(2021) 02 J&K CK 0114

In the Jammu And Kashmir High Court

Case No : Writ Petition (Crl) No. 116 Of 2020

Tanveer Ahmad Dar APPELLANT

Vs

Govt. Of J&K & Ors RESPONDENT

Date of Decision : 04-02-2021

Acts Referred:

Jammu And Kashmir Prevention Of Illicit Traffic In Narcotic Drugs And Psychotropic Substances Act, 1988 — Section 2, 3
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 20

Citation : (2021) 02 J&K CK 0114

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Shafqat Nazir, Saba Gulzar, B. A. Dar

Final Decision : Allowed

Judgement

1) Divisional Commissioner, Kashmir, in exercise of powers conferred under Section 3 of the Jammu and Kashmir Prevention of Illicit Traffic in

Narcotic Drugs and Psychotropic Substances Act, 1988 (hereinafter referred to as â??Act of 1988â?), has, vide order No.DIVCOM-

â??Kâ?/118/2020 dated 11.02.2020, ordered detention of Tanveer Ahmad Dar S/o Ghulam Hassan Dar R/o Reban Sopore District Baramulla

(hereinafter referred to as the detenue).

2) Petitioner has contended that the Detaining Authority has passed the impugned detention order mechanically without application of mind. It has

been further contended that the Constitutional and Statutory procedural safeguards have not been complied with in the instant case. It has also been

urged that the allegations made against the detenue in the grounds of detention are vague and that the detenue has been disabled from making an effective representation against his detention because the material, on the basis of which detention order has been passed, has not been provided to

the detenue.

3) Despite availing a number of opportunities, the respondents have neither chosen to file the counter affidavit nor have produced the detention record.

4) I have heard learned counsel for parties and I have also gone through detention record.

5) Learned counsel for the petitioner has highlighted various grounds while seeking quashment of impugned order but the main grounds on which

stress has been laid during the course of arguments are that there has been total non-application of mind while passing the impugned, inasmuch as at

the time of passing the detention order, the detenue was already implicated in case FIR No.172/2019 for offence under Section 8/20 of NDPS Act of

P/S Sopore and that there were no compelling reasons for the Detaining Authority to make the impugned detention order and the Detaining Authority

has not spelt out the compelling reasons for detaining the detenue under preventive detention laws; that the material on the basis of which impugned

detention order has been passed has not been supplied to the detenue thereby disabling him from making an effective representation against his

detention.

6) It has been contended by learned counsel for the petitioner that the Detaining Authority could not have passed a composite order of detention on

the ground of commission of acts within the meaning of the Act of 1988 as well as for maintenance of public order. In order to test the merit of this

contention of learned counsel for the petitioner, we need to understand the object and scope of Section 3 of the Act of 1988. The said provision

provides that a detention order can be made by the Government or any specially empowered officer of the Government of a particular rank with a

view to prevent him from committing any of the acts within the meaning of â?? illicit trafficâ? as defined in clause (c) of Section 2 of the Act, which

reads as under: (c) â??Illicit trafficâ?? means â?

(i) cultivating any coca plant or gathering any portion of coca plant;

(ii) cultivating the opium, poppy or any cannabis plant;

(iii) engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import, inter-State, export inter-State or transshipment of narcotic drugs of psychotropic substances;

(iv) dealing in narcotic drugs or psychotropic substances otherwise than as provided in sub-clause (i) and (iii);

(v) handling or letting any premises for use for any of the purposes referred to in sub-clauses (i) to (iv);

(vi) financing any activity by himself or through any other person in furtherance or in support of doing any of the aforesaid actsâ??

(vii) harbouring persons engaged in any of the activities specified in sub-clauses (i) to (iv); or

(viii) abetting or conspiring in the furtherance or in support of doing any of the aforesaid acts; except to the extent permitted under the

Narcotic Drugs and psychotropic Substances Act, 1985, or any rule or order made, or any condition of any licence, permit or authorization

issued thereunder.â??

7) In the instant case, the detaining authority has passed the order of detention in the following terms:

â??I am satisfied that in order to prevent Tanveer Ahmad Dar S/o Ghulam Hassan Dar R/o Reban Sopore District Baramulla from

committing any of the acts within the meaning of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 and for

Maintenance of Public order, it is necessary to detain him.â??

8) Mention of the words â??maintenance of public orderâ? would suggest that the detaining authority is not certain or has not been alive to the legal

position that under Section 3 of the â??Act of 1988â?, a person could not be detained for the acts prejudicial to the â??maintenance of public orderâ?

and that detention of a person can be ordered only for prevention of commission of the acts mentioned in clause (c) of section 2 of the Act of 1988.

