

(2022) 04 J&K CK 0069

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 122 Of 2021

Mushtaq Ahmad Ahangar

APPELLANT

Vs

Union Territory Of J&K & Anr

RESPONDENT

Date of Decision : 28-04-2022

Acts Referred:

Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 294
Indian Penal Code, 1860 — Section 147, 148, 188, 269, 336, 307

Citation : (2022) 04 J&K CK 0069

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Wajid Mohammad Haseeb, Sajjad Ashraf

Final Decision : Allowed

Judgement

Sanjay Dhar, J

1) By the instant petition, veracity and legality of the detention order No.DMS/PSA/34/2021 dated 05.08.2021, issued by District Magistrate, Srinagar (for brevity "detaining authority") has been challenged. In terms of the aforesaid order, Mushtaq Ahmad Ahangar son of Ali Mohammad Ahangar resident of Khonmoh Srinagar (for short "detenue") has been placed under preventive detention and lodged in District Jail, Kupwara.

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 vague, non-existent on which no prudent man can make a representation against such allegations. It has been further contended that the Constitutional and Statutory procedural safeguards have not been complied with in the instant case. It has been further urged that there has been non-application of mind on the part of detaining authority while passing the impugned detention order, inasmuch as the detenue was already admitted to bail in one of the FIRs, mention whereof has been made in the grounds of detention.

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 along with the material relied upon by the detaining authority were handed over to the detainee and the same was read over and explained to him. That the grounds urged by the petitioner are legally misconceived, factually untenable and without any merit. To substantiate their stand taken in the counter affidavit, the respondents have produced the detention record.

4) I have heard learned counsel for parties and perused the 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 there has been non-application of mind on the part of the detaining authority as the detainee has already been acquitted in FIR No.28/2011 for offence under Section 294 RPC of P/S Pantha Chowk, but this fact has not been mentioned in the grounds of detention.

(II) That there has been non-application of mind on the part of the detaining authority as the detainee was already in custody in connection with FIR No.40/2021 for offences under Section 147, 148, 336, 307, 188, 269 IPC of P/S Pantha Chowk, mention whereof has been made in the grounds of detention, and there were no compelling reasons for the Detaining Authority to make the impugned detention order and that the Detaining Authority has not spelt out the compelling reasons for detaining the detainee under preventive detention laws.

(III) That the whole of the material forming basis of the grounds of detention has not been furnished to the detainee.

6) 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 acquitted of the offence arising out of FIR No.28/2011 vide order dated 16.12.2013 passed by learned Special Mobile Magistrate, PT&E, Srinagar. 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.

7) The next ground projected by the learned counsel for the petitioner is that the detainee was already implicated in FIR No.40/2021 of P/S Pantha Chowk and there were no compelling reasons for the Detaining Authority to make the

impugned detention order and that the Detaining Authority has not spelt out the compelling reasons for detaining the detainee under preventive detention.

8) It is trite law that the preventive detention orders can be passed even when a person is in police/judicial custody or involved in a criminal case but for doing so, compelling reasons are to be recorded. The Detaining Authority is bound to record the compelling reasons as to why the detainee could not be deterred from indulging in subversive activities by resorting to normal law and in the absence of these reasons, the order of detention becomes unsustainable in law. I am supported in my aforesaid view by the judgment of the Supreme Court in the case of *Surya Prakash Sharma v. State of U. P. and others*, 1994 SCC (Cri) 1691.

9) It is also settled position of law that a person involved in a criminal case can be detained under the provisions of preventive detention laws provided there are compelling circumstances for doing so otherwise the order of detention becomes unsustainable. In this connection, it is quite apt to quote following observations of the of Supreme Court in *T. P. Moideen Koya vs. Government of Kerala and ors.*, 2004 (8) SCC 106:

".....in law there is no bar in passing a detention order even against a person who is already in custody in respect of a criminal offence if the detaining authority is subjectively satisfied that detention order should be passed and that there must be cogent material before the authority passing the detention order for inferring that the detainee was likely to be released on bail"

10) Adverting to the facts of the instant case, the detention record shows that the petitioner was implicated in FIR No.40/2021 of P/S Pantha Chowk. The detaining authority has not, in the grounds of detention spelled out any reason, much less compelling reasons for resorting to preventive detention, despite noticing that the petitioner was already booked and arrested in the said FIR. Details of specific incidents as regards the activities of the detainee which compelled the detaining authority to resort to preventive detention of the petitioner are not recorded in the grounds of detention. Thus, the detaining authority has not spelled out the compelling reasons for resorting to preventive detention in the case of the petitioner.

11) Next it is urged that whole of the material forming basis of the grounds of detention has not been supplied to the petitioner which deprived him from making an effective representation against his detention.

12) A perusal of the detention record produced by learned counsel for the respondents reveals that the material is stated to have been received by the petitioner on 13.08.2021. Report of Executing Officer in this regard forms part of the detention record, a perusal whereof reveals that it bears the signature of petitioner and according to it, the petitioner has received grounds of detention consisting of two leaves.

13) It is clear from the execution report, which forms part of the detention

record, that copy of the dossier has not at all been supplied to the detainee. Apart from this, if we have a look at the grounds of detention, it bears reference to FIR Nos.28/2011, 5/2020 and 40/2021 of P/S Pantha Chowk. It was incumbent upon the respondents to furnish not only the copies of the FIRs but also the statements of witnesses recorded during investigation of the said FIRs as well as the other material on the basis of which petitioner's involvement in the FIRs is shown. 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 a representation before the Advisory Board, as a result whereof his case has been considered by the Advisory Board in the absence of his representation, as is clear from the detention record. 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. Furnishing of material including the FIR and statements of witnesses is a necessary requirement for enabling the detainee to make an effective representation against the order of detention. I am supported in my aforesaid view by the judgments of the Supreme Court in *Sophia Gulam Mohd. Bham v. State of Maharashtra & ors* (AIR 1999 SC 3051), *Thahira Haris etc. etc. Vs. Government of Karnataka & Ors* (AIR 2009 SC 2184) and *Ibrahim Ahmad Bhatti alias Mohd. Akhtar Hussain alias Kandar Ahmad Wagher alias Iqbal alias Gulam Vs. State of Gujarat and others*", (1982) 3 SCC 440.

14) Viewed thus, the petition is allowed and the impugned order of detention is quashed. The detainee is directed to be released from the preventive custody forthwith provided he is not required in connection with any other case.

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