

(2022) 10 J&K CK 0022
In the Jammu And Kashmir High Court
Case No : Writ Petition (Criminal) No. 6 Of 2022

Rupesh Kumar

APPELLANT

Vs

UT Of Jammu And Kashmir And Others

RESPONDENT

Date of Decision : 17-10-2022

Acts Referred:

Constitution Of India, 1950 — Article 22(5)
Prevention Of Illicit Traffic In Narcotic Drugs And Psychotropic Substances Act, 1988 —
Section 3, 7, 8
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 21, 22
Code Of Criminal Procedure, 1973 — Section 82, 83, 84, 85, 161

Citation : (2022) 10 J&K CK 0022

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Mayank Gupta, Dewakar Sharma

Final Decision : Allowed

Judgement

Sanjay Dhar, J

1 The petitioner (hereinafter referred to as the 'detenu') has challenged order dated 28.06.2021 passed by the Divisional Commissioner, Jammu ('Detaining Authority') whereby he has been taken into preventive custody in terms of Section 3 of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (hereinafter referred to as 'PITNDPS Act')

2 It is contended in the petition that the detenu has been taken into preventive custody on the basis of vague, irrational and arbitrary grounds. It is further stated that the detenu has not been furnished whole of the material on the basis of which the impugned order of detention has been passed which has prevented him from making an effective representation against the said order. It has also been contended that the detenu has not been informed about his right to make representation to the Advisory Board. The detenu has also contended that there has been unreasonable and unexplained delay in execution of impugned order of

detention which renders the same unsustainable in law.

3 The respondents have filed a counter affidavit and resisted the petition by pleading that the petitioner is a habitual drug peddler and smuggler who is indulging in illicit traffic of narcotic drugs and psychotropic substances. It has been contended that the detenu poses a serious threat to the lives of young generation as well as to the economy of the country. It is further contended that detenu is involved in as many as 4 FIRs for various offences under NDPS Act in which he been granted bail and, as such, it was necessary to detain him to prevent him from indulging in similar activities. It is further contended that the petitioner was absconding and evading his arrest, as a result of which, the warrant of detention could not be executed until 30.01.2022.

4 I have heard learned counsel for the parties and perused the record of the case including the detention record produced by the respondents.

5 Although, a number of grounds have been urged by the detenu for impugning the detention order, yet, learned counsel for the detenu has laid much emphasis on the ground that there has been unreasonable delay in execution of order of detention which renders the same unsustainable in law. He has further contended that whole of the material relied upon by the Detaining Authority while framing the grounds of detention has not been supplied to the detnu which has prevented him from making an effective representation against the impugned order of detention.

6 Regarding the first ground, it is to be noted that the impugned order of detention has been passed on 28.06.2021 and admittedly, the same has been executed on 30.01.2022 i.e after more than seven months of passing of the order of detention. The explanation offered by the respondents is that detenu was evading arrest and, as such, the order of detention could not be executed until 30.01.2022.

7 Learned counsel for the detenu has submitted that mere bald assertion of respondents that the order of detention could not be executed because the detenu was evading arrest, would not be good enough to explain the delay in execution of warrant of detention, unless it is shown as to what steps the respondents had taken in effecting the execution of the warrant. Reliance has been placed by learned counsel for the detenu in this regard on the judgment of the Supreme Court in the case of P.M Hari Kumar vs. Union of India and others, krishan vs Union of India (1995) 5 SCC 691. In the said case, the Supreme Court, while dealing with the contention regarding delayed execution of detention order, has observed as under:

"13. If the respondents were really sincere and anxious to serve the order of detention without any delay it was expected of them, in the fitness of things, to approach the High Court or, at least, the Court which initially granted the bail for its cancellation as, according to their own showing, the petitioner had violated the conditions imposed, and thereby enforce his appearance or production as the

case might be. Surprisingly, however, no such steps were taken and instead thereof it is now claimed that a communication was sent to his residence which was returned undelivered. Apart from the fact that no such communication has been produced before us in support of such claim, it has not been stated that any follow up action was taken till 3.8.90 when Section 7 of the Act was invoked. Similarly inexplicable is the respondents' failure to insist upon the personal presence of the petitioner in the criminal case (C.C. No. 2/93) filed at the instance of the Custom Authorities, more so when the carriage of its proceeding was with them and the order of detention was passed at their instance. On the contrary, he was allowed to remain absent, which necessarily raises the inference that the Customs Authorities did not oppose his prayer, much less bring to the notice of the Court about the order of detention passed against the detenu".

