

(2020) 03 J&K CK 0073
In the Jammu And Kashmir High Court
Case No : Writ Petition (C) No. 330 Of 2019

Tufail Ahmad Zaldar

APPELLANT

Vs

State Of J&K And Others

RESPONDENT

Date of Decision : 20-03-2020

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 13

Citation : (2020) 03 J&K CK 0073

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Advocate : Zaiul Rehman, B.A Dar

Final Decision : Allowed

Judgement

Ali Mohammad Magrey, J

1. Through the instant petition, petitioner father of detenu seeks quashment of detention order bearing no. DMS/PSA/81/2019 dated 16.08.2019, passed by District Magistrate Srinagar, whereby the detenu namely Tufail Ahmad Zaldar S/o Mohammad Shafi Zaldar R/o Ranger Stop Zaldar Mohalla, Saidakadal, Srinagar, is under detention.

2. In the dossier it is alleged that the detenu is involved in anti-national activities, disturbing the public tranquility and peace in the area of Saidakadal and its adjacent areas. It is submitted that the detenu was found indulging in disturbing the maintenance of public order by way of resorting to stone pelting. It is submitted that the detenu is a constant threat to the security of the State. It is submitted that the detenu was arrested in cases FIR no. 70/2019 u/s 307, 147 RPC and FIR 47/2019 u/s 147, 148, 336 RPC registered at Police Station Nigeen. Therefore, on these allegations he was slapped under Public Safety Act, 1978.

3. The learned counsel for the petitioner-detenu has raised primarily three issues before the court questioning the validity of the detention. The first point taken by the learned counsel for the petitioner is that the detention order was passed

while the detenu was already in custody in respect of the FIR No. 70/2019. In these circumstances, it was submitted by the learned counsel for the petitioner, the detaining authority ought to have satisfied himself with the fact that there was imminent likelihood of release of the detenu in that case and that it was necessary to detain the detenu in order to prevent him from indulging in prejudicial activities. According to the learned counsel for the petitioner, there is no such satisfaction recorded in the grounds of detention. He placed reliance on the decision of the Supreme Court in the case of *Surya Prakash Sharma v. State of U.P. and others*: 1994 SCC (Cri) 1691 to submit that since the said satisfaction was not recorded, the detention order was vitiated.

4. The second point taken by the learned counsel for the petitioner was that non-supply of relevant material/ documents also vitiated the detention order. In this context, it was the case of the petitioner that no documents at all were supplied to the petitioner/detenu. The non-supply of relevant documents seriously undermines the capacity of a detenu to make an effective representation against the detention and that in itself would be a ground to declare the detention order void. This right flows from the Constitution of India. In support, he referred to the decision of the Supreme Court in the case of *Sophia Gulam Mohd. Bham v. State of Maharashtra*: AIR 1999 SC 3051.

5. The third point raised by the learned counsel for the petitioner was based on the provisions of Section 13 of the J&K Public Safety Act, 1978, which require that the grounds of detention should have been communicated to the detenu in the language which was understandable to him and that he should be afforded the earliest opportunity of making a representation against the order to the Government. According to him, the detenu only understood Kashmiri language and the grounds of detention were in English language and no translated copies of the grounds of detention in Kashmiri were provided to him. This seriously prejudiced his right to make an effective representation and on this ground also the detention order would be vitiated.

6. On the other hand, Mr. B.A Dar, Sr. AAG, defended the impugned detention and he responded to each of the points. With regard to the first point he submitted that there is a mention in the grounds of detention about the arrest of the detenu with reference to the FIR No. 70/2019. Therefore, according to him, the detaining authority was aware of the fact that the detenu was already in custody when the detention order was passed. He, therefore, submitted that the point raised by the learned counsel for the petitioner on this score was untenable.

7. With regard to the plea of non-supply of material/ documents, Mr. Dar, placed before me the record pertaining to the detention. On going through the same, I find that there nothing to show that the detenu have signed any document which reflects that he has received the entire material for filing a representation against his detention order.

