

(2022) 10 J&K CK 0027

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 97 Of 2022

Tawheed Ahmad Zargar

APPELLANT

Vs

UT Of J&K And Others

RESPONDENT

Date of Decision : 18-10-2022

Acts Referred:

Constitution Of India, 1950 — Article 19, 21, 22, 22(3)(b)
Indian Penal Code, 1860 — Section 307, 341, 406, 420, 506
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)
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 109, 363, 376

Citation : (2022) 10 J&K CK 0027

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : S.T.Hussain, Nida Nazir

Final Decision : Allowed

Judgement

Sanjeev Kumar, J

1. The petitioner is aggrieved of and has challenged the order of his detention bearing No. DMS/PSA/113/2021 dated 25.01.2022 issued by District Magistrate, Srinagar, whereby the petitioner has been placed under preventive detention with a view to prevent him from acting in any manner prejudicial to the maintenance of public order.

2. The impugned order of detention has been passed on the basis of the activities elaborately narrated in the grounds of detention. As is indicated in the grounds of detention, the petitioner was booked in case FIR No. 65/2019 under Section 363, 376 and 109 RPC registered in Police Station Parimpora and was

also arrested. It is submitted that after few months, the petitioner was enlarged on bail by the competent Court of law. The petitioner, after coming out on bail, did not shun his illegal activities and indulged in luring the youth of the locality to fall in drug addiction. For his activities the petitioner was again booked in FIR No. 154/2021 under Sections 341, 307 and 506 IPC registered in Police Station Nigeen. On the basis of these two FIRs and the illegal activities of the petitioner reported by the Police, the District Magistrate, Srinagar, passed the impugned order of detention to prevent the petitioner from acting in the activities prejudicial to the maintenance of public order.

3. The impugned order of detention has been challenged by the petitioner on the ground that the activities of the petitioner indicated in the grounds of detention could only be a law and order problem and do not, in any manner, affect or disrupt the normal life of the community. It is submitted that in the two FIRs registered against the petitioner, the competent Court of law has already granted bail to the petitioner and it is not the case of the respondents that after having been released on bail in the FIR No. 154/2021, the petitioner has indulged in any activities prejudicial to the maintenance of public order. It is also the contention of the petitioner that though the petitioner had been released in both the FIRs, yet the Detaining Authority has not shown its awareness with respect to the petitioner having been released on bail in FIR No. 154/2021. In short, the primary ground of challenge urged by the learned counsel for the petitioner is that the activities attributed to the petitioner, which are also subject matter of investigation in two FIRs, may pose the law and order problem but the same cannot, by any stretch of reasoning, be said to be prejudicial to the maintenance of public order.

4. Respondents have filed the reply affidavit of the District Magistrate. The plea of the petitioner is contested primarily on the ground that consistent and persistent unlawful activities of the petitioner have given sense of insecurity to the people of the locality and has created a serious problem in maintenance of public order. The petitioner is an incorrigible criminal and has been indulging in criminal activities over a period of time which has affected the community at large and, therefore, his activities have been found to be prejudicial to the maintenance of public order.

5. Having heard learned counsel for the petitioner and perused the material on record, I am of the view that this petition is liable to succeed on the ground that the activities attributed to the petitioner, which have also resulted in registration of FIR No. 65/2019 and 154/2021, may constitute law and order problem but cannot, by any stretch of reasoning, be construed to be prejudicial to the maintenance of public order.

6. The FIR registered in the year 2019 pertains to commission of sexual assault, in which the Court of competent jurisdiction has already enlarged the petitioner on bail. Though the Detaining Authority has not shown his awareness as to whether FIR No. 65/2019 has been challaned in the Court of law or not, yet it

needs to be noticed that the law has to take its own course and the normal law of the land is sufficient to deal with the persons accused of committing heinous offences of sexual assault. Similarly, FIR No. 154/2021 pertains to alleged attack by the petitioner on a boy with a sharp edged weapon, for which he is booked under Section 307 of the IPC. The petitioner claims that he has been bailed out in the aforesaid FIR as well, though the Detaining Authority has not shown any awareness.

