

(2021) 12 J&K CK 0055

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 17 Of 2021

Syed Tajamul Andrabi

APPELLANT

Vs

Union Territory Of J&K And Another

RESPONDENT

Date of Decision : 28-12-2021

Acts Referred:

Constitution Of India, 1950 — Article 21, 22, 22(5)
Jammu And Kashmir Public Safety Act, 1978 — Section 8, 13
Code Of Criminal Procedure, 1973 — Section 161, 164A
Indian Penal Code, 1860 — Section 121, 307
Arms Act, 1959 — Section 7, 27
Unlawful Activities (Prevention) Act, 1967 — Section 18, 20, 39

Citation : (2021) 12 J&K CK 0055

Hon'ble Judges : Vinod Chatterji Koul, J

Bench : Single Bench

Advocate : G. N. Shaheen, Hakim Aman Ali

Final Decision : Dismissed

Judgement

Vinod Chatterji Koul, J

1. The order no.09/DMP/PSA/21 dated 29.01.2021, passed by District Magistrate, Pulwama (for brevity "detaining authority") placing one, Syed Tajamul Andrabi S/o Syed Manzoor Andrabi R/o Drabgam Tehsil Rajpora District Pulwama (for short "detenu"), under preventive detention so as to prevent him from acting in any manner prejudicial to the security of the State and directing his lodgement in Central Jail, Jammu (Kotbhalwal), has been challenged in this petition precisely on the following grounds:

i) that the allegations mentioned in grounds of detention have no nexus with the detenu and have been fabricated by the police in order to justify its illegal action of detaining the detenu;

ii) that the allegations made in the grounds of detention are vague, non-existent and no prudent man can make a representation against such allegation and

passing of detention on such grounds is unjustified and unreasonable. The detaining authority has mentioned one FIR in the grounds of detention however it is respectfully submitted that the allegations as against the detenu are far from reality;

iii) that allegations as reflected in the grounds of detention are vague and don't justify the passing of detention order on the basis of such allegations. The detaining authority has mentioned single FIR in the grounds of detention however no specific allegation has been given regarding the detenu in the case mentioned in grounds of detention, even not an iota of connection is given in the grounds of detention connecting the detenu with the case. The very basis of the satisfaction recorded by the detaining authority is vague as such impugned order of detention suffers from complete non-application of mind on the part of detaining authority

iv) that detenu was already admitted to bail in the case mentioned in grounds of detention on 22.12.2020 and he was allowed to be at large and thereafter no fresh activity has been attributed to the detenu. The detention order is based on the case FIR registered against him in September 2020, he remained in custody for more than three months, the prospects for the bail came into existence in the month of December 2020 and he was actually enlarged to bail on 22.12.2020;

v) That when for all this period the detention of the detenu was not found necessitated, the passing of detention order after due process of law has taken its course will not be saved by the principles of Article 22 which permit preventive detention as deviation general rule to Article 21.

vi) That the single alleged activity on the basis of which the detention order has been passed has occurred on 13.09.2020 and thereafter the detenu was arrested in the case and enlarged to bail in the due course of law. There is delay of about five months between the single alleged activity and order of detention and during the period of this delay, there is no fresh activity attributed to the delay. The detaining authority has not given any reason for this delay. The delay between the activity and the order of detention in the present circumstances has snapped the proximity of the detention order with the object it is passing is justified for and thus delay in passing the detention order has rendered the detention order unreasonable;

vii) That the detaining authority has not prepared the grounds of detention by itself, which is a pre-requisite for him before passing any detention order. It is respectfully submitted that detaining authority has relied only on the police dossier and has not perused any supporting material or material relating to the case. Furthermore the detaining authority seems to have worked on the dictates of police authorities and has not enquired about the existence of the facts by perusing the supporting material as such detention order has been passed on the same day it was recommended and, therefore, non-application of mind by the detaining authority has rendered the detention order bad in law;