8. In so far as the point of supply of translated copies of grounds of detention in

Kashmiri language is concerned, the learned Sr. AAG, submitted that there was no need to supply translated copies of grounds of detention in Kashmiri language as grounds of detention had been communicated in the language understandable to the detenu. He submitted that it was clearly indicated in the receipt signed by the detenu on the back of the detention order that the grounds of detention were read over and explained to him in Kashmiri language. Therefore, the requirement of the constitutional and statutory provisions was entirely met.

10. Heard learned counsel for the parties, perused the record and considered the matter.

11. I shall take up the first point with regard to the ground of satisfaction that has to be recorded by the detaining authority in case the detenu is already in custody in connection with some other case. In this context we need to refer to the decision of the Supreme Court in *Surya Prakash Sharma* (supra). The relevant paras are extracted herein below:

"The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in custody has had been engaging the attention of this Court since it first came up for consideration before a Constitution Bench in *Rameshwar Shaw v. District Magistrate, Burdwan*. To eschew prolixity we refrain from detailing all those cases except that of *Dharmendra Suganchand Chelawat v. Union of India*, wherein a three Judge Bench, after considering all the earlier relevant decisions including *Rameshwar Shaw* answered the question in the following words:

"The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention: and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be sustained. Though the grounds of detention indicate the detaining authority's awareness of the fact that the detenu was in custody at the time of making the order of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of the averment made in grounds of detention that if the aforesaid *Surya Prakash Sharma* is released on bail "he may

again indulge in serious offences causing threat to public order". (emphasis supplied) To put it differently, the satisfaction of the detaining authority that the detenu might indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified.

On the conclusions as above we quash the order of detention."

12. From the above decision, it is evident that for an order of detention to be valid in respect of a person in custody, it is necessary that the grounds of detention must show that; (i) the detaining authority was aware of the fact that the detenu is already in custody; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression 'compelling reasons' has also been explained by the Supreme Court as signifying that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and that it was necessary to detain him in order to prevent him from engaging in such activities.

13. In the present case I find that although there is mention of the fact that the detenu had been arrested in connection with FIR No. 70/2019 but, it is not clear as to whether the detaining authority was aware of the fact that the detenu continued to be in custody. Furthermore, assume that the detaining authority was aware that the detenu was in custody in the aforesaid FIR, the compelling reasons, referred to above, have not been indicated in the grounds of detention. In other words, the grounds of detention nowhere make a mention or indicate satisfaction that the detenu was being likely to be released from custody in near future. Therefore, in view of the decision of the Supreme Court in Surya Prakash Sharma, this alone would vitiate the detention order.

14. Now move to the second point which pertains to the non-supply of relevant material in order that the detenu could make an effective representation against his detention. According to the learned Sr. AAG,

16 leaves along with dossier have been provided to the detenu. On examination of the record there are only seven leaves which been provided to the detenu.

15. The grounds of detention supplied to the detenu were incomplete. This in itself would vitiate the detention order as the detenu would have been incapacitated from making an effective representation.

16. The third point which was urged by the learned counsel for the petitioner was that translated copies of the detention order/ grounds of detention were not supplied and this can itself invalidate the detention of the detenu. Reliance was placed on the decision of the Supreme Court in the case of Razia Umar Bakshi v. Union of India and others: AIR 1980 SC 1751. In that decision, the Supreme Court had observed that where the detaining authority is satisfied that the

grounds are couched in a language which is not known to the detenu, it must see to it that the grounds are explained to the detenu, a translated script is given to him and the grounds bear some sort of a certificate to show that the grounds have been explained to the detenu in the language which he understands. In the present case, it is an admitted fact that the grounds of detention in Kashmiri language which is the language which the petitioner understood was not furnished to him. That being the case, this is yet another ground for invalidating the detention order.

17. Viewed thus, the Petition is allowed and the impugned detention order No. DMS/PSA/81/2019 dated 16.08.2019, whereunder the detenu namely Tufail Ahmad Zaldar S/o Mohammad Shafi Zaldar R/O Ranger Stop Zaldar Mohalla Saidakadal, Srinagar, is quashed along with any subsequent order passed thereto. The detenu is directed to be released forthwith. Records be returned to the learned Senior Additional Advocate General. No order as to costs.

18. In view of urgency expressed by learned counsel for petitioner, copy of the judgment be furnished to him under the seal and signature of Secretary for facilitating compliance.