs The State of Jammu & Kashmir, reported as AIR 1971 SC 263, held in Para-9 of the judgment as under:-

".....The detenu is an illiterate person and it is absolutely necessary that when we are dealing with a detenu who cannot read or understand English language or any language at all that the grounds of detention should be explained to him as early as possible in the language he understands so that he can avail himself of the statutory right of making a representation. To hand over to him the document written in English and to obtain his thumb impression on it in token of his having received the same does not comply with the requirements of the law which gives a very valuable-right to the detenu to make a representation which right is frustrated by handing over to him the grounds of detention in an alien language. We are therefore compelled to hold in this case that the requirement of explaining the grounds to the-detenu in his own language was not complied with."

13. It shall also be quite apposite to reproduce the following portions from Paras 3 and 5 of the judgment rendered by Hon^{ble} the Supreme Court in the case titled "Raziya Umar Bakshi Vs Union of India & Ors." (AIR 1980 SC 1751):

"3 The service of the ground of detention on the detenu is a very precious constitutional right and where the grounds are couched in a language which is not known to the detenu, unless the contents of the grounds are fully explained and translated to the detenu, it will tantamount to not serving the grounds of detention to the detenu and would thus vitiate the detention ex-facie.

5 in cases where the detaining authority is satisfied that the grounds are couched in a language which is not known to the detenu, it must see to it that the grounds are explained to the detenu, a translated script is given to him and the grounds bear some sort of a certificate to show that the grounds have been explained to the detenu in the language which he understands."

14. 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 also 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."

15. Vide impugned order, the Detaining Authority has though communicated to the detenu his right to represent against the order to the detaining Authority, but not the time limit, in which, he could make a representation to him, till approval of the detention order by the Government. In a case of National Security Act, titled "Jitendra Vs. Dist. Magistrate, Barabanki & Ors.", reported as 2004 Cri.L.J 2967, the Division Bench of Hon^{ble} Allahabad High Court, has held:-

"10. We make no bones in observing that a partial communication of a right (in the grounds of detention) of the type in the instant case, wherein the time limit for making a representation is of essence and is not communicated in the grounds of detention, would vitiate the right fundamental right guaranteed to the detainee under Article 22(5) of the Constitution of India, namely, of being communicated, as soon as may be the grounds of detention."

16. This is another reason, as to why the impugned order would be vitiated since the detainee's right to make a representation to the detaining authority was only available to him till approval of detention order by the Government. It follows as a logical imperative that the detaining authority should have communicated to the detainee in the grounds of detention the time limit, in which, he could make a representation to it i.e., till the approval of the detention order by the State Government.

17. The non-application of mind by the detaining authority is writ large in view of the fact that the detention order has been framed in a manner that it has not applied its mind but has acted upon the dossier, prepared by the Sr. Superintendent of Police Kulgam only. This is evident from the opening sentence of the order which is reproduced as under:-

"Whereas, on the basis of grounds of detention placed before me by the Superintendent of Police Kulgam vide his No. Legal/PSA-9/2021/7473-76 dated 17.10.2021. I am satisfied that with a view to prevent Mubarak Ahmad Thoker S/o Ab. Rashid Thoker R/O Sopat Tangpora Tehsil Devsar Kulgam District Kulgam from acting in any manner prejudicial to security, sovereignty and integrity of State , it is necessary to do so."

The detaining Authority has though referred the involvement of the detainee in two cases registered vide FIR No. 57/2018 registered at P/S Devsar and FIR No. 84/2018 registered at P/S Achabal, however, it has been shown in the grounds of detention that detainee was arrested in the case registered at Police Station Devsar and bailed out by the competent Court of law but there is no mention with regard to the development of the other case, registered in the Police Station at Achabal.

18. The contention of the learned counsel for the petitioner that the petitioner was in custody in the case registered at Police Station Achabal and he had not applied for grant of bail, as such, there was no occasion for the detaining authority to pass the detention order without assigning the compelling reasons is thus solidified . The Detaining Authority has not mentioned anything with regard to moving of bail application or likelihood of detainee being granted the same. This shows the callousness on the part of Detaining Authority while passing the detention order. Further the detaining authority has recorded the grounds of detention verbatim to the dossier prepared by the police which shows that the detaining authority has not just acted upon dossier, while considering the detention of the detainee without application of its mind.

19. The detention of the detenu has been ordered on the basis of two FIRs, registered in the year 2018, therefore, both the cases had no proximity of time with the detention order. Live and proximate link between the past conduct of the detenu and the imperative need to detain have to be harmonized to rely upon the alleged illegal activities of the detenu. Old and stale incidents shall be of no use as has been held in "Sama Aruna Vs State of Telangana & Anr." reported as (2018) 12 SCC150. Relevant paragraph No.16 is extracted as under:

"16. Obviously, therefore, the power to detain, under the Act of 1986 can be exercised only for preventing a person from engaging in or pursuing or taking some action which adversely affects or is likely to affect adversely the maintenance of public order; or for preventing him from making preparations for engaging in such activities. There is little doubt that the conduct or activities of the detenu in the past must be taken into account for coming to the conclusion that he is going to engage in or make preparations for engaging in such activities, for many such persons follow a pattern of criminal activities. But the question is how far back? There is no doubt that only activities so far back can be considered as furnish a cause for preventive detention in the present. That is, only those activities so far back in the past which lead to the conclusion that he is likely to engage in or prepare to engage in such activities in the immediate future can be taken into account. In *Golam Hussain vs State of W.B.*, this Court observed as follows:(SCC p.535 para 5)

"No authority, acting rationally, can be satisfied, subjectively or otherwise, of future mischief merely because long ago the detenu had done something evil. To rule otherwise is to sanction a simulacrum of a statutory requirement. But no mechanical test by counting the months of the interval is sound. It all depends on the nature of the acts relied on, grave and determined or less serious and corrigible, on the length of the gap, short or long, on the reason for the delay in taking preventive action, like information of participation being available only in the course of an investigation. We have to investigate whether the causal connection has been broken in the circumstances of each case".

Suffice it to say that in any case, incidents which are said to have taken place nine to fourteen years earlier, cannot form the basis for being satisfied in the present that the detenu is going to engage in, or make preparation for engaging in such activities".

Therefore, in the considered opinion of this Court, the detention order, other than not following the constitutional safeguards also suffers on merit as well, as the two cases made basis to invoke the preventive detention have no live and proximate link to the detention order.

20. Reproducing the dossier prepared by the Senior Superintendent of Police, Kulgam the order of detention, almost word by word; non furnishing of the whole of the record on which detention order was based; furnishing the material in English and not the language of the detenu; and not informing detenu of the

time limit in which detainee could make representation before the Detaining Authority or the Government, all reflect that the Detaining Authority has not applied its mind to draw the subjective satisfaction to detain the petitioner. The detainee, as such, has been deprived of his fundamental right to make effective and meaningful representation against the detention order to the Detaining Authority and the government rendering the same as illegal and unsustainable.

21. For the foregoing reasons and having regard to the facts of the case and the law applicable discussed hereinabove, this petition is allowed. Impugned order of detention No. 08/DMK/PSA/2021 dated 18.10.2021 is, as such, quashed. The detainee namely Mubarik Ahmed Thoker S/O Ab. Rashid Thoker R/O Sopat Tangpora Tehsil Devsar Distgrict Kulgam is ordered to be released from the preventive custody forthwith provided he is not required in connection with any other case(s).

22. Xerox copy of Detention record, as produced, be returned to the learned AAG.

23. Disposed of, accordingly.