

(2022) 09 J&K CK 0048

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 5 Of 2022

Salman Saleem Mir

APPELLANT

Vs

Union Territory Of J&K And Others

RESPONDENT

Date of Decision : 16-09-2022

Acts Referred:

Defence Of India Rules, 1962 — Rule 30, 30(1)(b)
Code Of Criminal Procedure, 1973 — Section 161
Arms Act, 1959 — Section 3, 4, 25
Indian Penal Code, 1860 — Section 323, 341, 382, 425, 504, 506
Jammu And Kashmir Public Safety Act, 1978 — Section 8, 8(1), 8(3)
Telangana Prevention Of Dangerous Activities Of Boot-Leggings, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders Land-Grabbers, Spurious Seed Offenders, Insecticide Offenders, Fertiliser Offenders, Food Adulteration Offenders, Fake Document Offenders, Scheduled Commodities Offenders, Forest Offenders, Gaming Offenders, Sexual Offenders, Explosive Substances Offenders, Arms Offenders, Cyber Crime Offenders And White Collar Or Financial Offenders Act, 1986 — Section 2(a), 2(x)

Citation : (2022) 09 J&K CK 0048

Hon'ble Judges : Rajnesh Oswal, J

Bench : Single Bench

Advocate : Azhar Usman Khan, Eishan Dadhichi

Final Decision : Allowed

Judgement

Rajnesh Oswal, J

1. The present petition has been filed by the petitioner through his father for quashing the detention order No. 01/DM/K/PSA of 2021 dated 24.11.2021 issued by the respondent No. 2 under the Jammu and Kashmir Public Safety Act, 1978 (for short the Act) on the following grounds:

(a) that the detaining authority while passing the detention order has not supplied to the petitioner the sufficient material i.e. statement of the witnesses recorded under section 161 Cr.P.C, list of the witnesses, statements made before Judicial Magistrate and other relevant material relied upon by respondent Nos. 2

and 3.

(b) that the respondent No. 2 while passing the order of detention has not considered the important fact that the petitioner has already been bailed out by the competent court and has not committed any crime, which is heinous in nature.

(c) That the grounds of detention in the dossier submitted by respondent No. 3 has been simply reproduced and there is no subjective satisfaction arrived at on the part of the respondent No. 2 that the detention of the petitioner is necessary.

2. Though the respondent Nos. 2 and 3 have filed the counter affidavits separately, but the counter affidavits have been filed on similar lines. It is stated that the petitioner is a notorious person having criminal mind set and is involved in FIR No. 02/2020 under sections 4/25 Indian Arms Act and 323 IPC, FIR No. 239/2021 under section 3/25 Indian Arms Act and FIR No. 67/2021 under sections 341, 323, 382, 504 and 506 IPC of Police Station, Kishtwar and on the basis of criminal and anti social activities, respondent No. 3 submitted a dossier and the same was examined by respondent No. 2 and after application of mind, detention order under section 8 of the Act was issued. The petitioner was also informed that the petitioner can approach the Advisory Board either himself or through advocate for preferring an appeal against the said order. The petitioner was also informed that he can make representation against the order of detention to respondent No. 2 as also to the Government. On 24.11.2021, the respondent No. 2 wrote a communication to the Principal Secretary to Government, Home Department and sought the approval/confirmation of the detention order. The Principal Secretary confirmed and approved the detention order vide Government order dated 27.12.2021. Subsequently, the order of detention after the expiry of initial period of three months was also extended. It is stated that the detention order was executed by Inspector Dilraj Singh. Petitioner was handed over the documents and the grounds of detention were read over and explained to the detenu/petitioner in English and Urdu. In acknowledgement thereof, the petitioner also signed the execution report. In nutshell, the stance of the respondents is that all the procedural safeguards have been followed by the respondents while passing and executing the detention order, as such, there is no illegality in detaining the petitioner.

