

(2023) 02 J&K CK 0080

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 245 Of 2021

Umer Qayoom Malla

APPELLANT

Vs

Union Territory Of Jammu & Kashmir And Others

RESPONDENT

Date of Decision : 27-02-2023

Acts Referred:

Constitution Of India, 1950 — Article 22(5)
Code Of Criminal Procedure, 1973 — Section 107, 151
Jammu And Kashmir Public Safety Act, 1978 — Section 13

Citation : (2023) 02 J&K CK 0080

Hon'ble Judges : Mohan Lal, J

Bench : Single Bench

Advocate : Sajad Ashraf

Final Decision : Disposed Of

Judgement

Mohan Lal, J

1. Petitioner by invoked the jurisdiction of this Court in terms of Article 226 Constitution of India has sought writ in the nature of certiorari for quashing of detention order No. DMS/PSA/68/2021 Dated 20.10.2021 passed by respondent no. 2 (District Magistrate, Srinagar) and also writ of mandamus commanding the respondents to release the petitioner (hereinafter referred as "detenue") forthwith from custody, with compensation of Rs. 10,00,000/- be awarded in favour of the detenue for illegally detaining him on the following grounds:-

(i) that the detenue is a law abiding and peace loving citizen of State and has never being involved in any subversive activity which would cause prejudice to the public order or security of state, however, the detenue was arrest by police after he was summoned by Police Station Safakadal Srinagar, where he was detaining illegally and thereafter shifted to District Jail Baramulla to be detained under the provisions of Public Safety Act;

(ii) that the allegations made in the grounds of detention are vague, non-existent

as no prudent man can make a representation against such allegation and passing of detention on such grounds is unjustified and unreasonable, the detaining authority has not mentioned any FIR in the grounds of detention and if the detainee was involved in any unlawful activity why the criminal law has not been set in motion against him, however the respondents have chosen to the provision of preventive detention directly which deserves to be quashed, the alleged unlawful activities mentioned in grounds of detention have not even an iota of connection, the grounds of detention are vague and shows complete non-application of mind on the part of detaining authority;

(iii) that as per the grounds of detention the detainee was already in custody in terms of section 107 Cr.P.C and the detaining authority despite having knowledge of the custody of the detainee has not mentioned any compelling reasons to pass the detention order which suffers from non-application of mind, which renders the detention order bad in law and liable to be quashed;

(iv) that respondents No. 2 has not furnished the relevant material to the detainee like copy of dossier and so called connected material, even the relevant papers regarding the proceedings u/s 107 Cr.P.C as mentioned in the grounds of detention have not been supplied to the petitioner/detainee so as to enable him to make effective representation to respondent No. 1, for non-supply of the relevant material constitutional rights guaranteed to the detainee under Article 22(5) of the Constitution of India stand infringed, whereby, the detention order becomes liable to be set aside;

(v) that the detainee is not an English literate person and understands only Kashmiri/Urdu language, but the order of detention is in English and no translated script in Kashmir/Urdu language has been furnished to the detainee, non-supply of translated script as well as non-explanation of grounds of detention have further prevented the detainee from making effective representation violating his fundamental right under Article 22(5) which renders the detention order illegal;

(vi) that post-detention petitioner/detainee submitted representation before respondent No. 2 however the same was not considered and neither the material was furnished to the petitioner as requested in the representation so that an effective representation could be made before the Government as well as Advisory Board which further renders the detention order illegal and liable to quashed.

2. Respondent No. 2 (District Magistrate Srinagar) has filed counter affidavit contending therein, that the petitioner has not approached the court with clean hands, the contentions made in the petition are baseless and merit outright rejection, when individual liberty comes in conflict with interest of society of the State or public order then the liberty of individual must give way to the larger interest of the nation. It is contended, that petitioner/detainee came to be detained under the provisions of the Act of 1978 validly and legally by virtue of

detention order bearing No. DMP/PSA/68/2021 dated 20.10.2021 issued by respondent no. 2- District Magistrate Srinagar, all statutory requirements and constitutional guarantees have been fulfilled and complied with by the detaining authority, law being well settled that in the case of preventive detention no offence is to be proved nor is any charge formulated but the justification of such detention is suspension of reasonability and there is no criminal conviction which can only be warranted by legal evidence, the detaining authority after deriving subjective satisfaction in the matter has passed order of detention. It is more so contended, that entire material relied upon by the detaining authority has been furnished to the detainee well within the statutory period provided u/s 13 of the Act, warrant of detention was accordingly executed by Executive Officer namely Siraj-ud-Din Shah No. 352/S (EXK No. 836289 of Police Station Safakadal Srinagar, whereby, the detainee was handed to Superintendent District Jail Baramulla for his lodgment, contents of the detention order/warrant and the grounds of detention were read over and explained to the detainee in the language which he fully understood and in lieu thereof, he has subscribed his signatures on the Execution report/order, whereby the detainee was also informed about his right of make representation to the detaining authority or to the government, however, the detainee despite having received the entire material has not so far chosen to make any representation against his detention, the government has approved the aforesaid detention order in terms of Government order No. Home/PB-V/934 of 2020 dated 22.10.2021 and the said order in question has been issued validly and legally. Prayer has been made for dismissal of the petition.

