

(2021) 01 J&K CK 0013
In the Jammu And Kashmir High Court
Case No : Letters Patent Appeal No. 216 Of 2019

Umar Yousuf Naik	Vs	APPELLANT
State Of J&K And Others		RESPONDENT

Date of Decision : 29-01-2021

Acts Referred:

Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 302, 307, 392
Jammu And Kashmir Public Safety Act, 1978 — Section 8, 8(a), 10A
Unlawful Activities (Prevention) Act, 1967 — Section 16
Arms Act, 1959 — Section 7, 27

Citation : (2021) 01 J&K CK 0013

Hon'ble Judges : Sanjeev Kumar, J;Rajnesh Oswal, J

Bench : Division Bench

Advocate : M. A. Ganai, B. A. Dar

Final Decision : Allowed

Judgement

Sanjeev Kumar, J

1. This intra Court appeal by one Umar Yousuf Naik (â??the detenueâ??) through his father is directed against the order and judgment dated

14.08.2019 passed by the learned Single Judge of this Court in HCP No. 46/2019 [WP (Cr.) no. 46/2019] whereby the petition of the detenue for

quashment of his detention order issued by the District Magistrate Shopian has been dismissed.

2. With a view to appreciating the grounds of challenge urged by the learned counsel for the appellant (detenue), it is necessary to notice material

background facts leading to the detention of the detenue under the J&K Public Safety Act.

3. Consequent upon a dossier supplied by Senior Superintendent of Police, Shopian, the District Magistrate Shopian, (the detaining authority for short),

vide its order No. 155/DMS/PSA/2019 dated 06.02.2019 (the detention order), ordered detention of the detainee under Section 8(a) of the J&K

PSA, 1978 with a view to preventing him from acting in any manner prejudicial to the security of the State. The detention of the detainee was ordered

on the ground that the detainee was an over ground worker (OGW) of banned terrorist organization known by the name of Hizbul Mujahideen

and was providing logistic support to the terrorists carrying subversive activities with the object to secede Union Territory of Jammu and Kashmir

from the Union of India. The details of the activities of the detainee, which formed the basis of his detention order, have been elaborated in the grounds

of detention claimed to have been served by respondents on the detainee. The detainee, as is evident from the reading of the grounds of detention, was

involved in as many as five different FIRs registered in Police Station Zainapora for various offences including the offences under Unlawful Activities

(Prevention) Act. All the FIRs, to which reference has been made in the grounds of detention, pertain to the year 2018. It is also stated in the grounds

of detention that the detainee has been arrested in case FIR No. 65 of 2019 under Section 302, 307, 392 RPC, 7/27 Arms Act and 16 ULA (P) Act

and during the course of interrogation has divulged the way he was undertaking various kinds of subversive activities aimed at threatening the peace

and security of the State. The detaining authority, relying upon the material supplied by Senior Superintendent of Police Shopian as also his opinion

based on inputs from various field formations, arrived at the satisfaction that the activities, the detainee was indulging in, were highly prejudicial to the

security of the State and, therefore, in order to curb his activities, the detention under Section 8 of the J&K Public Safety Act, 1978 was imperative.

The father of the detainee, feeling aggrieved of the preventive detention of his son, filed the petition in the nature of Habeas Corpus before this Court.

The detention of the detainee was assailed inter alia on the following grounds:-

(1) That at the time of passing the order of detention the detainee was already in custody and had not even applied for bail and, therefore, it was

necessary for the detaining authority to indicate the compelling circumstances for taking the detainee in preventive detention;

(2) That the detainee was never provided the relevant material relied upon by the detaining authority to derive his subjective satisfaction with regard to

the necessity of putting the detainee under preventive detention;

(3) That the detaining authority has not applied its mind and prepared the grounds of detention by reproducing the dossier supplied by the Senior

Superintendent of Police in verbatim.

4. On being put on notice, the respondents appeared before the Writ Court and filed their reply affidavit on behalf of the detaining authority. The

respondents also produced the detention records before the Writ Court to substantiate the pleas taken in the reply affidavit. The detention of the

detainee was sought to be justified on the grounds enumerated in detail in the grounds of detention served upon the detainee. Involvement of the

detainee in as many as five different FIRs and the detail of the activities narrated by Senior Superintendent of Police in the dossier was cited as the

relevant material on the basis of which the detaining authority arrived at the subjective satisfaction that remaining at large of the detainee was highly

prejudicial to the security of the State.

5. The Writ Court after considering the rival contentions and having gone through the detention record came to the conclusion that there was no legal

infirmity in the detention of the detainee and dismissed the petition primarily on the ground that material against the detainee detailed in the grounds of

detention was sufficient for the detaining authority to arrive at satisfaction that it was necessary to put the detainee under preventive detention so as to

restrain him from acting in any manner prejudicial to the security of the State. The Writ Court, on the basis of detention record, also came to the

conclusion that all safeguards viz. furnishing of grounds of detention alongwith requisite material and informing the detainee of his right to make

representation against his detention had been scrupulously followed by the detaining authority and, therefore, there was no reason to interfere with the

impugned detention order. The Writ Court did not advert to the other grounds of challenge urged on behalf of the petitioner holding that if a detention

order was issued on more than one ground independent of each other, the detention order will survive even if one of the grounds is found to be legally

unsustainable. Placing reliance on the judgment of Honâ??ble the Supreme Court in Goutam Jain v. Union of India and another, 2017 (1) JKL (1)

SC 1, the Writ Court declined to go into the star ground of challenge urged on behalf of the detainee that the detention order was vitiated, for, the

detaining authority despite being aware that the detainee was already in custody did not indicate any compelling reasons to put the detainee under

preventive detention. This is how the Writ Court did not find any merit in the petition and, accordingly, dismissed the same. Aggrieved, the appellant is

before us in this appeal.

