

(2023) 04 J&K CK 0025

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 461 Of 2022

Umair Mushtaq Rather

APPELLANT

Vs

Union Territory Of J&K & Others

RESPONDENT

Date of Decision : 19-04-2023

Acts Referred:

Constitution Of India, 1950 — Article 22

Unlawful Activities (Prevention) Act, 1967 — Section 13(2), 18, 19, 20, 38, 39

General Clauses Act, 1897 — Section 27

Citation : (2023) 04 J&K CK 0025

Hon'ble Judges : Moksha Khajuria Kazmi, J

Bench : Single Bench

Advocate : M. Ayoub Bhat, Mubashir Malik

Final Decision : Disposed Of

Judgement

Moksha Khajuria Kazmi, J

1. The petitioner is aggrieved of the order bearing No. No. 41 DMK/PSA/2022 dated 20.06.2022, passed by District Magistrate, Kulgam-respondent no. 2 herein (Detaining Authority), whereby, the detaining authority has placed Umair Mushtaq Rather son of Mushtaq Ahmad Rather resident of Gopalpora, Sheikh Mohalla District, Kulgam (for short "detenue") under preventive detention to prevent him from acting in any manner prejudicial to the security of the State and directed his lodgment in Kotbhalwal, Jail, Jammu.

2. It is stated in the petition that detenu has been arrested in the month of May, 2022 after he was called in Police Station D. H. Pora and was detained there illegally for about one month, however, during the illegal detention, the detenue came to be detained in terms of the impugned detention order and directed to be lodged in Kotbal, Jail Jammu. It is urged that grounds of detention have no nexus with the detenue but have been prepared to justify the illegal detention of the detenue. The grounds of detention are vague, non-existent and no prudent man can make a representation against such order. The detenue was not handed

over the relevant material.

The detainee after receipt of the detention order made a representation dated 05.07.2022 seeking revocation/recalling of the detention order or in alternative provide him the entire material, reference whereof is given in the detention order so that he is able to make an effective and meaningful representation for recalling of order of the detention.

3. The detainee has raised several other grounds to challenge the detention order, however, the counsel for the detainee only emphasize on the aforesaid ground of challenge.

4. Respondents have filed their reply affidavit stating therein that having regard to the nature of activities the detainee had been indulging in over a period of time, the detaining authority was of the opinion that remaining of the detainee at large was detrimental to the security of the State. It is submitted that because of his illegal and criminal activities, the detainee was named in FIR No. 97/2018 of Police Station D. H. Pora under Section 13(2), 18,19,20,38,39 UAP Act. [There is, however, no averment in the reply affidavit as to whether the representation made by the father of the detainee, on 05.07.2022 to the detaining authority has been considered or not].

5. Having heard learned counsel for the detainee and perused the material on record, I am of the considered view that the impugned order of detention does not sustain in the eye of law, as the representation made on his behalf by his father has not been considered by the detaining authority. Right of the detainee to make a representation is a fundamental right guaranteed to a person under detention under Article 22 of the Constitution and the competent authority is under a legal obligation to consider the same. The infraction of such a valuable right renders the detention illegal and unconstitutional.

6. The detainee has not only specifically averred but has also placed on record copy of the representation submitted to the District Magistrate, Kulgam on 05.07.2022. There is no denial or rebuttal of the same by the respondents in their reply affidavit. In these circumstances, this Court has no option but to presume that the representation has been made by the detainee through his father to the competent authority but the same has not been adverted to and considered. That being the admitted position, it is foregone conclusion that the order of detention, impugned in this petition cannot survive on the touchstone of settled legal position and the express right guaranteed to the detainee under Article 22 of the Constitution of India. [See Pankaj Kumar Chakrabarty & others Vs. State of West Bengal, AIR 1970 SC 97, a Constitution Bench Judgment].

7. That apart, from the perusal of the detention record produced by Mr. Mubashir Malik, Dy. AG, it is abundantly clear that the detainee has been served with a copy of PSA warrant, notice one leaf and the grounds of detention. It is mentioned in the document stayed as Receipt of grounds of detention & other relevant record that detention has been provided copies of FIR, statements of

witnesses and other related documents (01 Leave) which clearly shows that the documents, reference of which is made by the Detaining Authority in the grounds of detention have not been supplied to the detainee. It is thus clear that the detainee has also been deprived of relevant material which was required to be supplied to him along with the grounds of detention so as to enable him to make an effective representation. Even though the detainee was not provided the requisite material, he made a representation through his father to the competent authority, but that same has also not been considered by the competent authority.

8. It has been averred that the allegations reflected in the grounds of detention are far from the reality. The Detaining Authority has mentioned various allegations in the grounds of detention, however, no specific allegation has been mentioned regarding the detainee in the alleged activities mentioned in the grounds of detention which could connect the detainee with such activities. The very basis of the satisfaction recorded by the Detaining Authority are vague, as such, the impugned order of detention suffers from complete non-application of mind on the part of Detaining Authority. Furthermore the Detaining Authority has acted on the dictates of the police authorities and has not enquired about the existence of the facts. The grounds of detention seem to be replica of the police dossier. The detainee was already in police custody in the month of May, 2022, when he is shown to have been asked to report to Police Station in connection D.H. Pora, and despite that, the detainee has been booked under preventive detention in terms of impugned detention order.

9. Failure on the part of detaining authority to supply material, relied upon at the time of making detention order, to detainee, renders detention order illegal and unsustainable. I am drawing the support from the law laid down in *Thahira Haris Etc. v. Government of Karnataka*, AIR 2009 SC 2184; *Union of India v. Ranu Bhandari*, 2008, Cr. L. J. 4567; *Dhannajoy Dass v. District Magistrate*, AIR, 1982 SC 1315; *Sofia Gulam Mohd Bham v. State of Maharashtra and others* AIR 1999 SC 3051; and *Syed Aasiya Indrabi v. State of J&K &ors*, 2009 (I) S.L.J 219.

10. Taking into account the submissions made by learned counsel for parties, it would be appropriate to reproduce relevant portion of Section 27 of the General Clauses Act, 1897.

“27 Meaning of service by post. —Where any 49 [Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression “serve” or either of the expressions “give” or “send” or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post”.

11. The Supreme Court in *Abdul Latief Abdul Wahab Sheikh v. B. K. Jha*, 1987

(2) 22 has made it clear that it is the procedural requirements, which are the only safeguards available to detainee, that are to be followed and complied with as the Court is not expected to go behind the subjective satisfaction of Detaining Authority. In the present case, the procedural requirements, as discoursed and noted above, have not been followed and complied with by the respondents in letter and spirit and as a corollary thereof, the stand of the petitioner gets substantiated.

12. Besides above discussed facts, it would not be out of place to mention here that the respondents have not denied the plea of the detainee having sent the representation through registered post, therefore, this plea is deemed to be admitted.

13. For the foregoing reasons, this petition is allowed and detention Order No. 41 DMK/PSA/2022 dated 20.06.2022, passed by District Magistrate, Kulgam is quashed. Respondents are directed to release the detainee forthwith, provided he is not required in any other case. Disposed of.

14. Detention record be returned to Mr. Mubashir Malik, Dy. AG, learned counsel for respondents forthwith.