

(2022) 10 J&K CK 0031

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 390 Of 2022

Niyaz Ahmad Wani

APPELLANT

Vs

UT Of J&K & Ors

RESPONDENT

Date of Decision : 19-10-2022

Acts Referred:

Constitution Of India, 1950 — Article 19(2), 19(3), 19(4), 21, 22
Indian Penal Code, 1860 — Section 120B, 406, 420, 506
Jammu And Kashmir Public Safety Act, 1978 — Section 8

Citation : (2022) 10 J&K CK 0031

Hon'ble Judges : Moksha Khajuria Kazmi, J

Bench : Single Bench

Advocate : S. M. Ayoub, Asif Maqbool

Final Decision : Allowed

Judgement

Moksha Khajuria Kazmi, J

1. Petitioner, through his daughter, Ansab Niyaz, has assailed his detention order passed by the District Magistrate, Pulwama (the detaining authority) vide Order No. 38/DMP/PSA/22 dated 19.05.2022 (the impugned order), whereby the petitioner-Niyaz Ahmad Wani S/O Ab. Aziz Wani R/O New Colony, Pulwama ("the detainee") has been put under preventive detention with a view to prevent him from acting in any manner prejudicial to the maintenance of the public order.

2. Before advertng to the grounds of challenge, it is necessary to notice the material facts on the basis of which the detaining authority has derived its subjective satisfaction for placing the detainee under the preventive detention.

3. The grounds of detention which has been made basis by the detaianig authority for the preventive detention of the detainee is the Police report dated 18.05.2022, reveals that the detainee is involved in motivating and provoking the innocent youth, young and tender-aged boys for resorting to anti-social activities and that he is an active member of the gang "TRATH GOLA" which is headed by

Abdul Hamid Dar R/O Tujan Pulwama along with some other associates and is active in many Districts of the Valley. After the information was received by the police about the illegal activities of the detainee, FIR No. 123/2022 under Sections 420, 120-B IPC was registered and the detainee was apprehended in connection with the aforesaid FIR and was shown to be on Police Remand. The detainee is stated to be an active member of the gang since 2012, which was dishonestly and fraudulently extorting money worth Crores of rupees from gullible people on the pretext of paying returns in double and triple under the "TRATH GOLA" a scam. It is also stated that the detainee had lured the people into the trap and the amount so collected was used in illegal, illegitimate and illicit activities. It is further alleged that the detainee along with his other associates hatched a conspiracy to loot the general masses and persuaded many to sold their properties to invest in "TRATH GOLA" the scam, and that, the detaining authority was of the opinion that remaining at large of the detainee would be detrimental to the maintenance of peace and public order.

4. It is on the basis of these allegations, the detaining authority arrived at subjective satisfaction to detain the detainee to deter him from acting in any manner prejudicial to the maintenance of public order and as such by invoking Section 8 of the J&K Public Safety Act passed the impugned detention order against the detainee and directed his lodgment in District Jail Bhaderwah.

5. The respondents in their counter affidavit insisted that after considering the material by the competent authority the activities of the detainee were found to be prejudicial to the maintenance of public order and there were compelling reasons to detain the detainee under Section 8 of the J&K Public Safety Act, 1978.

6. Mr. Asif Maqbool, Dy. AG, has provided scanned copy of the detention record.

7. The impugned order of detention has been challenged by the petitioner inter-alia on the following grounds:

(I) That the detaining authority has made the basis for the detention of the detainee, the sole FIR No.123/2022 registered by Police Station, Pulwama under Section 420, 120B IPC, if found proved against the detainee, would constitute a criminal act and cannot be treated as an act which will disturb the peace and public order;

(II) That the material relied upon by the detaining authority to arrive subjective satisfaction for putting the detainee under preventive detention was not supplied to the detainee and was not also explained him to the language, which he could understand, meaning, thereby that the detainee has been prevented from making an effective representation to the detaining authority or the Government against his detention;

(III) That the grounds of detention are vague, irrelevant and non-existent and, therefore, no prudent person can make an effective and purposeful representation.

8. Perusal of the grounds of detention demonstrates that the detainee has been

put under preventive detention for his involvement in FIR No.123/2022. The allegations reflected in the aforesaid FIR, even if taken to be true on its face value, do not constitute an act having potential to disturb the public order.

9. This Court has already dealt with the issue raised in the instant petition in WP (Crl) No. 325/2022 decided on 20.09.2022, and has observed as under:-

The term "law and order" and "Public order" appears to be common but have different connotations. While former is a continual ongoing term, the latter is more temporal in nature. In the case of public order, the community or the public at large is affected by a particular action whereas the act or acts that affect only few individuals may be a case of law and order. Mere contravention of law such as indulging in cheating or criminal breach of trust certainly affects, law and order? but before it can be said to affect public order, it must affect the community or public at large. The nature of criminal act, the manner in which it is committed and its impact are some of the factors that determine whether a particular act would fall within the realm of "public order" or "law and order". What is alleged in the FIR, which is sole basis of putting the detainee under preventive detention, clearly falls within the ambit of term "Law and Order". Unless the criminal act attributed to the detainee has the effect of disturbing the even tempo of life of community or public at large, it would remain in the realm of "Law and order" and thus cannot be made the basis of preventive detention.