viii) That respondent no.2 has not furnished the relevant material like copy of dossier and so-called connected material as per record furnished to the detaining authority by police and relied upon by the detaining authority for passing the order of detention, nor the relevant material, like copy of FIR, Statements u/s 161, 164A CrPC, seizure memo, recovery memo, of the case mentioned in the grounds of detention, has been furnished to the detenu to enable him to make an effective representation by giving his version of facts attributed to him and make an attempt to dispel the apprehensions nurtured by the detaining authority concerning alleged involvement of the detenu in the alleged activities, against the said order to the competent authority. Since filing of an effective representation is a constitutional right and to enable the detenu to file such a representation it is necessary to provide him the copies of the dossier, connecting documents and the material and as in the instant case respondent no. 2 has not provided any such material to the detenu, therefore his constitutional rights guaranteed under Article 22(5) of the Constitution of India stand infringed;

ix) that the petitioner submitted a representation against detention of detenu, but same was not considered by respondent;

x) that post execution the detenu was not given any opportunity to make representation and also the detenu was not informed that he has a right to make a representation against his detention order to the detaining authority nor the respondents disclosed to him before whom authority of Government he can make the representation, and neither the respondents disclosed him the time frame within which he can make the respective representation, which is in total violation of the rights of the detenu as guaranteed under Article 22 of the Constitution and Section 13 of Public Safety Act.

2. Respondents have resisted the petition by filing reply affidavit in which they have denied contentions contained in the petition and have submitted that there is no illegality in the order of detention as it was necessary to place detenu under preventive detention so as to prevent him from acting in any manner prejudicial to security of the State. Detaining authority has, in its affidavit, justified the grounds of detention as well as impugned detention order while denying allegation of non-supply of relevant material to the detenu. To substantiate their case, the respondents have produced the detention record.

3. I have heard learned counsel for parties and considered the matter.

4. The first argument of learned counsel for petitioner is that impugned order of detention is unconstitutional, illegal and bad in law inasmuch as detaining authority has not followed the Constitutional and Statutory procedural safeguards as provided under Article 22(5) of the Constitution of India. It is stated in the petition that the allegations mentioned in grounds of detention have no nexus with detenu and have been fabricated by police in order to justify its illegal action of detaining the detenu. It is also averred that detenu has not been provided the material relied upon and referred to by detaining authority while passing

impugned detention order and as a necessary corollary thereof, detenu could not make a representation against detention.

In view of above submission, I have gone through the detention record produced by learned counsel for respondents. Perusal of the detention record reveals that the material relied upon by detaining authority has been furnished to detenu at the time of execution of the detention. It is evident from detention record that detenu, at the time of execution of detention order, has been handed over all what has been referred to in grounds of detention by detaining authority, so as to enable him to make an effective representation against his detention. In that view of matter, the contention of learned counsel for petitioner that detenu has not been provided material relied upon by detaining authority, has no substance and is, therefore, misconceived.

5. The second submission of learned counsel for petitioner is that detaining authority has not assigned any compelling reason for passing order of detention and that detaining authority has not specified the authority before whom the representation has to be made nor has detaining authority informed detenu to make representation to him before the order could be approved/confirmed by the Government.

This submission is again misconceived, for, perusal of grounds of detention reveals compelling and cogent reasons given by detaining authority to pass order of detention. In this regard it would be appropriate to reproduce relevant portion of grounds of detention hereunder:

"You are an active member of twin banned terrorist outfits of Hizbul Mujahideen (HM) and Jash-e-Mohammad (JeM). The aim and objective of these organizations is to secede the Union Territory of J&K from the Union of India and annex it with Pakistan. You have been aiding and abetting the terrorist activities being carried out by these banned terrorist organizations in and around the Puiwama Town. You have been harboring the terrorists operating in the area at far reaching locations and facilitating them to carry out their subversive activities effectively. You have been motivating the youth as also innocent populace of the District Pulwama and its adjoining areas for carrying out antinational and antisocial activities pre-judicial to the security, sovereignty and integrity of the State. You have been motivating the youth of the area to join militancy by exploiting their religious sentiments just to strengthen their cadets. You are fundamentalist in nature, therefore, in co-ordination with. other likeminded youth have been persistently resorting to activities prejudicial to the Security of the State. It is apt to mention here that with the passage of time, you became a hardcore fundamentalist and sympathizer of militants and as Over Ground Worker have been providing all logistical support to the militants of banned terrorist organizations of Hizbul Mujahideen (EIM) and Jash-e-Mohammad (JeM). You have been in close contact with militants since 2014 and due to your unscrupulous mental ideology, you went active with the militants in 2015 and as a result were categorized in the list of active militants vide SP Pulwama's letter No. CS/