8 Coming to the facts of the instant case, as per the grounds of detention, the detenu is involved in FIR No. 228/2020, FIR No. 251/2020, FIR No. 381/2020 and FIR No. 164/2021 of Police Station Kathua and all these FIRs relate to offences under Sections 8/21/22 of NDPS Act. The detenu has been granted bail in all these FIRs. There is nothing on record to even remotely suggest that the respondents had taken any steps for cancellation of bail of petitioner in these FIRs or for effecting his arrest. At least the record produced does not suggest so.

9 Section 8 of PITNDPS Act relates to powers pertaining to absconding persons. It reads as under:

8. Powers in relation to absconding persons.—

(1) If the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government may—

(a) make a report in writing of the fact to a Metropolitan Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 82, 83, 84 and 85 of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction, he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence under clause (b) of sub-section (1) shall be cognizable.

10 From a perusal of the aforesaid provision, it is clear that if a person, in respect of whom a detention order has been made, has absconded or is concealing himself so that the order cannot be executed, the Government has to make a report in writing to the Magistrate concerned, where said person ordinarily resides, whereafter action, in terms of Sections 82 to 85 of Cr.PC has to follow and an order has to be notified in the official gazette directing said person to appear before a specified officer at a specified place. Nothing of the said nature seems to have been done by the respondents in the instant case which clearly shows that their assertion that the detenu was absconding or concealing himself to avoid his arrest, is without any substance. Apart from this, the detenu has placed on record a certified copy of order dated 24.11.2021 passed by the Principal Sessions Judge Kathua in one of the cases in which the challan has been produced against the detenu. As per the said order, the presence of the detenu in Court is recorded which goes on to show that the detenu was appearing before the Court during the period when the respondents claim that he was absconding. Thus, it cannot be stated that the warrant of detention could not be executed upon the detenu because he was either absconding or concealing himself to avoid his arrest.

11 Once, it is shown that there was unexplained delay in execution of warrant of detention which, in the instant case, is more than seven months, there is a reasonable ground to think that the delay in execution of the detention warrant was occasioned by the respondents deliberately and such a delay throws a serious and considerable doubt on the genuineness of subjective satisfaction of the Detaining Authority leading to legitimate inference that the detaining authority was not really and genuinely satisfied about the necessity of detaining the detenu with a view to prevent him from acting in any prejudicial manner. That being so, the detention order is rendered illegal.

12 It has been next contended by learned counsel for the detenu that the detenu has not been provided whole of the material on the basis of which the grounds of detention have been formulated, which has prevented the detenu from making an effective representation against the impugned detention order.

13 If we have a look at the grounds of detention, it bears reference to four FIRs. FIR No. 228/2020, FIR No. 251/2020, FIR No. 381/2020 and FIR No. 164/2021 of Police Station Kathua. As per the police dossier, FIR No. 228/2020, FIR No. 251/2020 and FIR No. 164/2021 are under investigation, whereas challan is stated to have been filed in FIR No. 381/2020. As per the execution report, which is available in the detention record, the detenu has been provided the following documents:

- (i). Detention order (two leaves);
- (ii) Grounds of detention (three leaves);
- (iii) Dossier of detention)15 leaves); Total 2(0 leaves)

14 The execution report bears the signatures of the detenu. Thus, it is shown that (20) leaves, particulars whereof are given hereinabove, have been received by the detenu. The particulars of documents which have been received by the detenu are clearly enumerated in the execution report.

15 So far as the police dossier is concerned, it contains four annexures A, B, C and D. Annexure-A is certified copy of FIR 228/20, Annexure-B is certified copy of FIR No. 251/2020, Annexure-C is challan in respect of FIR No. 381/2020, whereas Annexure-D is certified copy of FIR 164/2021. This clearly shows that only copies of FIRs in respect of FIR No. 228/2020, FIR No.251/2020 and FIR No. 164/2021 have been provided to the detenu. Copies of statements of the witnesses recorded under Section 161 Cr.PC and seizure memos etc. have not been supplied to the detenu at all. In the absence of these vital documents, it was not possible for the detenu to make an effective representation against the impugned order of detention. Thus, in the instant case, the vital safeguards provided to the detenu in terms of Article 22 (5) of the Constitution of India have been observed by the respondents in breach. The omissions and commissions on the part of the respondents in this regard have rendered the order of detention unsustainable in law.

16 For what has been discussed hereinbefore, the impugned order of detention is rendered illegal and the same deserves to be quashed. The petition is, accordingly, allowed and the impugned detention order is quashed. The respondents are directed to release the detenu from the preventive detention forthwith, provided he is not required in connection with any other case.

17 The detention record be returned to the learned counsel for the respondents.