

(2023) 05 J&K CK 0021

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 72 Of 2022

Nazir Ahmed Pala

APPELLANT

Vs

UT Of J & K & Ors

RESPONDENT

Date of Decision : 16-05-2023

Acts Referred:

Constitution Of India, 1950 — Article 21, 22, 22(5)
Jammu And Kashmir Public Safety. Act, 1978 — Section 8, 13

Citation : (2023) 05 J&K CK 0021

Hon'ble Judges : M A Chowdhary, J

Bench : Single Bench

Advocate : S S Ahmed, Monika Kohli

Final Decision : Disposed Of

Judgement

M A Chowdhary, J

1. District Magistrate, Ramban (hereinafter called 'Detaining Authority') in exercise of powers under Section 8 of the Jammu & Kashmir Public Safety Act, 1978 (PSA Shortly), passed the detention Order No. 29/PSA of 2022 Dated 18.10.2022 (for short 'impugned order'), in terms whereof the petitioner namely Nazir Ahmed Pala S/O Ghulam Nabi Pala R/O Phagow Duligam, Tehsil Banihal, District Ramban (for short 'detenue') has been detained.

2. The impugned detention order has been challenged through the medium of the instant petition, allegedly having been passed in breach of the provisions of Article 22(5) of the Constitution of India read with Section 13 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; 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 detenue; that neither the petitioner is involved in any illegal or anti national activity nor he has committed

any such crime which has disturbed the society at large; that the detainee is not an English literate person and understands only Urdu language but the order of detention is in English and it is not possible for him to understand such a hyper technical language; and that the order of detention and the connected documents annexed with the petition clearly show violation of right of the detainee guaranteed in terms of the Article 22(5) of the Constitution of India.

4. Respondents in their counter affidavits have stated that the detainee was ordered to be detained for maintenance of 'public order' and had he been let free, there would have been every likelihood of his re-indulging in criminal activities; that the power of preventive detention is different from punishment as the preventive detention is aimed at stopping the illegal activities of an individual, which, otherwise, under common law both criminal/civil cannot be stopped and the said individual would have created havoc in the society which leads to public disorder, disturbing peace, stability and in certain cases also raises alarm bells regarding the National Unity and Integrity; that petitioner's activities, were threat to the public order, peace and stability in the society. It is also being stated that the petitioner is involved in numerous criminal activities, was not likely to desist from his criminal activities which were prejudicial to the maintenance of peace and public order in District Ramban.

5. Learned counsel for the detainee while being heard makes reference to the grounds of the detention and states that on a cursory look on them, 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, Ramban, without application of mind and without evaluating the allegations levelled against the detainee in the said dossier, copy of which was not even provided to the detainee, proceeded to pass impugned detention order whereby the detainee has been detained and directed to be lodged at Central Jail, Kot Bhalwal, Jammu. In addition, learned counsel submitted that the allegations levelled against the detainee are totally vague as nothing specific has been stated in the grounds of detention.

6. In rebuttal, learned Sr. AAG submits that the record reveals that there is no vagueness in the grounds of detention. The procedural safeguards prescribed under the provisions of PSA 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 government, against his detention.

7. Heard learned counsel for both the sides at length and considered the record.

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 humanising the harsh authority over individual liberty. In a democracy that of ours, 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. The detention record, as produced, reveals that the detainee was involved in anti-national/criminal activities and is in contact with suspected person(s) through his mobile phone No. 6006099940 as well as other social networking sites i.e WhatsApp, Facebook and Instagram. It has come to the notice that the detainee perhaps notices the activities of the security forces of UT of J&K and pass the same to the ANEs/Terrorists in Pakistan. During the course of enquiry and on checking of his mobile phone, it came to notice that the following foreign contacts have tried to communicate with him on WhatsApp: a) +923464271523, b) +1(717)6861280, c) +966541758841, d) +923069809752, and e) +1(202)7736230. Detainee is neighbour of one Sadam Hussain Ganie S/O Abdul Salam Ganie R/o Fagow Dooligam who is already detained under PSA and presently lodged in Kot-Balwal Jammu for his illegal activities, whose brother is presently in POK/Pakistan and is an active militant of HM outfit there and number of DD reports have been entered in Daily Diary of Police Station Banihal regarding his present activities. Involvement of the detainee in the aforementioned cases appears to have heavily weighed with the detaining authority while passing detention order.

