

(2022) 04 J&K CK 0034

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No 33 Of 2021

Parvaiz Ahmad Khoja

APPELLANT

Vs

Union Territory Of J&K & Anr

RESPONDENT

Date of Decision : 11-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 22(5)
Explosive Substances Act, 1908 — Section 3, 13

Citation : (2022) 04 J&K CK 0034

Hon'ble Judges : Mohd. Akram Chowdhary, J

Bench : Single Bench

Advocate : Wajid Mohammad Haseeb, Sajad Ashraf

Final Decision : Disposed Of

Judgement

Mohd. Akram Chowdhary, J

1. Through the medium of this petition, the petitioner has questioned the order of detention bearing No. 07-DMK/PSA of 2021 dated 13.03.2021 issued by District Magistrate, Kupwara - respondent No. 2 (for short detaining authority) by virtue of which the petitioner (for short 'detenue') has been ordered to be detained under the Jammu & Kashmir Public Safety Act, 1978 (for short 'THE ACT').

2. It is stated in the petition that the detenue was initially arrested and was falsely implicated in FIR bearing No. 05/2019 registered in Police Station, Keran, for the commission of offence under Section 34 Explosive Substance Act. He has already been bailed out in the said FIR but not released. During his continuation of arrest in the above mentioned FIR, the detenue was detained under the Act vide Order No. 02-DMK/PSA of 2020 dated 22.02.2020. The said order of detention was challenged by the detenue through the medium of writ petition bearing WP(Crl) No. 41/2020 and the said order was quashed by virtue of the judgment dated 26.02.2021. It is further stated that the detenue was not

released and the respondents passed another detention order, impugned in the instant petition. Further, it is stated that the detainee has filed representation against his detention but the same has not been considered by the authorities.

3. The detainee has questioned the impugned order of detention INTER ALIA on the grounds that the constitutional as well as procedural safeguards as envisaged under the Constitution of India as well as under the Act have not been complied with by the Detaining Authority while passing the order of detention. The order of detention was neither referred to the Advisory Board nor was approved within the stipulated time. No material that has been relied upon by the Detaining Authority has been furnished to the detainee thereby depriving him of his valuable right of making effective representation against preventive detention. The order of detention has been passed after a gap of more than 18 months, as such, the order of detention has been passed on stale grounds. The detainee has also placed on record earlier order of detention along-with grounds of detention.

4. Respondents have filed their response, in which they have stated that the detainee has been detained pursuant to the order of detention passed by the respondent No. 2 and while doing so, the procedural as well as statutory safeguards enshrined under Article 22(5) of the Constitution of India and Section 13 of the Act, have been complied with by the respondents. They have further stated that all the requisite documents have been supplied to the detainee so as to enable him to make an effective representation to the Detaining Authority and to the Government. The order of detention was executed and the detainee was taken into preventive custody after the contents of the detention order/warrant and the grounds of detention were read over and explained to him in the language which he fully understood and the detainee was also informed of his right to make an effective representation to the Detaining Authority. The Detaining Authority found it necessary to detain the detainee under the Act.

5. Respondents have produced the detention record in original.

6. Learned counsel for the detainee has vehemently argued that as the subsequent order of detention has been passed substantially on the same grounds on the basis of which the earlier detention order was passed, as such, the order of detention is bad in law. He has placed reliance on the following judgments on this subject only:-

- i) Ibrahim Bachu Bafan Vs. State of Gujarat & Ors. reported as (1985) 2 SCC 24’;
- ii) Chhagan Bagwan Kahar v. N.L. Kalna, reported as (1989) 2 SCC 318’ and:
- iii) Basharat Ahmad Mir Vs. State of JK & Anr., LPAHC No.09/2018, decided on 30.01.2019.

7. On the contrary, learned GA appearing for the respondents, contended that all the documents have been served upon the detainee. He has also contended that the detention order is legal and all procedural and statutory safeguards have been complied with while passing the order of detention, as such, the order of

detention is sustainable in the eyes of law.

9. From the perusal of both grounds of detention, it transpires that the order impugned has been passed on the similar grounds as narrated in the earlier grounds of detention on the basis of which the earlier order of detention was passed. Perusal of FIR No. 05/2019, as narrated in the grounds of detention, reveals that on 04.08.2019, Police Station, Keran got an information through reliable sources that some explosive substance got exploded at Keran Bazar in the shop of Parvaiz Ahmad Khoja (detenue herein), which resulted in death of one Adbul Hameed Sangoo S/O Abdul Rashid R/O Farkain and case FIR No.05/2019 under Section 34 Explosive Substance Act stands registered in Police Station, Keran and the investigation was initiated. During investigation the detenue was found involved in the said case. It is worth to mention here that the said incident occurs in the month of August, 2019, whereas the earlier detention order was passed on 22.02.2020, meaning thereby that on the basis of said FIR, the detenue was not ordered to be detained earlier. The grounds of detention of the earlier detention order have been taken into consideration while passing the present impugned order of detention by the Detaining Authority. The same grounds could not have been relied upon by the respondents for issuance of the fresh detention order.

10. The law is well settled that if the order of detention comes to an end either by revocation or by the expiry of the period of order of detention, there must be fresh facts for passing a subsequent order of detention. When the detention order has been quashed by the Court, the grounds of said detention order are not to be taken into consideration either as a whole or in part even along with the fresh grounds of detention in order to pass a fresh detention order and, if such previous grounds of detention are taken into consideration while passing a fresh detention order, the order of detention will be vitiated.

11. In the judgment rendered in case 'Chhagan Bagwan Kahar v. N.L. Kalna, reported as (1989) 2 SCC 318', the Hon'ble Apex Court has discussed the above issue meticulously, relevant Para of which is reproduced as under :-

"12. It emerges from the above authoritative judicial pronouncements that even if the order of detention comes to an end either by revocation or by expiry of the period of detention there must be fresh facts for passing a subsequent order. A fortiori when a detention order is quashed by the court issuing a high prerogative writ like habeas corpus or certiorari the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the court strikes down an earlier order by issuing rule it nullifies the entire order."

12. Another aspect that requires consideration is that the detaining authority in the grounds of detention has mentioned that the detenue is required to be detained for a maximum period under the Act. Mentioning of period will definitely

prejudice the detainee in the subsequent procedural safeguards available to him, as such, shows lack of application of mind on the part of the Detaining Authority.

13. In view of the above, this petition is allowed. Detention Order No. 07-DMK/PSA of 2021 dated 13.03.2021, is quashed. Detenue namely Parvaiz Ahmad Khoja S/O Ghulam Jeelani Khoja R/O Farkain, District Kupwara, be set free from the preventive custody provided he is not required in any other case(s).

14. Detention record, as produced, be returned to learned GA.

15. Disposed of accordingly.