To understand the concept better, here is an example: when two drunkards quarrel and fight in the public street, there is disorder but not public disorder. They can be dealt with under powers of maintenance of law and order but cannot be detained for disturbing public order. However, where two fighters are of rival communities and one of them tries to raise communal passions, the problem is still of law and order but raises apprehension of public disorder.

10. Recently in *Banka Sneha Sheela v. State of Telangana and ors*, (2021) 9 SCC 415, Hon^{ble} the Supreme Court was confronted with a case of preventive detention ordered by the State of Telangana on almost similar grounds. There were as many as five FIRs all registered against the detainee therein under Sections 420, 406 and 506 IPC and in all the FIRs the detainee was granted anticipatory bail. The detention was ordered primarily on the ground that remaining at large of the detainee would be detrimental to public order. The Hon^{ble} the Supreme Court, in paragraphs No. 14, 15 and 19 has held thus:-

" 14. There can be no doubt that for 'public order' to be disturbed, there must in turn be public disorder. Mere contravention of law such as indulging in cheating or criminal breach of trust certainly affects 'law and order' but before it can be said to affect 'public order', it must affect the community or the public at large.

15. There can be no doubt that what is alleged in the five FIRs pertain to the realm of 'law and order' in that various acts of cheating are ascribed to the Detenu which are punishable under the three sections of the Indian Penal Code set out in the five FIRs. A close reading of the Detention Order would make it

clear that the reason for the said Order is not any apprehension of widespread public harm, danger or alarm but is only because the Detenu was successful in obtaining anticipatory bail/bail from the Courts in each of the five FIRs. If a person is granted anticipatory bail/bail wrongly, there are well-known remedies in the ordinary law to take care of the situation. The State can always appeal against the bail order granted and/or apply for cancellation of bail. The mere successful obtaining of anticipatory bail/bail orders being the real ground for detaining the Detenu, there can be no doubt that the harm, danger or alarm or feeling of insecurity among the general public spoken of in Section 2(a) of the Telangana Prevention of Dangerous Activities Act is make believe and totally absent in the facts of the present case.

19. To tear these observations out of context would be fraught with great danger when it comes to the liberty of a citizen under Article 21 of the Constitution of India. The reason for not adopting a narrow meaning of 'public order' in that case was because of the expression "in the interests of" which occurs to Article 19(2) to 19(4) and which is pressed into service only when a law is challenged as being unconstitutional for being violative of Article 19 of the Constitution. When a person is preventively detained, it is Article 21 and 22 that are attracted and not Article 19. Further, preventive detention must fall within the four corners of Article 21 read with Article 22 and the statute in question. To therefore argue that a liberal meaning must be given to the expression 'public order' in the context of a preventive detention statute is wholly inapposite and incorrect. On the contrary, considering that preventive detention is a necessary evil only to prevent public disorder, the Court must ensure that the facts brought before it directly and inevitably lead to a harm, danger or alarm or feeling of insecurity among the general public or any section thereof at large."

11. Earlier Hon'ble the Supreme Court in the case of *Rekha v. State of T. N.*, (2011) 5 SCC 244 also discussed the nature and scope of preventive detention. Paragraphs No. 29 and 30 of the judgment are relevant and, therefore, set out below:-

"29. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.

30. Whenever an order under a preventive detention law is challenge done of the questions the court must ask in deciding its legality is: was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative,

the detention order will be illegal. In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in question was illegal.”

12. Heard learned counsel for the parties and perused the record. I am of the view that the impugned detention order cannot sustain in law.

13. This case is squarely covered by the Banka Sneha Sheela (supra).

The allegations in the FIR registered against the detenue may be a problem of law and order but would not certainly come within the purview of the term “public order”. There is nothing in the grounds of detention which would demonstrate that his activities, on the basis of which the FIR for cheating and fraud came to be registered against him, had an impact of disturbing even the tempo of life of the community or had the effect of affecting the public at large. The offences with which the detenue has been charged in the FIR are substantive offences and the ordinary law is sufficient to deal with the detenue, if he is ultimately found guilty of the allegations, leveled against him in the FIR. The apprehension of the detaining authority that the detenue was likely to get bail and in that event, his remaining at large would be detrimental to the maintenance of peace and public order, cannot be basis of putting the detenue under preventive detention. The detaining authority as also the other functionaries of the U. T are well within their rights to oppose the bail and, if granted, take remedial measures. The simplicitor case of cheating and fraud, without having wider ramifications, cannot be made the basis of issuing the detention order in the name of maintaining the public order.

14. For the foregoing reasons, this petition is allowed. The impugned order of detention is quashed and the detenue is directed to be released from the preventive detention forthwith, provided he is not required in any other case(s).