

(2022) 04 J&K CK 0040

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 149 Of 2020

Sadam Hussain Mir

APPELLANT

Vs

UT Of J&K And Ors

RESPONDENT

Date of Decision : 13-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 22(5)
Code Of Criminal Procedure, 1973 — Section 161
Jammu And Kashmir Public Safety Act, 1978 — Section 13

Citation : (2022) 04 J&K CK 0040

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

Bench : Single Bench

Advocate : Musavir Mir, Asif Maqbool, Iliyas Laway

Final Decision : Disposed Of

Judgement

M.A.Chowdhary , J

1. District Magistrate, Baramulla – respondent no.2 herein, by Order no.94/DMB/PSA/2020 Dated 17.06.2020, has placed Sadam Hussain Mir S/o Ghulam Mohammad Mir R/O Mir Mohalla Brath Kallan, Sopore District Baramulla (for short "detenu") under preventive detention to prevent him from acting in any manner prejudicial to the security of the State and directed his lodgment in Central Jail Jammu. It is this order of which petitioner is aggrieved and seeks quashment thereof.

2. The counter Affidavit has been filed by the respondents, wherein the petition has been strenuously resisted by respondents. The detention record has also been produced by the learned counsel for the respondents to substantiate the statements made in counter affidavit.

3. Having heard learned counsel for parties and perused the file, it would be proper to go through the detention record, produced by the counsel for the respondents, so as to see whether the material, relied upon by detaining

authority while issuing the impugned detention order, has been furnished to the detenu or not. The detention record, amongst others, comprises of "Receipt of Grounds of Detention", acknowledged by detenu, as also "Execution Report" of the detention. A perusal of "Receipt of Grounds of Detention", reveals that only 02 leaves have been given to detenu. For quick reference, relevant extract of "Receipt of Grounds of Detention" is reproduced as under:

"Receipt of Grounds of Detention

Received grounds of detention issued by District Magistrate Baramulla vide order No.94/DMB/PSA/2020 dated 17.06.2020 in English consisting of 02 leaves through Superintendent District Jail Kupwara.....

4. Perusal of above quoted portion of "Receipt of Grounds of Detention", would reveal that the detenu has not been furnished the material, viz. copy of FIR; copy of Dossier; copy of arrest memos; statements of witnesses; and other related documents, at the time of execution of the detention order or immediately thereafter. Same is true about Execution Report.

5. Perusal of impugned detention order reveals that Senior Superintendent of Police, Sopore, vide his letter no.Pross/PSA/2020/ 17278 dated 5.6.2020 has produced material record, such as dossier and other connected documents viz copy of FIR No. 301/2019 and seizure memo etc. in respect of detenu and it was only after perusal thereof that impugned detention order has been issued by detaining authority. The grounds of detention make reference of case FIR no.301/2019, to have been registered against detenu. Involvement of detenu in aforesaid case appears to have weighed with detaining authority, while making detention order. The record, as noted above, does not indicate that copies of aforesaid First Information Report, statements recorded under Section 161 Cr.P.C. and other material collected in connection with investigation of aforesaid case, was ever supplied to detenu. The abovementioned material, thus, assumes significance in the facts and circumstances of the case.

6. It needs no emphasis, that detenu cannot be expected to make a meaningful exercise of his Constitutional and Statutory rights guaranteed under Article 22(5) of the Constitution of India and Section 13 of the J&K Public Safety Act, 1978, unless and until the material on which detention order is based, is supplied to detenu. It is only after detenu has all the said material available that he can make an effort to convince detaining authority and thereafter the Government that their apprehensions concerning activities of detenu are baseless and misplaced. If detenu is not supplied the material, on which detention order is based, he will not be in a position to make an effective representation against his detention order. Failure on part of detaining authority to supply material, relied at the time of making detention order to detenu, renders detention order illegal and unsustainable. This view is fortified by the law laid down in Thahira Haris Etc. Etc. v. Government of Karnataka, AIR 2009 SC 2184; Union of India v. Ranu Bhandari, 2008, Cr. L. J. 4567; Dhannajoy Dass v. District Magistrate, AIR, 1982

SC 1315; Sofia Gulam Mohd Bham v. State of Maharashtra and others AIR 1999 SC 3051; and Syed Aasiya Indrabi v. State of J&K & ors, 2009 (I) S.L.J 219.

7. Another important submission has been made by the learned counsel for the petitioner, which is that the alleged activity mentioned in the grounds of detention and on the basis of which the detenu was apprehended, on 22.12.2019, whereas the impugned detention order has been passed after six months, i.e., on 17.06.2020. The unexplained delay, according to the counsel for petitioner, between the alleged activity and the passing of the impugned detention order has rendered the impugned detention unjustified. His another submission is that detenu is already in custody and is required in case FIR no.301/2019 and the detenu has neither applied for bail nor bail has been granted to him, and that the detaining authority being satisfied about custody of the detenu, has not spelt out the compelling reasons to pass the detention order when the detenu was already in custody.

8. Taking into account the submission made by counsel for petitioner, it is appropriate to say that whether a person, who is in jail, can be detained under preventive detention law, has been a subject matter of consideration before the Supreme Court in Dharmendra Suganchand Chelawat & anr v. Union of India, AIR 1990 SC 1196. The Supreme Court, held that an order for detention can be passed against a person in custody and for that purpose, it is necessary that grounds of detention must show that (i) detaining authority was aware of the fact that detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that detenu 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 detaining authority on the basis whereof it may be satisfied that (a) detenu is likely to be released from custody in near future, and (b) taking into account the nature of antecedent activities of detenu, 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.

9. If the above principles are applied to facts of the present case, there is no escape from the conclusion that impugned detention order cannot be sustained. The grounds of detention do not mention: whether detenu is in custody or not at the time of making of detention order; whether application for grant of bail has been made or not at the time detention order was made; whether bail has been granted by court of competent jurisdiction or not at the time of issuance of detention order. Thus, in the present case detaining authority has not drawn any subjective satisfaction vis-à-vis detention of detenu. There is no mention of the fact that detenu has applied for bail in criminal case(s) against him nor is there any satisfaction that detenu has been enlarged on bail before issuance of impugned order of detention. This clearly indicates and shows total absence of application of mind on the part of detaining authority while passing impugned detention order of detention. In that view of matter, impugned detention order is

vitiated.

10. For the foregoing reasons, this petition is disposed of and the impugned detention Order no.94/DMB/PSA/2020 dated 17.6.2020, passed by District Magistrate, Baramulla, is quashed. Respondents, including Jail Superintendent concerned, are directed to release the detenu forthwith, provided he is not required in any other case (s).

11. Xerox copy of detention record be returned to learned counsel for respondents.