10. Report of the Executing Officer in this regard forms part of the detention record, a perusal thereof reveals that it bears the signatures of the petitioner and according to this document, the petitioner has received the detention order (one leaf), notice of detention (one leaf), grounds of detention (three leaves), whereas dossier of detention, copies of the FIRs and statement of witnesses and other related documents were not supplied to him. It is clear from the execution report that copy of dossier of the detention has not been provided to the petitioner at all and it is also noted that the petitioner is in contact with certain elements in Pakistan through suspicious apps and other mobile contacts regarding which a number of DD reports have been entered in the Daily Diary of the Police Station, but in the execution report, it is nowhere mentioned that copies of these DD reports have been furnished to the petitioner. The sole basis for detaining the petitioner is the DD reports of the police and the police dossier, which, in the instant case, seems not to have been supplied to the petitioner. Even otherwise, a perusal of the copy of the representation annexed with the petition reveals that the petitioner has specifically averred in the said representation that he has not been served with the dossier submitted by the Senior Superintendent of Police, Ramban to the District Magistrate, Ramban. Thus, the stand of the petitioner right from the inception is that he has not been provided the whole material which has formed the basis of grounds of detention.

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 the 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.

11. It needs no emphasis that the detainee cannot be expected to make an effective and purposeful representation, which is a constitutional right guaranteed under Article 22(5) of the Constitution of India, unless and until, the material on the basis of which his detention has been ordered, is supplied to the detainee. The failure on the part of the Detaining Authority to supply the material renders the detention order illegal and unsustainable.

12. 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.

13. 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 detention order (01leaf), notice of detention (01leaf), grounds of detention (03 leaves), [Total 05 leaves]. However, he has not been provided with copies of translated script of the grounds of detention, copies of DD Reports, statements of witnesses as well as the material relied upon by the detaining authority under which the petitioner has been detained. The detainee, thus cannot be said to be provided with whole of the record which based his detention, so as to make an effective and meaningful representation. The failure on the part of the detaining authority to supply material renders detention illegal and unsustainable.

14. This Court is fortified to take this opinion, in view of the law laid down by the Apex Court in following cases. A three Judge Bench of the Apex Court in a case titled "Sushanta Kumar Banik versus State of Tripura & Ors" (2022 SCC Online SC 1333), while dealing with preventive detention, held on 30.09.2022 in paragraph 28, as follows:

"The preventive detention is a serious invasion of personal liberty and the normal methods open to a person charged with commission of any offence to disprove the charge or to prove his innocence at the trial are not available to the person preventively detained and, therefore, in prevention detention jurisprudence whatever little safeguards the Constitution and the enactments authorizing such detention provide assume utmost importance and must be strictly adhered to."

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."

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 him and the government in Hindi/Urdu language, but no time limit was communicated, 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 detenu 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 detenu'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 detenu 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. Reproducing the dossier prepared by the Senior Superintendent of Police, Ramban in 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 detainee; and not informing detainee of his right to make representation before the Detaining Authority within the statutory period, all reflect that the Detaining Authority has not applied its mind to draw the subjective satisfaction to detain the petitioner and detainee has also been deprived of his fundamental right to make effective and meaningful representation against the detention order to the Detaining Authority and the government.

18. For the foregoing reasons and the law discussed hereinabove, this petition is allowed. Impugned order of detention No. 29/PSA of 2022 dated 18.10.2022 is, as such, quashed. The detainee namely Nazir Ahmed Pala S/O Ghulam Nabi Pala R/O Phagow Duligam, Tehsil Banihal, District Ramban, is ordered to be released from the preventive custody, forthwith, provided he is not required in connection with any other case(s).

19. Detention record, as produced, be returned to the learned Sr. AAG.

20. Writ petition is disposed of, accordingly.