

(2020) 08 J&K CK 0089
In the Jammu And Kashmir High Court
Case No : Writ Petition (C) No. 559 Of 2019

Tawseef Ahmad Dar

APPELLANT

Vs

State Of J&K And Others

RESPONDENT

Date of Decision : 11-08-2020

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 13
Constitution Of India, 1950 — Article 22(5)

Citation : (2020) 08 J&K CK 0089

Hon'ble Judges : Sindhu Sharma, J

Bench : Single Bench

Advocate : Wajid Haseeb, S. H. Naqashbandi

Judgement

Sindhu Sharma, J

1. The detention order No. 45/DMK/PSA/19 dated 09.08.2019 passed by District Magistrate, Kulgam detaining Tawseef Ahmad Dar S/o Abdul Hameed Dar R/o D.H. Pora District Kulgam is assailed in this petition by the detenu through his mother. Vide this order, the detaining authority has prevented the detenu from acting in any manner prejudicial to the security, sovereignty and integrity of the State.

2. The impugned order of detention is challenged on the ground that three FIRs bearing Nos.103/2016, 104/2016 and 105/2016 were registered against the detenu and he was released on bail in all the FIRs, but this fact has neither been noticed nor reflected by the detaining authority in the grounds of detention, as such, there is a total non-application of mind on the part of detaining authority and detention of the detenu is vitiated.

3. Learned counsel for the petitioner submits that the impugned detention order is based on the incidents reported in 2016 and there is also un-explained delay of more than three years from the date of alleged activities attributable to the detenu for his detention and further no new activities are referred to the detenu,

as such, there is no live and proximate link with the activities for passing of detention order.

4. The detaining authority has neither furnished the relevant material on which the detention order is based to the detenu nor the same has been explained to him in the language to which he fully understands to enable him to make an effective representation, thus, has violated his right under Article 22(5) of the Constitution of India as well as under Section 13 of the J&K Public Safety Act.

5. Mr. S. H. Naqashbandi, learned AAG has filed counter affidavit as well as produced the record. He has submitted that the detenu was detained as an preventive act to prevent him from acting in any manner prejudicial to the security and interest of the State. It is contended that all statutory requirements and constitutional guarantees have been fulfilled and complied with by the detaining authority. The detaining authority has passed the order of detention after arriving at the subjective satisfaction on the grounds of detention. The entire material relied upon by the detaining authority was furnished to the detenu and the same was also read over and explained to the detenu in the language which he understands.

6. Heard learned counsel for the parties as well as perused the record.

7. Perusal of the record reveals that the detaining authority in the grounds of detention has relied upon the activities of the detenu in FIR Nos. 103/2016, 104/2016 and 105/2016 registered at Police Station D. H. Pora. However, the detenu was enlarged on bail in FIR No. 104 on 17.11.2016 in FIR No. 103 on 10.12.2016 and in FIR No. 106 in 28.12.2016, but the detaining authority has not shown its awareness to this fact. Non-mentioning of the grant of bail gives rise to the inference that there is non-application of mind on the part of detaining authority, while passing the impugned detention order.

8. The Apex Court in *Anant Sakharam Raut and others V. State of Maharashtra and another*, AIR 1987 SC 137, the court while considering the similar proposition held that:

"5..... The one contention strongly pressed before us by the petitioner's counsel is that the detaining authority was not made aware at the time the detention order was made that the detenue had moved applications for bail in the three pending cases and that he was enlarged on bail on 13-1-1986, 14-1-1986 & 15-1-1986. We have gone through the detention order carefully. There is absolutely no mention in the order about the fact that the petitioner was an under trial prisoner, that he was arrested in connection with the three cases, that applications for bail were pending and that he was released on three successive days in three cases. This indicates a total absence of application of mind on the part of the detaining authority while passing the order of detention.

"7..... that there was clear non-application of mind on the part of the detaining authority about the fact that the petitioner was granted bail when the

order of detention was passed. In the result we set aside the Judgment of the Bombay High Court under appeal, quash the order of detention and direct that the petitioner be released forthwith....."

9. In *Rushikesh Tanaji Bhoite V. State of Maharashtra & others*, (2012) 2 SCC 72, It was held that;

"8. It would be, thus, seen that the order releasing the detenu on bail in the crime registered on August 14, 2010 and the order relaxing the bail condition were passed by the Judicial Magistrate, 1st Class, Dharangaon much before the issuance of detention order dated January 10, 2011. However, the detention order or the grounds supplied to the detenu do not show that the detaining authority was aware of the bail order granted in favour of the detenu on August 15, 2010.

9. In a case where detenu is released on bail and is enjoying his freedom under the order of the court at the time of passing the order of detention, then such order of bail, in our opinion, must be placed before the detaining authority to enable him to reach at the proper satisfaction."

Thus, non-placing and non-consideration of this material fact of grant of bail orders itself vitiates the subjective decision of detaining authority.

10. The next contention is that the detenu is not English literate and he understands only Kashmiri and Urdu language but the impugned order of detention was neither read over or explained to him nor a translated script of the same was furnished to him in Urdu or English language, thus, prevented him from making an effective representation. The respondents have replied that the grounds of detention were read over and explained to the detenu in the language understood by him and he was also informed that he has a right to file a representation against the detention order. There is no contemporaneous record in support of this contention. It is settled that mere oral explanation without the grounds being made available to the detenu in the language he understands would not enable him to make a meaningful representation.

11. The Apex Court in *Raziya Umar Bakshi V. Union of India and others*, AIR 1980 SC 1751 has held as under;

"3. This allegation seems to have been denied by the respondents in para 14 of the affidavit of Mr. P. M. Shah, on behalf of the detaining authority, where he stated that the grounds were explained to the detenu in the language known to him. It was averred in para 5 that one Mr. A. K. Sharma, Police Inspector, C.I.D. (Crime Branch), Ahmedabad had explained to the detenu the order of detention and the grounds communicated to him on January 30, 1980. This affidavit, in my opinion, is wholly inadmissible in evidence. If it was a fact that Mr. Sharma had personally explained the grounds to the detenu then the respondents should have filed an affidavit of Mr. Sharma himself to show that he had actually explained the contents of the grounds to the detenu by translating the same in

the language which he understood. No such affidavit is forthcoming. No Contemporaneous record has been produced to show that Mr. Sharma had actually explained or translated the grounds to the detenu. The service of the ground of detention on the detenu is a very precious constitutional right and where the grounds are couched in a language which is not known to the detenu, unless the contents of the grounds are fully explained and translated to the detenu, it will tantamount to not serving the grounds of detention to the detenu and would thus vitiate the detention ex-facie.

4. In case of *Hadibandhu Das v. District Magistrate, Cuttak & Anr.* [1969 (1) SCR 227], it was clearly held that merely oral explanation of an order without supplying him a translation in a script or language which the detenu understood amounted to a denial of right of being communicated the grounds. In the instant case, it is not even alleged in the affidavit of Mr. Shah that any translation or translated script of the grounds was furnished to the detenu."

12. In these circumstances the order of detention cannot be said to have been communicated and the detenu cannot be said to have been given an adequate opportunity for making an effective and purposeful representation against the order of detention.

13. In view of the aforesaid, it is not necessary to advert to other grounds taken in the petition. For the aforesaid reasons, this petition is allowed and impugned detention order No.45/DMK/PSA/19 dated 09.08.2019 passed by District Magistrate, Kulgam is quashed. Accordingly, the respondents/detaining authority are directed to release the detenu from the custody forthwith, if he is not required in any other case.

14. Let the detention record be handed over to learned counsel for the respondents.