

(2023) 06 J&K CK 0039

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 171 Of 2022

Musaib Bin Shafi Sheikh

APPELLANT

Vs

Union Territory Of J&K & Anr

RESPONDENT

Date of Decision : 16-06-2023

Acts Referred:

Constitution Of India, 1950 — Article 19, 22(5)

Citation : (2023) 06 J&K CK 0039

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Hilal Ahmad Wani, Sajad Ashraf

Final Decision : Allowed

Judgement

Sanjay Dhar, J

1) By the instant petition, quashment of order No.98/DMS/PSA/ 2022 dated 08.03.2022, issued by District Magistrate, Shopian (for brevity "detaining authority") is sought. In terms of the aforesaid order, Musaib Bin Shafi Sheikh son of Late Mohd. Shafi Sheikh resident of Turkawangam Tehsil Chitragam District Shopian, (for short "detenu") has been placed under preventive detention and lodged in Central Jail Kotbhalwal, 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. It has been further urged that the material which formed basis of the grounds of detention and the consequent order of detention has not been provided to the detainee. It has also been contended that the grounds of detention are vague, non-existent and stale.

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 security of the State. 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; that the grounds urged by the petitioner are legally misconceived, factually untenable and without any merit and that the impugned detention order has been passed strictly in accordance with law occupying the field. In support of their stand taken in the counter affidavit, the respondents have also produced the detention record.

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 the material, on the basis of which the grounds of detention have been formulated, has not been supplied to him.

(II) That there has been non-application of mind on the part of the detaining authority as the detainee has already been admitted to bail in FIR No.46/2021 of P/S Zainapora, but this fact has not been mentioned in the grounds of detention.

(III) That although a representation was submitted against the detention by the detainee through his father before the respondents yet the same was not considered thereby rendering the detention order unsustainable in law.

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 basis 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 copies of detention order (01 leaf), notice of detention (01 leaf), grounds of detention (03), copy of dossier of detention (Nil), copies of FIR, statements of witnesses and other relevant documents (01 leaf), (total 06 leaves). If we have a look at the grounds of detention, it bears reference to FIR No.46/2021 of P/S Zainapora. It was incumbent upon respondents to furnish not only the copy of the FIR but also the statements of witnesses recorded during investigation of the said FIR and other material on the basis of which petitioner's involvement therein FIR is shown. All this material would run in dozens of pages and it is impossible that all this material would be covered in only one leaf. Even the copy of the dossier of detention has not been supplied to the petitioner.

7) Thus, 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 these vital documents in making an effective representation before the Advisory Board. 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.

8) 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 in law. 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) and, *Thahira Haris Etc. Etc. V. Government of Karnataka & Ors.* (AIR 2009 SC 2184).

9) Next it has been contended that the impugned detention order suffers from non-application of mind on the part of the detaining authority, inasmuch as the grounds of detention do not bear any reference to the fact that the petitioner had already been admitted to bail in FIR No.46/2021 vide order dated 21.11.2021 passed by Special Judge designated under NIA Act, Anantnag. A copy of the order issued by the said Court in this regard has been placed on record by the petitioner. The non-mentioning of this important fact in the grounds of detention exhibits non-application of mind on the part of detaining authority. This shows that the detaining authority has not meticulously examined the record while passing the impugned order of detention which renders the same unsustainable in law. I am supported in my aforesaid view by the judgment of the Supreme Court rendered in the case of *Anant Sakharam Raut v. State of Maharashtra & Ors.* AIR 1987 SC 137.

10) The next ground projected by the petitioner is that he had submitted a representation against his detention but the same has not been considered by the respondents.

11) It has been specifically contended by the petitioner that he had made a representation against his detention through his Uncle Firdous Ahmad Sheikh, which, seemingly, has been received by the office of District Magistrate, Shopian, on 19.04.2022. The copy of the representation bears the seal and endorsement of the office of the District Magistrate concerned. The petitioner has specifically pleaded in ground (ix) of his petition that he made a representation before the Detaining Authority but the same has not been placed before the Advisory Board. These assertions have gone un rebutted as there is no denial to the same by the respondents in the counter affidavit. The detention record does not suggest that the said representation has been either placed before the Advisory Board or considered by the Board. The failure of the respondents to place the representation submitted by the detainee before the Advisory Board and its consequent non-consideration indisputably amounts to violation of constitutional safeguards provided the provisions of Article 22(5) of the Constitution. A reference in this behalf to the judgment of the Apex Court in the case of

Rahmatullah Vs. State of Bihar and Ors., 1979 (4) SCC 559, would be relevant. In Para 4 of the aforesaid judgment, the Court observed as under:-

"4. The normal rule of law is that when a person commits an offence or a number of offences, he should be prosecuted and punished in accordance with the normal appropriate criminal law; but if he is sought to be detained under any of the preventive detention laws as may often be necessary to prevent further commission of such offences, then the provisions of Article 22(5) must be complied with. Sub-Article (5) of Article 22 reads:

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

This Sub-Article provides, *inter alia*, that the detaining authority shall as soon as may communicate the grounds of detention and shall afford him the earliest opportunity of making a representation against the order. The opportunity of making a representation is not for nothing. The representation, if any, submitted by the detenu is meant for consideration by the Appropriate Authority without any unreasonable delay, as it involves the liberty of a citizen guaranteed by Article 19 of the Constitution. The non-consideration or an unreasonably belated consideration of the representation tantamount to non-compliance of Sub-Article (5) of Article 22 of the Constitution."

12) From the aforesaid legal position on the subject, it is clear that non-consideration or an unreasonably belated consideration of the representation tantamount to non-compliance of Article 22(5) of the Constitution, which in turn renders the detention unsustainable in law.

13) Viewed thus, the petition is allowed and the impugned order of detention 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.

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