
(2021) 02 J&K CK 0041
In the Jammu And Kashmir High Court
Case No : Writ Petition (Crl) No. 41 Of 2020

Parvaiz Ahmad Khoja

APPELLANT

Vs

Ut Of J&K & Another

RESPONDENT

Date of Decision : 26-02-2021

Acts Referred:

Jammu And Kashmir Public Safety. Act, 1978 — Section 8
Unlawful Activities (Prevention) Act, 1967 — Section 13, 16, 18, 20
Explosive Substances Act 1883 — Section 3,4
Arms Act, 1959 — Section 7, 25

Citation : (2021) 02 J&K CK 0041

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Wajid Haseeb, Sajjad Ashraf

Final Decision : Allowed

Judgement

1) In the instant petition, impugned is the detention order bearing No.02-DMK/PSA of 2020 dated 22.02.2020. In terms of said order, Parvaiz Ahmad

Khoja son of Ghulam Jeelani Khoja resident of Farkain Tehsil Kralpora District Kupwara (hereinafter referred to as the detainee), has been taken into

preventive custody by invoking powers under Section 8 of the J&K Public Safety Act.

2) The petitioner has challenged the impugned order on the grounds that the allegations made in the grounds of detention are vague and non-existent;

that there has been non-application of mind on the part of the detaining authority, inasmuch as the impugned order of detention has been passed with a

view to prevent the detainee from acting in any manner prejudicial to the security of the State whereas in the grounds of detention, the detaining

authority has not only mentioned that the detainee is a constant threat to the

security of the State but it has also mentioned that he poses a serious threat to the peace and public order, which shows that the detaining authority is not sure about the reasons for passing the impugned order of detention; that the detaining authority while formulating the grounds of detention has not mentioned the fact that the detainee was already on bail in the FIR, mention whereof has been made in the grounds of detention which exhibits non-application of mind on the part of detaining authority; that the detainee has not been furnished all the material forming basis of the grounds of detention.

3) The respondents have resisted the petition by filing a counter affidavit thereto in which they have denied the contentions raised by the petitioner in the petition. The detaining authority has, in its affidavit, justified the grounds of detention as well as the impugned detention order while denying the allegation of non-supply of relevant material to the detainee. To substantiate their case, the respondents have produced the detention record.

4) I have heard learned counsel for the parties and perused the record.

5) Though the petitioner has projected a number of grounds to throw challenge to the impugned detention order yet during the course of arguments, the main ground which has been urged by learned counsel for the petitioner is with regard to non-application of mind on the part of detaining authority while passing the impugned detention order.

6) As already noted, it has been contended by the petitioner that the detaining authority while passing the impugned detention order was not certain as to on which ground the impugned order is being passed as it has made reference to both the expressions, namely, "activities prejudicial to the security of the State" and "activities prejudicial to the maintenance of public order" in the impugned order as well as in the grounds of detention.

7) According to the learned counsel for the petitioner, the aforesaid course adopted by the detaining authority in this case exhibits lack of application of mind and lack of certainty in the decision making of the detaining authority. To support his contention, the learned counsel has placed reliance on the judgment of the Supreme Court in *G. M. Shah v. State of J&K*, 1980 AIR 494.

8) Before determining the issue raised by learned counsel for the petitioner in this case, it would be appropriate to notice the legal position on the subject. The Supreme Court in *Dr. Ram Manohar Lohia v. State of Bihar* and

others, 1966 AIR SC 740, while discussing the distinction between the expressions "law and order", "public order" and "security of the State" has observed as under:

"One has to imagine three concentric circles, in order to understand the meaning and import of the above expressions. 'Law and order'

represents the largest circle within which is the next circle representing "public order" and the smallest circle represents "security of State".

It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of

State. It is in view of the above distinction, the Act defines the expressions "acting in any manner prejudicial to the security of the State" and

acting in any manner prejudicial to the maintenance of public order" separately. An order of detention made either on the basis that the

detaining authority is satisfied that the person against whom the order is being made is acting in any manner prejudicial to the security of

the State or on the basis that he is satisfied that such person is acting in any manner prejudicial to the maintenance of public order but

which is attempted to be supported by placing reliance on both the bases in the grounds furnished to the detenu has to be held to be an

illegal one vide decisions of this Court in *Bhupal Chandra Ghosh v. Arif Ali & Ors.* (2) and *Satya Brata Ghose v. Arif Ali & Ors.*(3).

9) From the ratio laid down by the Supreme Court in the above referred judgment, it is clear that there is a clear distinction between "security of

the State" and "maintenance of public order". An act prejudicial to the security of the state has to be of graver nature than an act prejudicial to

the maintenance of public order. The Supreme Court in the aforesaid judgment has made it clear that if an order of detention is made on both grounds

i.e. on the ground of "security of the State" as well as on the ground of "maintenance of public order", such an order has to be held illegal.

The aforesaid ratio has been reiterated and reaffirmed by the Supreme Court in the case of *G. M. Shah v. State of J&K*, 1980 AIR 494.

10) In the instant case, the detaining authority has mentioned in the grounds of detention that the petitioner is a constant threat to the maintenance of

security of the State and thereafter the authority has come to the conclusion that the petitioner poses a threat to the peace and public order. While

passing the impugned detention order, the detaining authority has noted that the activities of the petitioner are highly prejudicial to the maintenance of peace and public order but in the operative portion of the impugned order, it has been provided that the petitioner is to be taken into preventive custody with a view to prevent him from acting in any manner prejudicial to the security of the State. Thus, it is clear that the detaining authority is unsure as to whether the activities of the detainee are prejudicial to the security of the State or the same are prejudicial to the maintenance of public order. The detaining authority while passing an order of detention has to be satisfied and sure about the exact nature of the activities of the detainee. In the instant case, the manner in which the grounds of detention and the impugned order of detention have been framed clearly reflects a state of uncertainty and tentativeness on the part of the detaining authority while recoding its satisfaction. This renders the impugned order of detention unsustainable in law.

11) The petitioner has placed on record copy of the docket dated 17.02.2020 issued by Special Judge, TADA/POTA, Srinagar, which shows that the

petitioner was admitted to bail in FIR No.05/2019 for offences under Section 13, 16, 18, 20 ULA(P) Act, ¾ Explosive Substances Act and 7/25

Arms Act. The impugned order of detention has been passed on 22.02.2020 but there is no mention of the factum of grant of bail in the grounds of

detention though it bears reference to the aforesaid FIR. It appears that the detaining authority has simply reiterated what was there in the dossier of

the police which was prepared prior to grant of bail to the petitioner. This clearly exhibits lack of application of mind on the part of the detaining

authority. On this ground also, the impugned order of detention becomes unsustainable in law.

1) For the foregoing reasons, this petition is allowed. The impugned order of detention is quashed. A direction is issued to the respondents to release

the detainee from the preventive custody forthwith, provided he is not required in connection with any other case.

2) The record be returned back to the learned counsel for the respondents.