3. Mr. Azhar Usman Khan, learned counsel for the petitioner vehemently argued that the grounds of detention do not fall within the purview of "activities prejudicial to the maintenance of public order" as defined under section 8 of the Act, as such, there is complete non application of mind on the part of the respondent No. 2 in issuing the detention order. He further argued that the respondent No. 2 has not taken into consideration the fact that the petitioner was enlarged on bail in all three aforesaid FIRs, as the respondent No. 3 never furnished the orders granting bail to the respondent No. 2 so as to enable the respondent No. 2 to derive subjective satisfaction that there is necessity to detain the petitioner under the Act.

4. On the other hand, Mr. Eishan Dadhichi, learned GA vehemently argued that all the constitutional as well as procedural safeguards have been meticulously followed by the respondents. Since the activities of the petitioner were prejudicial to the maintenance of public order, the petitioner has rightly been detained by respondent No. 2 by issuance of order impugned.

5. Heard and perused the record.

6. A perusal of the detention order reveals that three FIRs i.e. FIR Nos. 02/2020 under sections 4/25 Indian Arms Act, 323 IPC, FIR No. 239/2021 under section 3/25 Indian Arms Act and FIR No. 67/2021 under sections 341, 323, 382, 504 and 506 IPC registered with Police Station, Kishtwar have been relied upon by the respondent No. 2 while issuing the detention order. In FIR No. 2/2020, the allegations were that the petitioner along with two others assaulted the complainant with sharp edged weapon as a result of which, he was injured, however, during investigation, offence under section 3/25 Indian Arms Act could not be proved and charge sheet was filed under sections 341, 324 and 34 IPC before the competent court. In FIR No. 67/2021 for commission of offence under sections 341, 323, 382, 504 and 506 IPC of Police Station, Kishtwar, the allegations were that the petitioner along with others restrained the way of the complainant and assaulted him mercilessly with punches and threatened him of dire consequences, besides using unparliamentary language. The allegation of snatching of golden chain was also leveled. However, during the course of investigation, offence under section 382 IPC could not be proved. So far as 3rd FIR bearing No. 239/2021 for commission of offence under section 3/25 of the Indian Arms Act is concerned, it has been simply mentioned that the petitioner was arrested in the said FIR on the ground that one pistol (desi katta) was recovered from the petitioner.

7. Now, it is to be examined as to whether the activities of the petitioner as mentioned in FIRs mentioned above fall within the purview of "activities prejudicial to the maintenance of public order" as defined under section 8 of the Act so as to necessitate his detention under the Act.

8. Under section 8 (1) of the Jammu and Kashmir Public Safety Act, the government may detain any person if the government is satisfied that the detention is necessary with a view to prevent such person from acting in any manner prejudicial to the maintenance of public order. Section 8(3) of the Act defines the activities those are considered as prejudicial to the maintenance of public order and the same is reproduced as under:

(3) For the purposes of sub-section (1),

[(a) Omitted]

(b) "acting in any manner prejudicial to the maintenance of public order" means-

(i) promoting, propagating, or attempting to create feelings of enmity or hatred or disharmony on the ground of religion, race, caste, community, or region;

(ii) attempting to commit, or committing, or instigating, inciting, provoking or otherwise abetting the commission of mischief within the meaning of section 425 of the Indian Penal Code where the commission of such mischief disturbs or is likely to disturb public order;

(iii) attempting to commit or committing or instigating, inciting, provoking or otherwise abetting the commission of an offence punishable with death or imprisonment for life or imprisonment of a term extending to 7 years or more where the commission of such offence disturbs or is likely to disturb public order;

9. In *Vijay Narain Singh v. State of Bihar* reported in (1984) 3 SCC 14, the Apex Court has observed as under:

"32. ... It is well settled that the law of preventive detention is a hard law and therefore it should be strictly construed. Care should be taken that the liberty of a person is not jeopardised unless his case falls squarely within the four corners of the relevant law. The law of preventive detention should not be used merely to clip the wings of an accused who is involved in a criminal prosecution. It is not intended for the purpose of keeping a man under detention when under ordinary criminal law it may not be possible to resist the issue of orders of bail, unless the material available is such as would satisfy the requirements of the legal provisions authorising such detention. When a person is enlarged on bail by a competent criminal court, great caution should be exercised in scrutinising the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal court."

