
(2022) 10 J&K CK 0009

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 8 Of 2022

Shakeel Ahmad Bhat

APPELLANT

Vs

Union Territory Of J&K & Ors.

RESPONDENT

Date of Decision : 11-10-2022

Acts Referred:

Constitution Of India, 1950 — Article 22(5)

Code Of Criminal Procedure, 1973 — Section 107, 151

Citation : (2022) 10 J&K CK 0009

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Wajid Haseeb, Sajad Ashraf

Final Decision : Allowed

Judgement

Sanjay Dhar, J

1) Impugned in this petition is order of detention bearing No.DMS/PSA/103/2021 dated 16.12.2021, issued by District Magistrate, Srinagar (for brevity "Detaining Authority"). In terms of the aforesaid order, Shakeel Ahmad Bhat @ Adja son of Lt. Ghulam Qadir Bhat resident of Malik Angan Feteah Kadal, Srinagar, (for short "detenu") has been placed under preventive detention and lodged in Central Jail, Srinagar.

2) The petitioner has contended that the Detaining Authority has passed the impugned detention order mechanically without application of mind, inasmuch as the statutory procedural safeguards have not been complied with in the instant case. It has been further urged that the material which formed basis of the grounds of detention and the consequent order of detention has not been provided to the detenu. It has also been contended that the grounds of detention are vague, non-existent and stale and there is total non-application of mind on the part of the detaining authority.

3) The respondents, in their counter affidavit, have disputed the averments made

in the petition and insisted that the activities of detainee are highly prejudicial to the maintenance of public order. It is pleaded that the detention order and grounds of detention were handed over to the detainee and same were read over and explained to him; that the grounds urged by the petitioner are legally misconceived, factually untenable and without any merit and the impugned detention order has been passed strictly in accordance with law occupying the field. In support of their stand taken in the counter affidavit, the respondents have also produced the detention record.

4) I have heard learned counsel for parties and perused the material on record.

5) Learned counsel for the petitioner, while seeking quashment of the impugned order, projected various grounds but his main thrust during the course of arguments was on the following grounds:

(I) That the detainee's right of making an effective representation against his detention has been violated as the material, on the basis of which the grounds of detention have been formulated, has not been supplied to him.

(II) That there has been non-application of mind on the part of detaining authority while passing the impugned detention order.

6) The first ground projected by the learned counsel for the petitioner that the detainee has been disabled from making an effective representation against the order of detention as the material, which formed basis of the grounds of detention and the consequent order of detention, has not been furnished to him, appears to have substance. A perusal of the detention record reveals that the petitioner has been provided copies of grounds of detention, notice of detention (total 11 leaves). If we have a look at the grounds of detention, it bears reference to twelve FIRs Viz. FIR Nos.117/1997, 2102/2003, 114/2003, 20/2008, 39/2010, 39/2017, 65/2014, 02/2021, 90/2021, 69/2007, 70/2007 and 79/2012. It was incumbent upon respondents to furnish not only the copies of these FIRs but also the statements of witnesses recorded during investigation of these FIRs and other material on the basis of which petitioner's involvement in these FIRs is shown, particularly when the petitioner is not nominated in these FIR. All this material would run in dozens of pages and it is impossible that all this material would be covered in only eleven leaves. Apart from this, the grounds of detention bear reference to proceedings under Section 107 and 151 of Cr. P. C against the detainee but the copies of relevant documents pertaining to these proceedings have also not been provided to the detainee, as is clear from the detention record.

7) Thus, the contention of the petitioner that whole of the material relied upon by the detaining authority, while framing the grounds of detention has not been supplied to him, appears to be well-founded. Obviously, the petitioner has been hampered by non-supply of these vital documents in making an effective representation before the Advisory Board, as a result whereof his case has been considered by the Advisory Board in the absence of his representation, as is clear

from the detention record. Thus, vital safeguards against arbitrary use of law of preventive detention have been observed in breach by the respondents in this case rendering the impugned order of detention unsustainable in law.

