

(2023) 04 J&K CK 0026

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 649 Of 2022

Rouf Ahmad Naik

APPELLANT

Vs

Union Territory Of J&K & Anr

RESPONDENT

Date of Decision : 17-04-2023

Acts Referred:

Constitution Of India, 1950 — Article 21, 22, 22(5)
Jammu And Kashmir Public Safety Act, 1978 — Section 8(a), 10A, 13
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 147, 148, 149, 332, 336

Citation : (2023) 04 J&K CK 0026

Hon'ble Judges : M.A.Chowdhary, J

Bench : Single Bench

Advocate : N.A.Ronga, Mubashir Majid Malik

Final Decision : Disposed Of

Judgement

M. A.Chowdhary, J

1. The petitioner, in terms of the detention order No. 74/DMK/PSA/2022 dated 27.08.2022 (for short 'impugned order'), has been detained in the interest of security of the State by District Magistrate Kulgam -Respondent No.2 (hereinafter for short 'detaining authority') in exercise of powers conferred on him under Clause (a) of Section 8 of the J&K Public Safety Act, 1978. The said detention order has been challenged through the medium of present petition, allegedly being in breach of the provisions of Article 22(5) of the Constitution of India.

2. The petitioner has pleaded in the petition that the detenue was arrested by the police without any justification and was placed in illegal confinement. It is being contended that the allegations/grounds of detention are vague and mere assertions of the detaining authority and no prudent man can make an effective representation against these allegations. Furthermore, it is stated that the allegations whose mention is made in the grounds of detention have no nexus with the detenue and have been fabricated by the police in order to justify its illegal action of detaining the detenue. In addition, it is stated that the detaining

authority has not prepared the grounds of detention by itself whileas, relied the impugned detention order upon dossier only. Also it is being pleaded that the detaining authority has not furnished the material and other connected documents, relied upon, to the detainee to enable him to make an effective representation. Detainee has also not been informed that within what time-frame he can make representation against his detention, which clearly shows violation of the right of the detainee guaranteed in terms of the Article 22(5) of the Constitution of India.

3. Respondents in their reply affidavit have stated that the grounds of detention are precise, proximate, pertinent and relevant. There is no vagueness or staleness in the grounds coupled with definite indications as to the impact thereof, which has been precisely stated in the grounds of detention. Further it is contended that the grounds of detention give complete account of the activities of the detainee which on the face of it are highly prejudicial for maintenance of security of the State, as such, there was no option left but to order detention of the detainee under Public Safety Act.

4. The main plea of learned counsel for the detainee is that the allegations made in the grounds of detention are vague, non-existent and no prudent man can make a representation against such allegations and passing of detention on such grounds is unjustified and unreasonable. All the allegations levelled against the detainee are far from reality and that the detainee is not involved in any unlawful activity, so as to justify his preventive detention.

5. Learned Dy.AG, ex-adversus, submits that the record reveals that there is no vagueness in the grounds of detention. The procedural safeguards prescribed under the provisions of Public Safety Act and the rights guaranteed to the detainee under the Constitution have strictly been followed in the instant case. The detainee has been furnished all the material, as was required, and was also made aware of his right to make representation to the detaining authority against his detention. He further argued that the pleas of the grounds of detention being vague, non-existent, non-relevant, not proximate or invalid, shall not invalidate the detention order as statutorily provided in Section 10-A of the J&K PSA, in terms whereof petitioner has been detained. He finally submits that the impugned detention order, having been passed perfectly in consonance with law, grounds of detention explained / communicated to the detainee, as is disclosed from his receipt of the material, all safeguards complied with the subjective satisfaction of detaining authority, cannot be gone into, to substantiate its own opinion by the Court. It was prayed to uphold the impugned detention order.

6. Heard and considered.

7. On perusal of the record it reveals that the detainee has not been furnished all the documents pursuant to the order impugned in terms of which he was taken into custody. He has not been provided copy of the communication of the

sponsoring agency referred to in the impugned order which is stated to have been received from the said agency, on which the detaining authority has stemmed its subjective satisfaction. In case the detaining authority intends to rely on the stand, as is reflected in the records, that the copies of the documents were furnished to the detainee, then it was mandatory upon the said authority to place on record the affidavit of the person who has furnished the documents to the detainee. In this regard it may be apt to quote the relevant observation made in the case "State Legal Aid Committee, J&K Vs. State of J&K & others (AIR 2005 SC 1270)":-

