

(2022) 08 J&K CK 0061

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 1218 Of 2021

Riyaz Paswal

APPELLANT

Vs

Union Territory Of J&K & Anr

RESPONDENT

Date of Decision : 29-08-2022

Acts Referred:

Constitution Of India, 1950 — Article 22(5)

Citation : (2022) 08 J&K CK 0061

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Wajid Haseeb, Asif Maqbool

Final Decision : Allowed

Judgement

Sanjay Dhar, J

1) By the instant petition, quashment of order No.79/DMS/PSA/2021 dated 08.05.2021, issued by District Magistrate, Shopian (for brevity "Detaining Authority") is sought. In terms of the aforesaid order, Riyaz Paswal son of Fakar Din Paswal resident of Shalidar Zraken District Shopian (for short "detenu") has been placed under preventive detention and lodged in District Jail, Kathua.

2) The petitioner has contended that the Detaining Authority has passed the impugned detention order mechanically without application of mind, and the procedural safeguards have not been complied with in the instant case. It has been further urged that the material which formed basis of the grounds of detention and the consequent order of detention has not been provided to the detenu.

3) The respondents, in their counter affidavit, have disputed the averments made in the petition and insisted that the activities of detenu are highly prejudicial to the preservation of the forest wealth. It is pleaded that the detention order and grounds of detention were handed over to the detenu and the same were read over and explained to the detenu. The grounds urged by the petitioner are

legally misconceived, factually untenable and without any merit and that all the constitutional and procedural safeguards have been strictly followed while issuing the impugned order. The respondents have produced the detention records in order to buttress the contentions raised in the counter affidavit.

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

5) Learned counsel for the petitioner, while seeking quashment of the impugned order, projected various grounds but his main thrust during the course of arguments was on the following grounds:

(I) That the detinue's right of making an effective representation against his detention has been violated as the material, on the basis of which the grounds of detention have been formulated, has not been supplied to him;

(II) That the impugned order of detention is based upon stale incidents having no proximate link to the activities alleged to be prejudicial to the preservation of the forest wealth of District Shopian/Pulwama;

6) Per contra, the learned counsel for the respondents has made an attempt to justify the passing of the order impugned by contending that the detinue was a habitual criminal, inasmuch as there are various FIRs pending against him and on this basis, the Detaining Authority was well within its jurisdiction to pass the impugned order of detention as there was every likelihood of the detinue indulging in similar activities. It has been further contended that all the documents relied upon by the Detaining Authority were, provided to the detinue and in token of having received the same, the detinue has executed the receipt. It is also urged that the contents of the documents were read over and explained to the detinue in the language understood by him.

7) The first ground projected by learned counsel for the petitioner is that the detinue has been disabled from making an effective representation against the order of detention as whole of the material, which formed basis of the grounds of detention, has not been furnished to him.

8) The detention record, as produced by learned counsel for the respondents, contains a copy of the Execution Report dated 23.08.2021, perusal whereof reveals that, 04 leaves comprising of copy of detention warrant and the copy of grounds of detention have been provided to the detinue, in token whereof his signatures have been obtained on the said Execution Report. The receipt does not show anything to even suggest that any other document/material has been furnished to the detinue. This goes on to show that the copy of the dossier of the activities and the copies of the FIRs, reference whereof is made in the grounds of detention, have not been furnished to the detinue. This strengthens the contention of the petitioner that the material on which the grounds of detention are based, have not been supplied to the petitioner. Furnishing of copy of the grounds of detention would not absolve the detaining authority of its duty to furnish the material forming basis of the grounds of detention. It is this

material which would have enabled the petitioner to make an effective representation against the detention. Non-supply of the material forming basis of the grounds of detention would amount to violation of right of detenu under Article 22 (5) of the Constitution of India and its deprivation renders the detention order unsustainable in law. In my aforesaid view, I am fortified by the judgments of the Supreme Court rendered in the cases of Sophia Gulam Mohd. Bham v. State of Maharashtra &ors (AIR 1999 SC 3051), Thahira Haris etc. etc. vs. Government of Karnataka &Ors (AIR 2009 SC 2184) and 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.

9) As already noted, in the instant case the record shows that neither the copies of the FIRs nor the statements of the witnesses recorded during the investigation of these FIRs which find mention in the grounds of detention have been furnished to the petitioner. Even the copy of dossier of activities has not been furnished to the detenu. Thus, vital safeguards against arbitrary use of law of preventive detention have been observed in breach by the respondents in this case rendering the impugned order of detention unsustainable in law.

10) It has been next contended by learned counsel for the petitioner that the impugned order of detention has been passed on the basis of stale incidents having no proximate link with the activities alleged to be prejudicial to the preservation of the forest wealth.

11) A perusal of the grounds of detention reveals that the incidents referred therein pertain to the year 2019, that is more than two years prior to the passing of impugned order of detention. There is no reference to any recent incident involving the petitioner in the grounds of detention. Thus, it is clear that the order of detention has been based on past and stale incidents.

12) The Supreme Court in the case of Sama Aruna v. State of Telengana and & anr, (2018) 12 SCC 150, while holding that the incidents which are said to have taken place long back, cannot form basis for being satisfied that the detenu is going to engage in similar activities, observed as under:

"17. We are, therefore, satisfied that the aforesaid detention order was passed on grounds which are stale and which could not have been considered as relevant for arriving at the subjective satisfaction that the detenu must be detained. The detention order must be based on a reasonable prognosis of the future behavior of a person based on his past conduct in light of the surrounding circumstances. The live and proximate link that must exist between the past conduct of a person and the imperative need to detain him must be taken to have been snapped in this case. A detention order which is founded on stale incidents, must be regarded as an order of punishment for a crime, passed without a trial, though purporting to be an order of preventive detention. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it."

From the aforesaid enunciation of the law on the subject, it is clear that there has to be a live and proximate link between the past conduct of the detenue and the activities alleged to be prejudicial to the maintenance of public order. In the instant case, the said link is completely missing, as the time between the order of detention and the incidents referred to in the grounds of detention is far too large to presume such a link. On this ground also, the impugned order of detention, therefore, cannot be sustained.

13) Viewed thus, the petition is allowed and the impugned order of detention is quashed. The detenue is directed to be released from the preventive custody forthwith provided he is not required in connection with any other case.

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