

(2022) 03 J&K CK 0008

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 133 Of 2021, Criminal Miscellaneous
Cases No. 1249 Of 2021

Rouf ul Islam

APPELLANT

Vs

UT Of Jammu And Kashmir and Others

RESPONDENT

Date of Decision : 02-03-2022

Acts Referred:

Constitution Of India, 1950 — Article 22(5)
Unlawful Activities (Prevention) Act, 1967 — Section 17, 18, 20, 21, 38, 39, 40
Code Of Criminal Procedure, 1973 — Section 161, 164A

Citation : (2022) 03 J&K CK 0008

Hon'ble Judges : Javed Iqbal Wani, J

Bench : Single Bench

Advocate : Syed Musaib, Asif Maqbool

Final Decision : Disposed Of

Judgement

Javed Iqbal Wani, J

1. Through the medium of instant petition quashment of detention order bearing No. 36/DMP/PSA/2021 dated 14.09.2021, (hereinafter for short the 'impugned order') passed against the detenu, namely, Rouf ul Islam, is being sought for by the petitioner as also a writ of mandamus for his release.

2. It is being stated in the petition that the detenu is a law abiding and peace-loving citizen and has never involved in any subversive activity prejudicial to the security of the State or maintenance of public order. The detenu is stated to have been implicated falsely in case FIR No. 75/2018 registered at Police Station, Khrew and while being in custody thereincame to be detained under preventive custody by the respondents in terms of impugned order and lodged at Central Jail, Kotbalwal, Jammu.

3. The impugned order is being challenged, inter alia, on the grounds that the detenu was earlier also shown involved in previous order of detention in case FIR

No. 75/2018, Police Station, Khrew, under sections 17, 18, 20, 21, 38, 39 and 40 of Unlawful Activities (Prevention) Act and presently again shown in the impugned detention order in connection with same FIR No. 75/2018 under the same offences and the detaining authority despite having the knowledge of the said fact, detained the detenu without spelling out any compelling reason thereof in the grounds of detention.

4. It is being contended that there has been non-application of mind on the part of detaining authority while passing the detention order as in the order of detention, the activities of the detenu are shown to be prejudicial to the maintenance of public order while as in the grounds of detention, he has been shown to have been kept under detention prejudicial to the Security of the State.

5. It is being further contended that earlier order of detention having the similar contents and the same FIR stand quashed by this Court in terms of judgement and order dated 28.05.2019 in HCP No. 398/2018. To substantiate this contention, learned counsel for the petitioner has appended a copy of the judgement with the record of the instant petition passed in the earlier case.

6. It is being further urged in the grounds that the detenu had not been provided copies of the relevant material, like copy of dossier, copy of FIRs, statements under Section 161, 164-A Cr. PC, referred to in the grounds of detention, thus, depriving him to file an effective representation against his detention. The said failure is stated to have infringed the constitutional right of the detenu guaranteed under Article 22 (5) of the Constitution of India.

7. Per contra, respondents, in their reply affidavit justify the passing of the order of detention against the detenu contending that the same has been passed validly and legally by the detaining authority keeping in view the activities of the detenu being prejudicial to the maintenance of public order.

8. It is being stated that all statutory requirements and constitutional guarantees have had been fulfilled and complied with while detaining the detenu.

9. Heard learned counsel for the parties and perused the record.

10. While dealing with the first contention/ground of challenge urged by the petitioner qua non-recording of compelling reasons for detaining the detenu when he was already in custody, it would be appropriate to refer to the judgement of the Apex Court in this regard passed in case titled as 'Surya Parkash Sharma v. State of U.P and Others, reported in 1994 (3) SCC 195', wherein at paragraph 5 following has been noticed and laid down: -

"5. The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in custody has had been engaging the attention of this Court since it first came up for consideration before a Constitution Bench in Rameshwar Shaw V. District Magistrate, Burdwan (1964) 4 SCR 92: AIR 1964 SC 334: (1964) 1CrL LJ 257. To eschew prolixity, we refrain from detailing all those cases except that of

Dharmendra SuganchandChelawat V. Union of India (1990) 1 SCC 746: 1990 SCC (CrI) 249: AIR 1990 SC 1196, wherein a three Judge Bench, after considering all the earlier relevant decisions including Rameshwar Shaw answered the question in the following words (SCC 754 para 21:

"The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that

(i) the detaining authority was aware of the fact that the detainee is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detainee is already in detention. The expression 'compelling reasons' in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detainee is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detainee, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

11. Perusal of the grounds of detention/order of detention would manifestly reveal that the detaining authority has not drawn any satisfaction as per the mandate laid down by the Apex Court in the case of Surya Parkash Sharma (supra), while passing the impugned detention order against the detenu, so much so, the detaining authority has also failed to express any such compelling reason even in Reply Affidavit. The impugned order, thus in law, does not sustain on this count alone.

12. In the instant case, it is seen that the detaining authority has mentioned in the grounds of detention that the detainee poses threat to the Security of the State and however, the authority has held that the activities of the detenu are prejudicial to the maintenance of the Public Order while passing the impugned detention order. As such, it becomes clear that the detaining authority is unaware 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. It is settled law that the detaining authority while passing an order of detention has to be satisfied and specific about the exact nature of the activities of the detenu, however, the manner in which the grounds of detention and the impugned order of detention have been framed clearly reflects a state of ambiguity and non-application of mind on the part of the detaining authority while recording its satisfaction. This renders the impugned order of detention unsustainable in law. Reference in this regard to the judgement passed by a Coordinate Bench of this Court in Parvaiz Ahmad Khoja v. UT of J&K and another [WP (CrI) No. 41/2020 decided on 26.02.2021, would be relevant and as such, the impugned order in view of above is rendered legally not sustainable.

13. It is germane to mention here that the judgement referred to and relied upon

by the counsel for the respondents are misplaced and misdirected and does not lend any support thereof to the case of the respondents.

14. Viewed thus, in the context what has been observed, analyzed and considered in the preceding paragraphs, instant petition is allowed and consequent to which the impugned order of detention bearing No. 36/DMP/PSA/2021 dated 14.09.2021, is quashed, with the direction to the respondents to release the detenu forthwith from preventive custody unless required in any other case.

15. Disposed of along with all connected CrIM(s).

16. The record produced by the respondents for perusal of the Court shall be returned to learned counsel for the respondents.