SR12015/5102 dated 3 1.08.2015 and after few days returned back. Owing to issuance of guidelines by the Government of J&K regarding counseling programme, you have been released without framing any charges. Pfter release your activities had been monitored and kept under surveillance. After few months you were again found involved in militant related activities, such as motivating the youth to join militant ranks and providing logistic support to the militants. You used to work for one of the dreaded militant of the area namely Sameer Ahmad Bhat @ Tiger S/o Mohammad Maqbool Bhat Rio Drabgam Puiwama and after his death Y ou established contact with another militant of your area namely Zahid Nazir Bhat S/o Nazir Abmad Bhat Rio Drabgam Pulwama who later was killed in an encounter at Dadoora Puiwama.

Your active role was ascertained in firing incident on 44 RR patrolling party and another firing incident at 183 Bn CRPF camp Below Puiwama regarding which case FIR No. 65/2020 U/S 307-IPC, 7/27 A Act and 20 UAP Act and FIR No. 87/2020 U/s 7/27 A Act and 16,18 UAP Act were registered in Police Station Rajpora respectively and investigation embarked on. You were also found involved in case FIR No. 83/2020 U/S 121-Ipc & 18, 20, 39 UAP Act registered in Police Station Rajpora.

On 30.07.2020, the Commandant 44 RR vide letter informed that patrolling party of 44 RR while moving at about 1345 hours in village Drabgam, in a vehicle came under heavy indiscriminate fire at Firdous Colony Drabgam and on retaliation the terrorists took advantage of thick vegetation managed to escape regarding which Case FIR No. 65/2020 U/S 307-IPC, 7/27 A Act and 20 UAP Act was registered at P/S Rajpora and investigation set in motion. During the investigation the in the instant case, it divulged that you too were involved in the said firing incident actively.

In another incident on 20.09.2020 Police Station Rajpora received a written docket/Complaint from commanding Officer 183 Bn CRPF Below Puiwama to the effect that about 2125 hours unknown militants fired 6-8 rounds from distance of 250 meters from north direction towards Morcha No. 03 located inside the camp. The Santri retaliated by fire but the militants took advantage of darkness and escaped from the spot. The said firing incident concluded without loss of life. In this regard Case FIR No. 87/2020 U/S 7/27 A Act 16, 18 UAP Act was registered at P/S Rajpora and investigation embarked on. During the course of investigation your involvement in the instant incident was established.

In another incident on 13.09.2020 Police Station Rajpora received information through reliable sources to the effect that you alongwith Sameer Ahmad Bhat S/o Firdous Ahmad Bhat, Bilal Alimad Dar S/o Gh Hassan Dar, Tariq Ahmad Dar S/o Mohammad Ashraf Dar residents of Drabgam Balla are working as OGWs of banned terrorist outfits and have therefore been rendering assistance to the terrorists to carry out subversive activities in the area in an effective manner so as to vitiate the peaceful atmosphere in the area. You have also been providing them shelter and information about the movement of the Police and security

forces to these militants thereby ensuring their prolonged sustenance and enabling them to carry out the subversive activities in an effective manner. On the face of your involvement Case FIR No. 83/2020 U/S 121-IPC & 18, 20, 39 UAP Act was registered at P/S Rajpora and investigation embarked on.

The activities as projected in the forgoing Paras of the instant dossier run heavily against you and are highly prejudicial to the Security of the State. Being highly motivated to carry on the illegal designs you are not likely to desist from indulging in anti-national and antisocial activities and the normal laws are not sufficient to deter you from indulging in such activities. Therefore, in order to prevent you from indulging in the activities, which are prejudicial to the Security of the State, it is necessary to detain you by invoking the provisions of J&K Public Safety Act, 1978."