10. Also in *Union of India v. Yumnam Anand M.* reported in (2007) 10 SCC 190, Apex Court has observed as under:

"In case of preventive detention no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. But at the same time, a person's greatest of human freedoms i.e. personal liberty is deprived, and, therefore, the laws of preventive detention are strictly construed, and a meticulous compliance with the procedural safeguard, however technical, is mandatory. The compulsions of the primordial need to maintain order in society, without which enjoyment of all rights, including the right of personal liberty would lose all their meanings, are the true justifications for the laws of preventive detention. This jurisdiction has been described as a "jurisdiction of suspicion", and the compulsions to preserve the values of freedom of a democratic society and social order sometimes merit the curtailment of the individual liberty. To lose our country by a scrupulous adherence to the written law, said Thomas Jefferson, would be to lose the law, absurdly sacrificing the end to the means. No law is an end itself and the curtailment of liberty for reasons of State's security and national economic discipline as a necessary evil has to be administered under strict constitutional

restrictions. No carte blanche is given to any organ of the State to be the sole arbiter in such matters.”

11. Thus, in view of the aforesaid judgements, a person may be detained under preventive detention laws provided the case falls within the parameters of law laid down under the Act. The perusal of detention order reveals that in all the FIRs, the allegations against the petitioner are with regard to the commission of offences those do not fall within the realm of “public order” as defined by section 8(3) of the Act as there are no allegations against the petitioner regarding his activities affecting public at large. The allegations may amount to law and order issue but in no manner can be said to have disturbed the public order. In *Mallada K Sri Ram v. State of Telangana*, 2022 SCC OnLine SC 424, Apex Court has considered the distinction between “law and order” and “public order” and observed as under:

12. The distinction between a disturbance to law and order and a disturbance to public order has been clearly settled by a Constitution Bench in *Ram Manohar Lohia v. State of Bihar*. The Court has held that every disorder does not meet the threshold of a disturbance to public order, unless it affects the community at large. The Constitution Bench held:

“51. We have here a case of detention under Rule 30 of the Defence of India Rules which permits apprehension and detention of a person likely to act in a manner prejudicial to the maintenance of public order. It follows that if such a person is not detained public disorder is the apprehended result. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. Does the expression “public order” take in every kind of disorders or only some of them? The answer to this serves to distinguish “public order” from “law and order” because the latter undoubtedly takes in all of them. Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival communities and one of them tried to raise communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances which subvert the public order are. A District Magistrate is entitled to take action under Rule 30(1)(b) to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances.

52. It will thus appear that just as “public order” in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those

affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. By using the expression "maintenance of law and order" the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules."

(emphasis supplied)

11.A In *Banka Sneha Sheela v. State of Telangana* reported in 2021(9) SCC 415, Apex Court held as under:

"9. ...learned counsel appearing on behalf of the petitioner has raised three points before us. First and foremost, he said there is no proximate or live connection between the acts complained of and the date of the detention order, as the last act that was complained of, which is discernible from the first 3 FIRs (FIRs dated 12-12-2019, 12-12-2019 and 14-12-2019), was in December 2019 whereas the detention order was passed 9 months later on 28-9-2020. He then argued, without conceding, that at best only a "law and order" problem if at all would arise on the facts of these cases and not a "public order" problem, and referred to certain judgments of this Court to buttress the same. He also argued that the detention order was totally perverse in that it was passed only because anticipatory bail/bail applications were granted. The correct course of action would have been for the State to move to cancel the bail that has been granted if any further untoward incident were to take place.