6. The impugned order of the Writ Court is assailed before us primarily on the ground that the Writ Court erred in upholding the detention of the

detainee, in that, the detaining authority despite being well aware that the detainee at the time of detention was already in custody of the State in

connection with commission of various serious offences including Section 302 RPC and had not approached any Court for bail, yet ordered the

detention that too without disclosing compelling reasons for doing so.

7. Mr. Mushtaq Ganai, learned counsel for the detainee vehemently contends that non-consideration of this vital ground of challenge to the detention

urged before the Writ Court, the judgment impugned is vitiated in law. Referring to the grounds of detention, it is argued that the detaining authority,

though well aware that the detainee was under arrest in FIR No. 65/2018 for very serious non-bailable offences including Section 302 RPC and

Section 16 ULA(P) Act, yet thought of placing the detainee under preventive detention without even spelling out the compelling reasons to do so.

Learned counsel further urges that reliance by the Writ Court on the judgment of the Supreme Court in the case of Goutam Jain (*supra*) was totally

misplaced. He argues that the ground of challenge, which was not adverted to or considered by the Writ Court on the strength of judgment of Goutam

Jain, was not a ground of detention independent of other grounds of detention with reference to which the judgment in Goutam Jain was rendered by

the Supreme Court.

8. Having heard learned counsel for the parties and perused the record, we are of the considered opinion that the view taken by the Writ Court is not

a correct view in the eye of law. Admittedly, on the date of detention the detainee was already in jail in FIR No. 65/2018 for very serious non-bailable

offences. The detainee had not even applied for bail before any competent Court of law. And it is because of this reason perhaps the detaining

authority did not voiced his apprehension of likelihood of the detainee being released on bail. That being the situation, it was incumbent on the detaining

authority to indicate compelling reasons for resorting to provisions of Section 8(a) of the J&K Public Safety Act, 1978 and place the detainee under

preventive detention. If the idea of issuing the detention order was to prevent the detainee from acting in any manner prejudicial to the security of the

State, that objective stood already achieved with the arrest of the detainee in connection with commission of substantive offences. In these

circumstances the detaining authority could not have absolved itself of the responsibility to, at least, indicate the compelling circumstances for taking

such decision. In that view of the matter, the detention of the detainee, when he was already in custody cannot be said to have been made because of

any undisclosed compelling reasons, and, therefore, cannot be justified in view of the law laid down by Supreme Court in *Surya Prakash Sharma vs.*

State of UP and ors, 1994 Supp (3) SCC 195.

9. When the principles laid down in the aforesaid case are applied to the facts of the instant case, there is no escape from the conclusion that the

impugned order of detention cannot be sustained and so is the fate of the order impugned in this appeal.

10. With regard to the reliance placed by the Writ Court on the judgment of *Goutam Jain (supra)*, a Division Bench of this Court has already delved

deep in the issue in the case of *Nissar Ahmad Qazi v. State of Jammu and Kashmir* (LPAHC No. 06/2019 decided on 27.11.2020). The Court has

already drawn a distinction between the grounds of detention on the basis of which citizen is detained under the preventive detention law and the

grounds of challenge urged by the detainee to assail his detention order. What is envisaged under Section 10A of the J&K Public Safety Act is a

situation where detention is ordered on two or more grounds, which are severable and independent of each other. In these circumstances, the Section

provides that order of detention shall not be deemed invalid or inoperative merely because one or some of the ground is or are vague, non-existent, not

relevant, not connected or not proximately connected with such person or invalid for any other reason whatsoever etc. etc.

11. Viewed thus, in the light of the distinction drawn in the case of *Nissar Ahmad Qazi (supra)*, it is seen that in the instant case the subjective

satisfaction is fundamentally based on one ground i.e. the activities the detainee has been persistently involved in over a period of time, if not prevented

by putting him under preventive detention, would pose serious threat to the security of the State. All other details, including reference to involvement of the detinue in FIRs etc. only constitute subsidiary facts giving rise to a substantive ground on the basis of which the detaining authority has arrived at a satisfaction that the detention of the detinue under preventive law is necessary and imperative.

12. The plea of the appellant that the subjective satisfaction of the detaining authority, which is sine quo non, for ordering detention under preventive law is vitiated by non-application of mind, is strictly speaking not a ground of detention but a specific ground of challenge raised to assail the order of detention itself. Subjective satisfaction without taking relevant material into consideration and non-application of mind by the detaining authority are the grounds that go to the root of detention and vitiates it abinitio. In that view of the matter, we reiterate our view that judgment in Goutam Jain (supra) is not attracted in the case in hand. The order of detention is clearly vitiated by total non-application of mind by the detaining authority and it should have been held so by the Writ Court.

13. In view of the above we accept this appeal, set aside the order of the Writ Court and quash the impugned order of detention of the detinue.

14. As a result, the respondents are directed to release the detinue forthwith from the preventive custody if not required in any other case.