

(2022) 08 J&K CK 0013

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 07 Of 2022

Reyaz Ahmad Dar

APPELLANT

Vs

U.T. Of J&K And Another

RESPONDENT

Date of Decision : 12-08-2022

Acts Referred:

Constitution Of India, 1950 — Article 22(5), 226
Jammu And Kashmir Public Safety Act, 1978 — Section 3, 8, 11(1), 11(1)(a), 11(1)(b), 11(2), 13
General Clauses Act, 1897 — Section 21

Citation : (2022) 08 J&K CK 0013

Hon'ble Judges : Sindhu Sharma, J

Bench : Single Bench

Advocate : Auqib Hussain Bhat, Satinder Singh Kala

Final Decision : Dismissed

Judgement

Sindhu Sharma, J

1. The District Magistrate, Budgam detained the detenue-Reyaz Ahmad Dar under Section 8 of the J&K Public Safety Act, 1978 vide his office order No. DMB/PSA/11 of 2021 dated 07.12.2021, to prevent him from acting in any manner prejudicial to the security of the State. This order of detention has been challenged by the detenue through his father-Ghulam Rasool Dar.

2. The order of detention has been assailed by the detenue on the grounds that; (i) the allegations made in the grounds of detention are vague, non-existent and no prudent man can make a representation against the same; (ii) the detenue was already acquitted of the charges in FIR No. 167 of 2004 and FIR No. 216 of 2013 after facing trial but this important fact has not been mentioned in the grounds of detention which shows total non-application of mind; (iii) the detenue was placed under detention earlier vide order dated 19.03.2017 and 24.01.2019 and when these detention orders were quashed in the habeas corpus petitions (HCP No. 166/2017 and HCP No. 62/2019) filed by the detenue which were

decided on 05.09.2017 and 04.07.2019. Thereafter, no such fresh activity has been alleged to the detainee to pass the order of detention, as such, this order of detention is bad and is required to be quashed; (iv) the detainee was already in custody in FIR No. 135 of 2018 registered in Police Station, Chadoora and this important fact has not been reflected in the grounds of detention and neither any compelling reasons have been spelled out in the grounds of detention to pass the order of detention once the detainee was already in custody; (v) the last alleged activity attributed to the detainee as per the grounds of detention was in the year 2018 and thereafter no fresh activity has been attributed to the detainee; (vi) the detaining authority has not prepared the grounds of detention itself and, as such, this has resulted in vitiating the order of detention; (vii) the detainee has not been furnished the relevant material relied upon by the detaining authority while passing the order of detention and neither any opportunity of making representation has been given, as such, this has resulted in detainee not been able to make an effective representation and also has resulted in infraction of the rights as guaranteed to the detainee under law, thus, the detention is bad and is required to be set aside.

3. Mr. Satinder Singh Kala, learned A.A.G has filed counter affidavit as well as produced the record.

4. Learned counsel for the respondents submits that the detainee was detained to prevent him from acting in any manner resulting in any of his past acts. The Detaining Authority has complied with all the constitutional and procedural safeguards provided to the detainee under the Constitution of India and J&K Public Safety Act. The detainee has been provided with all the requisite material relied upon by the Detaining Authority while passing the order of detention. The detainee was also informed of his right to make a representation against the order of detention.

5. Heard learned counsel for the parties and perused the record also.

6. The detainee, it is submitted was earlier placed under detention vide order No. DMB/PSA/10/2017 dated 19.05.2017 and this detention order was quashed by this Court on 05.09.2017 in HCP No. 166/2017. The detainee was again detained vide detention order No. DMB/PSA/03/2019 dated 24.01.2019 and this order was also quashed by this Court in HCP No. 62/2019 dated 04.07.2019. It is submitted that the detention of the detainee is on the same grounds on which the earlier orders of detention have been passed and quashed by this Court is arbitrary and illegal, thus, the detention order is required to be set aside.

7. The respondents have neither rebutted the averments in the reply affidavit nor placed any material on record to controvert the same. The order of detention by the Detaining Authority on the same grounds in part or as a whole would not be sustainable in law.