It is apparent from grounds of detention, as reproduced above, that detenu is an active member of twin banned terrorist outfits of Hizbul Mujahideen (HM) and Jash-e-Mohammad (JeM). Detenu is said to have been aiding and abetting terrorist activities being carried out by the banned terrorist organisations in and around Pulwama Town and that detenu has been harbouring terrorists operating in the area at far reaching locations and facilitating them to carry out their subversive activities effectively. Grounds of detention also mention that detenu has been motivating the youth as also innocent populace of District Pulwama and its adjoining areas for carrying out antinational and antisocial activities, which are prejudicial to the security of the State. It is also contained in grounds of detention that detenu became a hardcore fundamentalist and sympathizer of militants and as overground worker has been providing all logistical support to militants of banned terrorist organisation HM and JeM and that detenu has been in close contact with militants since 2014 and as a result was categorized in the list of active militants vide S.P. Pulwama's letter no.CS/ SR/2015/5102 dated 31.08.2015. Grounds of detention also make a mention that in view of issuance of guidelines by the Government of J&K regarding counselling programme, detenu was released without framing any charges. After his release, his activities were monitored and kept under surveillance and after few months detenu was again found involved in militant related activities. Detenu is used to have worked for one of the dreaded militants of the area, namely, Sameer Ahmad Bhat @ Tiger S/o Mohammad Maqbool Bhat R/o Drabgam, Pulwama, and after his death, detenu established contact with another militant of his area, namely, Zahid Nazir Bhat S/o Nazir Ahmad Bhat R/o Drabgam, Pulwama, who later was killed in an encounter. It is also mentioned in grounds of detention that active role of detenu in an encounter in firing incident on 44 RR patrolling party and another firing incident at 183 Bn CRPF Camp Below Pulwama regarding which a FIR no.65/2020 and FIR no.87/2020 were registered in police station Rajpora. Detenu is said to have also been found involved in case FIR no.83/2020. It is further mentioned in grounds of detention that activities of detenu are highly prejudicial to security of the State and he is not likely to desist from indulging in antinational and antisocial activities and that normal laws are not sufficient to deter detenu from

indulging in such activities.

The detenu has been very well informed to make representation to the Government as well as detaining authority as is self-evident from communication no.DMP/PSA/33-35 dated 29.01.2021, addressed by detaining authority to the detenu.

In that view of matter, sufficient grounds have been given by detaining authority to place detenu under preventive detention.

6. Another submission of learned counsel for petitioner is that subjective satisfaction has not been derived by detaining authority which is sine quo non for passing the order of detention and that grounds of detention are mere repetition of dossier prepared by Senior Superintendent of Police concerned.

I have examined detention record, produced by learned counsel for respondents. It is evident from the detention record that the detention order was made on proper application of mind to the facts of the case and detenu was delivered at the time of execution of the detention order, material and grounds of detention and was also informed that he had a right to represent against his preventive detention both before detaining authority as also the Government. The detaining authority has narrated the facts and figures that made the authority to exercise its powers under Section 8 of the Act of 1978, and record subjective satisfaction that detenu was required to be placed under preventive detention in order to prevent him from acting in any manner prejudicial to the security of the State.

7. Perusal of record reveals that detention order has been approved by the Government within time. The case is said to have been referred to Advisory Board for its opinion. The Advisory Board is stated to have held that there is sufficient cause for detention of detenu and that upon receipt of the opinion of the Advisory Board, the impugned order of detention has been confirmed by the Government.

8. In examining the question whether ordinary laws of land would have sufficed, and whether recourse to preventive detention was unnecessary, it must be borne in mind that the compulsions of the primeval need to maintain order in the society without which the enjoyment of all rights, including right to personal liberty of citizens, would lose their meaning, provide justification for laws of preventive detention. These laws suggest that an individual's conduct, prejudicial to maintenance of public order, security of State, preservation of forest wealth, provide grounds for satisfaction for a reasonable assessment of possible future manifestations of similar propensities on the part of the offender. The object of the law of preventive detention is not punitive, but is only preventive. In preventive detention no offence is to be proved nor is any charge formulated. The justification of such detention is suspicion and reasonability.

9. The essential concept of preventive detention is that detention of a person is not to punish him for something he has done, but to prevent him from doing it.

Its basis is satisfaction of the Executive of a reasonable probability of detenu acting in a manner similar to his past acts, and preventing him by detention from so doing. Preventive detention, an anticipatory measure, is resorted to when the executive is convinced that such detention is necessary to prevent a person detained from acting in a manner prejudicial to certain objects which are specified by the law. In preventive detention no offence is proved, and justification of such detention is suspicion or reasonable probability. Order of detention is based on a reasonable prognosis of future behaviour of a person based on his past conduct in light of surrounding circumstances. The power of preventive detention is exercised in reasonable anticipation. It may or may not relate to an offence. It does not overlap with the prosecution even if it relies on certain facts for which prosecution may be, or may have been, launched. An order of preventive detention may be made before or during prosecution. It may be made with or without prosecution and in anticipation or after discharge or even acquittal. Pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.