7. The distinction between law and order and public order has been elaborately explained by this Court in *Khursheed Ahmad Bhat v. UT of J&K and Ors*, [WP (Crl) No. 324/2022 decided on 20.09.2022]. The relevant paragraphs of the judgment are reproduced hereunder:-

"8. From perusal of grounds of detention, it clearly transpires that the petitioner has been put under preventive detention primarily for his involvement in FIR No.123/2022. The allegations contained in the aforesaid FIR, which is made basis of the detention order, even if taken to be true on their face value, do not constitute an act which has the potentiality of disturbing the public order. The term "law and order" and "Public order" look deceptively similar but both have different connotations. While former is a continual ongoing term, the latter is more temporal in nature. In the case of public order, the community or the public at large is affected by a particular action whereas the act or acts that affect only few individuals may be a case of law and order. Mere contravention of law such as indulging in cheating or criminal breach of trust certainly affects "law and order" but before it can be said to affect public order, it must affect the community or public at large. The nature of criminal act, the manner in which it is committed and its impact are some of the factors that determine whether a particular act would fall within the realm of "public order" or "law and order". What is alleged in the FIR, which is sole basis of putting the detainee under preventive detention, clearly falls within the ambit of term "Law and Order". Unless the criminal act attributed to the detainee has the effect of disturbing the even tempo of life of community or public at large, it would remain in the realm of "Law and order" and thus cannot be made the basis of preventive detention.

9. To understand the concept better, here is an example: when two drunkards quarrel and fight in the public street, there is disorder but not public disorder. They can be dealt with under powers of maintenance of law and order but cannot be detained for disturbing public order. However, where two fighters are of rival communities and one of them tries to raise communal passions, the problem is still of law and order but raises apprehension of public disorder.

10. Recently in *Banka Sneha Sheela v. State of Telangana and ors*, (2021) 9 SCC 415, Hon'ble the Supreme Court was confronted with a case of preventive detention ordered by the State of Telangana on almost similar grounds. There were as many as five FIRs all registered against the detainee therein under Sections 420, 406 and 506 IPC and in all the FIRs the detainee was granted anticipatory bail. The detention was ordered primarily on the ground that

remaining at large of the detenu would be detrimental to public order. The Hon^{ble} the Supreme Court, in paragraphs No. 14, 15 and 19 has held thus:-

14. There can be no doubt that for 'public order' to be disturbed, there must in turn be public disorder. Mere contravention of law such as indulging in cheating or criminal breach of trust certainly affects 'law and order' but before it can be said to affect 'public order', it must affect the community or the public at large.

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 Indian 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 security 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.

19. To tear these observations out of context would be fraught with great danger when it comes to the liberty of a citizen under Article 21 of the Constitution of India. The reason for not adopting a narrow meaning of "public order" in that case was because of the expression "in the interests of" which occurs to Article 19(2) to 19(4) and which is pressed into service only when a law is challenged as being unconstitutional for being violative of Article 19 of the Constitution. When a person is preventively detained, it is Article 21 and 22 that are attracted and not Article 19. Further, preventive detention must fall within the four corners of Article 21 read with Article 22 and the statute in question. To therefore argue that a liberal meaning must be given to the expression 'public order' in the context of a preventive detention statute is wholly inapposite and incorrect. On the contrary, considering that preventive detention is a necessary evil only to prevent public disorder, the Court must ensure that the facts brought before it directly and inevitably lead to a harm, danger or alarm or feeling of insecurity among the general public or any section thereof at large."

11. Earlier Hon^{ble} the Supreme Court in the case of *Rekha v. State of T. N.*, (2011) 5 SCC 244 also discussed the nature and scope of preventive detention. Paragraphs No. 29 and 30 of the judgment are relevant and, therefore, set out below:-

"29. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England

(except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.

30. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is: was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal. In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in question was illegal.”

12. This case is fully covered by the Banka Sneha Sheela (supra). The allegations in the FIR registered against the detenue may be a problem of law and order but would not certainly come within the purview of the term “public order”. There is nothing mentioned in the grounds of detention to demonstrate that the activities of the detenue, on the basis of which the FIR for cheating and fraud came to be registered against him, had an impact of disturbing even the tempo of life of the community or had the effect of affecting the public at large. The offences with which the detenue has been charged in the FIR are substantive offences and the ordinary law of the land is sufficient to deal with the detenue, if he is ultimately found guilty of the allegations leveled against him in the FIR. The apprehension of the detaining authority that the detenue was likely to get bail and in that event, his remaining at large would be detrimental to the maintenance of peace and public order, cannot be basis of putting the detenue under preventive detention. The detaining authority as also the State machinery is well within its rights to oppose the bail and, if granted, take remedial measures by way of approaching the higher forum. The simplicitor case of cheating and fraud, without having wider ramifications, cannot be made the basis of issuing the detention order in the name of maintaining the public order.”

8. For the foregoing reasons, I find merit in this petition and the same is, accordingly, allowed. The impugned order of detention is quashed with a direction to the respondents to release the detenue forthwith, if not required in any other case.