The clause nowhere makes a mention of â??maintenance of public orderâ?. Thus, the impugned order of detention smacks of non-application of mind

on the part of detaining authority.

9) There is yet another circumstance which goes onto suggest that there was total non-application on the part of the detaining authority while passing

the order of preventive detention against the detenue The detenue in connection with FIR No.172/2019 registered by P/S Sopore for commission of offence under Section 8/20 of NDPS Act was taken into custody. Subsequently, the detenue was admitted to bail by the Court of Additional Sessions

Judge, Sopore, on 19.08.2019. However, in the grounds of detention it is no where mentioned that the detenue has been admitted to bail in the

aforesaid criminal case. It means either the Detaining Authority has not applied its mind or the full material relatable to the detenue had not been

placed before it. So the non-application of mind is explicit which renders the order of detention illegal. In my view I am fortified by the judgment

rendered in the case captioned Anant Sakharam Raut Vs. State of Maharashtra and others reported in AIR 1987 SC 137.

10) The assertion of the petitioner regarding non-supply of relevant material has remained unrebutted in the absence of any counter or record on

behalf of the respondents.

11) Making of an effective representation by a detenue is a very vital constitutional safeguard against the preventive detention. In the absence of the

material on the basis of which grounds of detention have been formulated, the detenue has been rendered handicapped and hampered in making an

effective representation against the order of detention. The violation of this vital safeguard by the respondents renders the impugned order of detention

unsustainable in law. I am supported in my aforesaid view by the judgment of the Supreme Court in Ibrahim Ahmad Bhatti alias Mohd. Akhtar

Hussain alias Kandar Ahmad Wagher alias Iqbal alias Gulam Vs. State of Gujarat and othersâ??, (1982) 3 SCC 440.

12) Another ground that has been urged by learned counsel for the petitioner during the course of argument is that there were no compelling reasons

for the detaining authority to pass the order of detention against the petitioner because he was already implicated in connection with case FIR

No.172/2019 of P/S Sopore. In this regard it may be noted that preventive detention orders can be passed even when a person is in police custody or

involved in a criminal case but for doing so, there must be compelling reasons for the detaining authority to do so. The Detaining Authority is bound to

record the compelling reasons as to why the detenue could not be deterred from indulging in subversive activities by resorting to normal law and in the

absence of these reasons, the order of detention becomes unsustainable in law. I am supported in my aforesaid view by the judgment of the Supreme

Court in the case of Surya Prakash Sharma v. State of U. P. and others, 1994 SCC (Cri) 1691.

13) The following observations of the of Supreme Court in T. P. Moideen Koya vs. Government of Kerala and ors.â? reported in 2004 (8) SCC 106,

are also relevant to the context and the same are reproduced as under:

â??â?¦â?¦in law there is no bar in passing a detention order even against a person who is already in custody in respect of a criminal

offence if the detaining authority is subjectively satisfied that detention order should be passed and that there must be cogent material

before the authority passing the detention order for inferring that the detenue was likely to be released on bailâ??

14) Further the Supreme Court in Sama Aruna v. State of Telangana & Anr (AIR 2017 SC 2662, while considering the question whether an order of

detention could be passed in the face of the fact that the detenue was already in custody in a substantive offence, observed as under:

â??24. There is another reason why the detention order is unjustified. It was passed when the accused was in jail in Crime No.221 of 2016.

His custody in jail for the said offence was converted into custody under the impugned detention order. The incident involved in this offence

is sometime in the year 2002-03. The detenue could not have been detained preventively by taking this stale incident into account, more so

when he was in jail. In Ramesh Yadav v. District Magistrate, Etah and ors, this Court observed as follows:

â??6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was

passed as the detaining authority was apprehensive that in case the detenue was released on bail he would again carry on his criminal

activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was

granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under

trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed.â??

15) From the discussion of the aforesaid law on the subject, it is clear that though a person who is already booked in a criminal case can be taken into

preventive custody yet for doing so, there must be compelling reasons.

16) Coming to the instant case, the detention record shows that the detenue was arrested in FIR No.172/2019 for offence under Section 8/20 of P/S

Sopore. So far as the grounds of detention are concerned, the same are based upon the solitary incident which is the subject matter of aforesaid FIR.

There was no material on record excepting the allegations made in the afore-noted FIR before the Detaining Authority which would have compelled it

to pass the impugned detention order against the petitioner who was already booked for commission of a substantive offence.

17) For the afore-stated reasons, the petition is allowed and the order of detention bearing No. DIVCOM-â??Kâ?/118/2020 dated 11.02.2020, issued

by the Divisional Commissioner, Kashmir, is quashed. Detenue is directed to be released from the preventive custody provided he is not required in

connection with any other case.