
(2020) 10 J&K CK 0023
In the Jammu And Kashmir High Court
Case No : Writ Petition (C) No. 666 Of 2019

Nisar Ahmad Kumar

APPELLANT

Vs

Union Territory Of J&K And Others

RESPONDENT

Date of Decision : 09-10-2020

Acts Referred:

Jammu And Kashmir Prevention Of Illicit Traffic In Narcotic Drugs And Psychotropic Substances Act, 1988 — Section 2(c), 3
Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 8, 21, 29, 37
Code Of Criminal Procedure, 1973 — Section 161

Citation : (2020) 10 J&K CK 0023

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Tasaduk Hussain Reshi, B. A. Dar

Final Decision : Allowed

Judgement

Sanjay Dhar, J

1) Divisional Commissioner, Kashmir, in exercise of powers conferred under Section 3 of the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (hereinafter referred to as "Act of 1988"), has, vide order No.DIVCOM-"K"/100/2019 dated 21.10.2019, ordered detention of Shri Nisar Ahmad Kumar @ Naseera S/o Mohammad Ramzan Kumar R/o Kumar Mohalla Plan Bandipora (hereinafter referred to as the detainee).

2) Petitioner has contended that the Detaining Authority has passed the impugned detention order mechanically without application of mind. It has been further contended that the Constitutional and Statutory procedural safeguards have not been complied with in the instant case. It has also been urged that the allegations made against the detainee in the grounds of detention are vague and that the detainee has been disabled from making an effective representation against his detention because the material, on the basis of which detention order has been passed, has not been provided to the detainee.

3) Despite availing a number of opportunities, the respondents have not chosen to file the counter affidavit.

4) I have heard learned counsel for parties and I have also gone through detention record.

5) Learned counsel for the petitioner has highlighted various grounds while seeking quashment of impugned order but the main grounds on which stress has been laid during the course of arguments are that there has been total non-application of mind while passing the impugned, inasmuch as at the time of passing the detention order, the detainee was already in custody in connection with case FIR No.71/2019 for offence under Section 8/21, 29 NDPS Act of P/S Tarzoo and that there were no compelling reasons for the Detaining Authority to make the impugned detention order and the Detaining Authority has not spelt out the compelling reasons for detaining the detainee under preventive detention laws; that the material on the basis of which impugned detention order has been passed has not been supplied to the detainee thereby disabling him from making an effective representation against his detention. Another ground urged by the petitioner is that there has been non- application of mind on the part of the Detaining Authority as the grounds of detention are more or less a Xerox copy of the dossier.

6) It has been contended by learned counsel for the petitioner that the Detaining Authority could not have passed a composite order of detention on the ground of commission of acts within the meaning of the Act of 1988 as well as for maintenance of public order. In order to test the merit of this contention of learned counsel for the petitioner, we need to understand the object and scope of Section 3 of the Act of 1988. The said provision provides that a detention order can be made by the Government or any specially empowered officer of the Government of a particular rank with a view to prevent him from committing any of the acts within the meaning of "illicit traffic" as defined in clause (c) of Section 2 of the Act, which reads as under:

(c) "Illicit traffic" means -

(i) cultivating any coca plant or gathering any portion of coca plant;

(ii) cultivating the opium, poppy or any cannabis plant;

(iii) engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import, inter-State, export inter-State or transshipment of narcotic drugs of psychotropic substances;

(iv) dealing in narcotic drugs or psychotropic substances otherwise than as provided in sub-clause (i) and (iii);

(v) handling or letting any premises for use for any of the purposes referred to in sub-clauses (i) to (iv);

(vi) financing any activity by himself or through any other person in furtherance or in support of doing any of the aforesaid acts'

(vii) harbouring persons engaged in any of the activities specified in sub-clauses (i) to (iv); or

(viii) abetting or conspiring in the furtherance or in support of doing any of the aforesaid acts;

except to the extent permitted under the Narcotic Drugs and psychotropic Substances Act, 1985, or any rule or order made, or any condition of any licence, permit or authorization issued thereunder."

7) In the instant case, the detaining authority has passed the order of detention in the following terms:

"I am satisfied that in order to prevent Nisar Ahmad Kumar @ Naseera S/o Mohammad Ramzan Kumar R/o Kumar Mohalla Plan Bandipora from committing any of the acts within the meaning of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 and for Maintenance of Public order, it is necessary to detain him."

8) Mention of the words "maintenance of public order" would suggest that the detaining authority is not certain or has not been alive to the legal position that under Section 3 of the "Act of 1988", a person could not be detained for the acts prejudicial to the "maintenance of public order" and that detention of a person can be ordered only for prevention of commission of the acts mentioned in clause (c) of section 2 of the Act of 1988. The clause nowhere makes a mention of "maintenance of public order". Thus, the impugned order of detention smacks of non-application of mind on the part of detaining authority.