"Though several questions have been raised in this petition, it is not necessary to deal with them in detail as we find that there is no definite material to show that the requirements of Section 13 of the Jammu & Kashmir Public Safety Act, 1978, (in short the Act), requiring the grounds of order of detention to be disclosed/communicated to the person affected by the order has been complied with. Though in the affidavit filed by the State, it has been stated that the contents of the warrants and grounds of detention were served, read over and explained to the detainee and he was informed about his right to make a representation against the detention, if he so desired, there is no material placed on record to substantiate this stand. It is stated in the affidavit that the detainee refused to receive copy of the detention order and also refused to put his signatures on the documents. The least the State could have done is to file an affidavit of the person who wanted to serve the relevant documents and an endorsement to the effect that there was refusal. Even the name of the official has not been indicated in the affidavit. That would have been sufficient to comply with the requirements of Section 13 of the Act."

8. The Hon'ble Apex Court in the judgment rendered in the case 'Sophia Gulam Mohd. Bham V. State of Maharashtra & Ors. (AIR 1999 SC 3051)', has held 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 detainee 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 to the detainee 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."

9. It needs no emphasis that the detainee cannot be expected to make a meaningful exercise of his constitutional and statutory rights guaranteed under Article 22(5) of the Constitution of India unless and until the material on which the detention is based, is supplied to the detainee. If the detainee is not supplied the material on which detention order is based, the detainee cannot be in a position to make an effective and meaningful representation against his detention.

10. It is also a fact that time frame within which representation was required to be filed has not been conveyed to the detainee. This too has to be treated as a breach of right of the detainee under Section 13 of Public Safety Act and Article 22 of the Constitution of India.

Allahabad High Court has rendered the judgment in the case 'Jitendra Vs. District Magistrate (2004 CriLJ 2967) in this regard and has observed that:

"...There is another reason as to why in our judgment the impugned detention order would be vitiated. Since the detainee's right to make a representation to the detaining authority was only available to him till the approval of the detention order by the Government, it follows as logical imperative that the detaining authority should have communicated to the detainee in the grounds of detention the time limit, in which, he could make a representation to him i.e. till the approval of the detention order by the State Government."

11. Grounds of detention reveal that the detainee has been an over-ground worker of the terrorist organisations, providing logistic support to their cadres; that he has actively participated in arms and ammunition procurement, recruitment and planning of attacks on security forces as well as weapon snatching. With no specific allegations on these counts, his involvement has been shown in the commission of offences in a case registered vide FIR No. 193/2016 under Sections 147, 148, 149, 332, 336 RPC at Police Station Kulgam, with no details as to his trial or its outcome. This too is a stale ground to base the detention in the month of August 2022, of an incident in the year 2016, after a period of more than five years. The afore-stated grounds of detention, as such, are general allegations against the detainee, with no specific instances/incidents. The detention order based on such vague and stale grounds is not sustainable, for the reason that the detaining authority before passing the order has not applied its mind to draw subjective satisfaction to order detention of the detainee by curtailing his liberty which is a valuable and cherishable right guaranteed under Article 21 of the Constitution of India. In this regard reliance can be placed on the judgments of Supreme Court in the cases (i) Jahangir Khan Fazal Khan Pathan Vs. Police Commissioner Ahmadabad (1989) 3 SCC 590 and, (ii) Abdul Razak Nanekhan Pathan Vs. Police Commissioner Ahmadabad AIR 1989 SC 2265.

12. The detainee, as discussed hereinabove, was ordered to be detained vide impugned detention order on vague and general grounds. The detainee in absence of specific grounds was not able to make an effective representation, either to the detaining authority or to the Government of J&K within statutory period. Therefore, the detainee has been denied the legal, statutory and constitutional safeguards against his detention, rendering his detention unconstitutional.

13. On the touchstone of the law laid down above and the rival submissions, the order of detention, impugned in the instant petition, does not sustain on the aforesaid grounds. In the afore-stated backdrop, this petition is allowed. Order of

detention No. 74/DMK/PSA/2022 dated 27.08.2022 passed by District Magistrate Kulgam is, as such, quashed. The detainee namely Rouf Ahmed Naik S/O Mohammed Yaqoob R/O Khudwani Qaimoh Kulgam, is ordered to be released from the preventive custody forthwith provided he is not required in connection with any other case(s).

14. Detention record is directed to be returned back to the learned counsel for the respondents.

15. Petition disposed of, as above.