8) It needs no emphasis that the detainee cannot be expected to make an effective and purposeful representation which is his constitutional and statutory right guaranteed under Article 22(5) of the Constitution of India, unless and until the material, on which detention is based, is supplied to the detainee. The failure on the part of detaining authority to supply the material renders detention order illegal and unsustainable. While holding so, I am fortified by the judgments rendered in *Sophia Ghulam Mohd. Bham V. State of Maharashtra and others* (AIR 1999 SC 3051) and, *Thahira Haris Etc. Etc. V. Government of Karnataka &Ors.* (AIR 2009 SC 2184).

9) Next it has been contended by the petitioner that the impugned detention order suffers from non-application of mind on the part of the detaining authority, inasmuch as the detaining authority while passing the impugned detention order was not certain as to on which ground the impugned order is being passed as it has made reference to both the expressions, namely, "activities prejudicial to the maintenance of public order" and "activities prejudicial to the security of the UT" in the grounds of detention.

10) According to the learned counsel for the petitioner, the aforesaid course adopted by the detaining authority in this case exhibits lack of application of mind and lack of certainty in the decision making of the detaining authority. To support his contention, the learned counsel has placed reliance on the judgment of the Supreme Court in *G. M. Shah v. State of J&K*, 1980 AIR 494.

11) Before determining the issue raised by learned counsel for the petitioner in this case, it would be appropriate to notice the legal position on the subject. The Supreme Court in *Dr. Ram Manohar Lohia v. State of Bihar and others*, 1966 AIR SC 740, while discussing the distinction between the expressions "law and order", "public order" and "security of the State" has observed as under:

"One has to imagine three concentric circles, in order to understand the meaning and import of the above expressions. '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 State. It is in view of the above distinction, the Act defines the expressions "acting in any manner prejudicial to the security of the State" and "acting in any manner prejudicial to the maintenance of public order" separately. An order of detention made either on the basis that the detaining authority is satisfied that the person against whom the order is being made is acting in any manner prejudicial to the security of the State or on the basis that he is satisfied that such person is acting in any manner prejudicial to the maintenance of public order but which is attempted to be supported by placing reliance on both the

bases in the grounds furnished to the detainee has to be held to be an illegal one vide decisions of this Court in *Bhupal Chandra Ghosh v. Arif Ali & Ors* and *Satya Brata Ghose v. Arif Ali & Ors.*”

12) From the ratio laid down by the Supreme Court in the above referred judgment, it is clear that there is a clear distinction between “security of the State” and “maintenance of public order”. An act prejudicial to the security of the state has to be of graver nature than an act prejudicial to the maintenance of public order. The Supreme Court in the aforesaid judgment has made it clear that if an order of detention is made on both grounds i.e. on the ground of “security of the State” as well as on the ground of “maintenance of public order”, such an order has to be held as illegal. The aforesaid ratio has been reiterated and reaffirmed by the Supreme Court in the case of *G. M. Shah v. State of J&K*, 1980 AIR 494.

13) In the instant case, the detaining authority has mentioned in the grounds of detention that the petitioner is a constant threat to the maintenance of security of the UT. While passing the impugned detention order, it has been provided that the petitioner is to be taken into preventive custody with a view to prevent him from acting in any manner prejudicial to the maintenance of public order. Thus, it is clear that the detaining authority is unsure 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. The detaining authority while passing an order of detention has to be satisfied and sure about the exact nature of the activities of the detainee. In the instant case, the manner in which the grounds of detention and the impugned order of detention have been framed clearly reflects a state of uncertainty and tentativeness on the part of the detaining authority while recoding its satisfaction. This renders the impugned order of detention unsustainable in law.

14) Viewed thus, the petition is allowed and the impugned order of detention is quashed. The detainee is directed to be released from the preventive custody forthwith provided he is not required in connection with any other case.

15) The detention record be returned to learned counsel for the respondents