9) Apart from what has been discussed hereinbefore, the non-application of mind on the part of detaining authority is also reflected from the contents of grounds of detention which are more or less a Xerox copy of the dossier forwarded by Senior Superintendent of Police, Sopore, to the detaining authority with interplay of words here and there. While formulating the grounds of detention, the detaining authority has to apply its own mind and the authority cannot simply reiterate whatever is written in the police dossier. In this behalf, I am supported by the judgment of the Supreme Court in the case of Jai Singh & Ors. v. State of J&K, AIR 1985 SC 764.

10) A perusal of the detention record shows that the detaining authority has been provided only the grounds of detention consisting of two leaves. Although in the grounds of detention there is reference to FIR No.71/2019 for offence under Section 8/21-29 NDPS Act registered with P/S Tarzoo yet neither the copy of FIR nor the statements of witnesses recorded under Section 161 Cr. P. C seem to have been supplied to the detainee. It has been specifically alleged by the petitioner in the petition that he was not provided with all the material to support the grounds of detention. The detention record confirms the said assertion of the

petitioner, which has even otherwise remained unrebutted in the absence of any counter on behalf of the respondents.

11) Making of an effective representation by a detainee is a very vital constitutional safeguard against the preventive detention. In the absence of the material on the basis of which grounds of detention have been formulated, the detainee has been rendered handicapped and hampered in making an effective representation against the order of detention. The violation of this vital safeguard by the respondents renders the impugned order of detention unsustainable in law. I am supported in my aforesaid view by the judgment of the Supreme Court in 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.

12) Another ground that has been urged by learned counsel for the petitioner during the course of argument is that there were no compelling reasons for the detaining authority to pass the order of detention against the petitioner because he was already in custody in connection with case FIR No.71/2019 of P/S Tarzoo. In this regard it may be noted that preventive detention orders can be passed even when a person is in police custody or involved in a criminal case but for doing so, there must be compelling reasons for the detaining authority to do so. 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.

13) The observations of the of Supreme Court in T. P. Moideen Koya vs. Government of Kerala and ors." reported in 2004 (8) SCC 106, are relevant to the context and the same are reproduced as under:

".....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"

14) Further the Supreme Court in Sama Aruna v. State of Telangana & Anr (AIR 2017 SC 2662, while considering the question whether an order of detention could be passed in the face of the fact that the detainee was already in custody in a substantive offence, observed as under:

"24. There is another reason why the detention order is unjustified. It was passed when the accused was in jail in Crime No.221 of 2016. His custody in jail for the said offence was converted into custody under the impugned detention order. The incident involved in this offence is sometime in the year 2002-03. The detainee could not have been detained preventively by taking this stale incident into account, more so when he was in jail. In Ramesh Yadav v. District

Magistrate, Etah and ors, this Court observed as follows:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detainee was released on bail he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed."

15) From the discussion of the aforesaid law on the subject, it is clear that though a person who is already in custody can be taken into preventive custody yet for doing so, there must be compelling reason.

16) Coming to the instant case, the detention record shows that the detainee was arrested in FIR No.71/2019 for offence under Section 8/21, 29 of P/S Tarzoo. So far as the grounds of detention are concerned, the same are based upon the solitary incident which is the subject matter of aforesaid FIR. There was no material on record excepting the allegations made in the aforementioned FIR before the Detaining Authority which would have compelled it to pass the impugned detention order against the petitioner who was already booked for commission of a substantive offence.

17) There is yet another circumstance which goes on to suggest that there was no compelling reason for the detaining authority to pass an order of preventive detention against the detainee. The petitioner/ detainee was in custody in a substantive offence under Section 8/21 of NDPS Act, as commercial quantity of charas was allegedly recovered from his possession. In the face of the rigor contained in Section 37 of NDPS Act, there was remote possibility of the petitioner getting enlarged on bail in the aforesaid offence. Thus, detaining authority had no reason, much less a compelling reason to pass the impugned order of detention against the petitioner. The impugned order of detention of the petitioner is, therefore, unsustainable in law on this ground as well.

18) For the afore-stated reasons, the petition is allowed and the order of detention bearing No.DIVCOM-"K"/100/2019 dated 21.10.2019, issued by Divisional Commissioner, Kashmir, is quashed. Detainee is directed to be released from the preventive custody provided he is not required in connection with any other case.

19) The record, as produced, be returned to the learned counsel for the respondents.