Reference to *Sophia Gulam Mohd. Bham v. State of Maharashtra and others*, AIR 1999 SC 3051; *Anant Sakharam Raut v. State of Maharashtra and another*, AIR 1987 SC 137; *Banka Sneha Sheela v. State of Telangana and others*, AIR 2021 SC 3656, and judgement dated 23.05.2019 passed by a Division Bench of this Court in *Majid Gulzar v. State of J&K and others*, in view of the distinguishable facts and circumstances of the present case, will not give any aid or assistance to the case of petitioner.

10. It is useful to make mention of here that a six Judge Constitution Bench of the Supreme Court way back in the year 1951, in the case of *The State of Bombay v. Atma Ram Shridhar Vaidya*, AIR 1951 SC 157, while looking into the scope subjective satisfaction arrived at by the detaining authority has held that the same is extremely limited and that the Court, while examining the material, which is made basis of subjective satisfaction of detaining authority, would not act as a court of appeal and find fault with satisfaction on the ground that on the basis of the material before detaining authority, another view was possible. Such being the scope of enquiry in this field, and the contention of counsel for petitioner, therefore, cannot be accepted. While going through the grounds of detention and dossier, I do not find that grounds of detention are ditto copy of dossier supplied by sponsoring authority. As is evident from the detention record, the material has been supplied to detenu. and all this material was before detaining authority when it arrived at subjective satisfaction that the activities of detenu are such, which would entail preventive detention under J&K Public Safety Act, 1978.

11. It is not impertinent to mention here that the powers of preventive detention under the Act of 1978 are in addition to those contained in the Criminal Procedure Code, where preventive detention is followed by an inquiry or trial. By its very nature, preventive detention is aimed at preventing commission of an

offence or preventing detained person from achieving a certain end. The authority, making the order, therefore, cannot always be in possession of full detailed information when it passes the order and the information in its possession may fall far short of legal proof of any specific offence, although it may be indicative of a strong probability of impending commission of a prejudicial act. The Act of 1978, therefore, requires that the State Government must be satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to public order, security of State, or preservation of forest wealth, it is necessary so to do, make an order directing that such person be detained.

12. As can be inferred from the provisions of Section 8 of the Act, before the Government can pass an order of preventive detention it must be satisfied with respect to the individual person that his activities are directed against one or other of the objects mentioned in the section, and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. The provisions of the Section 8, thus, clearly provide that it is the satisfaction of the State Government on the point which alone is necessary to be established. It is significant that while the objects intended to be defeated are mentioned, the different methods, acts or omissions by which that can be done are not mentioned, as it is not humanly possible to give such an exhaustive list. The satisfaction of the Government, however, must be based on some grounds. There can be no satisfaction if there are no grounds for the same. There may be a divergence of opinion as to whether certain grounds are sufficient to bring about the satisfaction required by the section. One person may think one way, another the other way. If, therefore, the grounds, on which it is stated that the State Government was satisfied, are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of mala fides cannot be challenged in a court. Whether in a particular case the grounds are sufficient or not, according to the opinion of any person or body other than the State Government, is ruled out by the wording of the section. It is not for the court to sit in the place of the Government and try to determine if it would have come to the same conclusion as the Government. As has been generally observed, this is a matter for subjective decision of the Government and that cannot be substituted by an objective test in a court of law. Such detention orders are passed on information and materials which may not be strictly admissible as evidence under the Evidence Act in a court, but which the law, taking into consideration the needs and exigencies of administration, has allowed to be considered sufficient for subjective decision of the Government.

13. To wrap up, it is relevant to refer to the observations of the Supreme Court while dealing with the question of preventive detention in the case of Prakash Chandra Mohan v. Commissioner, 1986 Cr. L.J. 786. The Supreme Court observed that it must be remembered that observance of written law about the procedural safeguards for protection of individual is normally the high duty of public official

but in all circumstances not the highest. The law of self-preservation and protection of the country and national security may claim in certain circumstances higher priority.

14. For the reasons discussed above, the instant petition is without any merit and is, accordingly, dismissed with connected CM(s).