12. While it cannot seriously be disputed that the detenu may be a "white collar offender" as defined under Section 2(x) of the Telangana Prevention of Dangerous Activities Act, yet a preventive detention order can only be passed if his activities adversely affect or are likely to adversely affect the maintenance of public order. "Public order" is defined in the Explanation to Section 2(a) of the Telangana Prevention of Dangerous Activities Act to be a harm, danger or alarm or a feeling of insecurity among the general public or any section thereof or a grave widespread danger to life or public health.

15. There can be no doubt that what is alleged in the five FIRs pertain to the realm of "law and order" in that various acts of cheating are ascribed to the detenu which are punishable under the three sections of the Penal Code set out in the five FIRs. A close reading of the detention order would make it clear that the reason for the said order is not any apprehension of widespread public harm, danger or alarm but is only because the detenu was successful in obtaining anticipatory bail/bail from the courts in each of the five FIRs. If a person is granted anticipatory bail/bail wrongly, there are well-known remedies in the ordinary law to take care of the situation. The State can always appeal against the bail order granted and/or apply for cancellation of bail. The mere successful

obtaining of anticipatory bail/bail orders being the real ground for detaining the detenu, there can be no doubt that the harm, danger or alarm or feeling of insecurity among the general public spoken of in Section 2(a) of the Telangana Prevention of Dangerous Activities Act is make-believe and totally absent in the facts of the present case.

32. On the facts of this case, as has been pointed out by us, it is clear that at the highest, a possible apprehension of breach of law and order can be said to be made out if it is apprehended that the detenu, if set free, will continue to cheat gullible persons. This may be a good ground to appeal against the bail orders granted and/or to cancel bail but certainly cannot provide the springboard to move under a preventive detention statute.

We, therefore, quash the detention order on this ground....”

12. Both the above mentioned decisions have been followed by Hon’ble Apex Court in case titled “ Shaik Nazneen vs. The State of Telangana and Ors.” bearing no. Criminal Appeal NO. 908 OF 2022 (@ SLP (CRL.) NO. 4260 OF 2022, decided on 22.06.2022, wherein it has been held that in two recent decisions, this Court had set aside the detention orders which were passed, under the same Act, i.e., the present Telangana Act, primarily relying upon the decision in Dr. Ram Manohar Lohia case (supra) and holding that the detention orders were not justified as they were dealing with a law and order situation and not a public order situation.

13. In view of aforesaid pronouncements of the Supreme Court, this Court is of the considered opinion that the petitioner could not have been detained on the ground of maintenance of public order.

14. Further, from perusal of the grounds of detention as also the order of detention, it is found that there is no whisper either in the grounds of detention or in the order of detention as to whether the petitioner was granted bail in FIR No. 239/2021 under section 3/25 Indian Arms Act. The petitioner has specifically pleaded in ground (b) of his writ petition that the petitioner has been granted bail by the court but in the grounds of detention as also in the order of detention, there is no whisper as to whether the petitioner has been granted bail in FIR No. 239/2021. The respondent No. 3 in his dossier has also not stated as to whether the petitioner was granted bail in FIR No. 239/2021 or not. The respondent No. 3 in his response has admitted that the petitioner was granted bail at the time of completion of investigation. This Court is of the considered view that the respondent No. 3 was under obligation to place all the material before respondent No. 2 including the orders of granting bail to the petitioner so as to enable the respondent No. 2 to derive subjective satisfaction that the detention of the petitioner is necessary so as to prevent him from acting in any manner prejudicial to the maintenance of public order {See (1986)4 SCC 771 and (1992)1 SCC 1}. The order impugned is not sustainable on this ground as well.

15. In view of all what has been discussed above, the present petition is allowed.

The detention order No. 01/DM/K/PSA of 2021 dated 24.11.2021 issued by the respondent No. 2 under the Jammu and Kashmir Public Safety Act, 1978 is hereby quashed. Petitioner (detenue) be set free from the preventive custody, provided his custody is not required in any other case.