8. In "Ibrahim Bachu Bafan vs. State of Gujarat, (1985) 2 SCC 24, it has been held that:

"...The power conferred under clauses (a) and (b) of sub-section (1) of Section 11 is in fact extension of the power recognized under Section 21 of the General Clauses Act and while under the General Clauses Act, the power is exercisable by the authority making the order, the named authorities under clauses (a) and (b) of Section 11 (1) of the Act are also entitled to exercise the power of revocation. When the High Court exercises jurisdiction under Article 226 of the Constitution it does not make an order of revocation. By issuing a high prerogative writ like habeas corpus or certiorari it quashes the order impugned before it and by declaring the order to be void and striking down the same it nullifies the order. The ultimate effect of cancellation of an order by revocation and quashing of the same in exercise of the high prerogative jurisdiction vested in the High Court may be the same but the manner in which the situation is obtained is patently different and while one process is covered by Section 11(1) of the Act, the other is not known to the statute and is exercised by an authority beyond the purview of sub-section (1) of Section 11 of the Act. It is, therefore, our clear opinion that in a situation where the order of detention has been quashed by the High Court, subsection (2) of Section 11 is not applicable and the detaining authority is not entitled to make another order under Section 3 of the Act on the same grounds."

9. Similarly, in "Chhagan Bagwan Kahar vs. N. L. Kalna and others", 1989 AIR 1234, the Hon'ble Supreme Court has held as under:

"...It emerges from the above authoritative judicial pronouncements that even if the order of detention come to an end either by revocation or by expiry of the period of detention there must be fresh facts of 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. In the present case, no doubt, the order of detention contains fresh facts. In addition to that the detaining authority has referred to the earlier detention order and the judgement of the High Court quashing it, presumably for the purpose of showing that the detenu in spite of earlier detention order was continuing his bootlegging activities."

10. Similar provisions have been considered in "Jahangir Khan Fazal Khan Pathan vs. Police Commissioner, Ahmedabad and another", 1989 AIR 1812, the Hon'ble Supreme Court has held as under:

"...it is therefore, clear that an order of detention cannot be made after considering the previous grounds of detention when the same had been quashed by the court, and if such previous grounds of detention are taken into consideration while forming the subjective satisfaction by the detaining authority in making a detention order the order of detention will be vitiated. It is of no consequence if the further fresh facts disclosed in the grounds of the impugned detention order have been considered..."

11. In view of the settled position of the law, if a detention order is quashed, the grounds of the order so quashed cannot be taken into consideration either in whole or in part or even along with the fresh grounds of detention for drawing subjective satisfaction to pass fresh order of detention. The Detaining Authority, therefore, cannot rely on the grounds which were passed in the earlier order, as such, the impugned order of detention taking into consideration the grounds on which the earlier order of detention dated 24.01.2019 is passed is vitiated and unsustainable.

12. Learned counsel for the detenu has also urged that the detenu has not been provided all the material relied upon by the Detaining Authority while passing the order of detention, thus, preventing him from making an effective representation. This has resulted in infraction of constitutional and statutory safeguards guaranteed to him under Article 22(5) of the Constitution of India and Section 13 of the J&K Public Safety Act.

13. The respondents had not supplied all the relevant material to the detenu, even when the earlier detention order dated 24.01.2019 was passed. This was one of the grounds for quashing the aforesaid detention order. In the present case also, the respondents have not supplied all the relevant material to the detenu, as it is only after all material relied upon is supplied, the detenu can make a purposeful representation against his detention. The failure of the Detaining Authority to provide him the material relied upon at the time of passing of the order of detention has rendered the detention illegal.

14. The law as laid down in "Sophia Ghulam Mohd. Bham V. State of Maharashtra and others", AIR 1999 SC 3051, the Apex Court observed 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 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. Similar view has also been fortified in "Icchu Devi Choraria (Smt.) v. Union of India and others", (1980) 4 SCC 531 and "Thahira Haris Etc. vs. Govt. of Karnataka & Ors", AIR 2009 SC 218.

16. In view of the aforesaid discussion, there is no need to advert to other grounds raised in this petition. Keeping in view the aforesaid facts and circumstances and the law as laid down by the Apex Court, this petition is allowed and the detention order No. DMB/PSA/11 of 2021 dated 07.12.2021, passed by the District Magistrate, Budgam, under which the detenu-Reyaz Ahmad Dar S/o Ghulam Rasool Dar is under detention is quashed. The respondents are directed to release the detenu from the custody forthwith,

provided he is not required in any other case.

17. Detention record be returned to learned counsel for the respondents by the Registry forthwith.