3. Mr. M.A. Qayoom, learned appearing counsel for the petitioner, has sought the setting aside/quashment of impugned detention order no. DMP/PSA/68/2021 dated 20.10.2021 by vehemently canvassing arguments, that petitioner/detainee has not been supplied with copies of FIR alongwith relevant documents/material pertaining to section 107 Cr.P.C proceedings enabling him to make effective representation against impugned detention order, detainee has a right to make representation to the detaining authority so long as order of detention has not been approved by the Government, in the case in hand, non-supply of such material/communication to the petitioner/detainee has constituted infringement of valuable right of the petitioner as guaranteed to him under Article 22 (5) Constitution of India r/w Section 13 of J&K PSA 1978, which makes the detention order invalid and legally unsustainable. It is argued that petitioner/detainee is not an English literate person and only understands Kashmiri/Urdu language, but the impugned detention order has been supplied to him in English language with no translated script in Kashmiri/Urdu language which is pre-requisite for maintainability of detention order, non-supply of detention order as well as other documents in the language which the petitioner detainee understands violates provisions of law, whereby, the detention order deserves to be quashed.

4. Mr. Sajad Ashraf, learned GA appearing for respondents, has recapitulated the grounds urged in the counter affidavit and has vehemently sought dismissal of

writ petition and affirmation of impugned detention order by portraying arguments, that petitioner/detenué has no respect for law and indulges in cases of breach of peace u/ss 107/151 Cr.P.C, the grounds of detention disclose that petitioner/detenué has indulged in activities at the behest of terrorist outfit TRF and handlers across the border and is providing all logistic support including transporting of arms of terrorists from one place to another, recent killings of civilians aimed to create cycle of terror in the valley, petitioner is OGW of TRF and indulges in activities regarding killing of covert and clandestine manner so that law enforcement is not in a position to detect and confront him. It is argued that the petitioner/ detenué was previously detained u/s 107/151 Cr.P.C, however, the same has not deterred him from propagating terrorism and secessionism, as he further indulges in anti-state sentiments to create conducive atmosphere for terrorist activities for carrying out which are prejudicial to the maintenance of security of the state, and therefore, in order to prevent the petitioner from indulging in such activities as normal law has not been found sufficient, petitioner has been detained under Public Safety Act.

5. I have heard learned counsel for the petitioner, learned GA for the respondents, have perused the contents of petition, counter affidavit filed by respondent No. 2 and have also gone through the detention record carefully.

6. The 1st argument canvassed by learned counsel for the petitioner/detenué is, "that the detenué has not been supplied/provided the entire material/record viz the copies of dossier, copy of FIR and relevant documents/ record pertaining to section 107/151 Cr.P.C on the basis of which he was detained under PSA, non-supply of relevant material has violated/infringed petitioner's right to make representation in terms of Article 22 (5) Constitution of India r/w Section 13 of the Jammu Kashmir PSA 1978, thereby, vitiating the detention order" .Hon'ble Supreme Court of India in a case law reported in AIR 2000 SC 2504 [State of Maharashtra & Ors-Appellants v. Santosh Shanker Acharya-Respondent] quashed the detention order on the ground, that the detenué was not supplied the copies of material from which detention order was made, which amounted to denial of representation to the detenué and infraction of a valuable constitutional right guaranteed to the detenué under Article 22 (5) of the Constitution of India. A Co-ordinate Bench of this Court in a case law titled "Hilal Ahmad Khuroo Vs. Union Territory of J&K & Ors. [WP (Crl.) No. 80/2022, decided on 10.08.2022] has held, that respondents are duty bound to provide to the petitioner/detenué the material as regards the proceedings u/s 107/151 of the Cr.P.C and non-supply thereof renders the detention order illegal and unsustainable. Ratio's of the judgments (supra) and the principle of law deduced there from are squarely applicable to the facts of the case in hand. In the instant case, on perusal of the detention record, it is discernable, that the essential material/record as regards to the proceedings u/s 107/151 of Cr.P.C against petitioner forming the edifice for issuance of impugned detention order has not been supplied to the detenué, therefore, the petitioner/detenué's constitutional right guaranteed to him under Article 22(5) Constitution of India r/w Section 13 of J&K PSA 1978 has been

infringed/violated, which renders the impugned detention order illegal and legally unsustainable.

7. The 2nd argument urged by learned counsel for the petitioner is, "that the detainee only understands Kashmiri/Urdu language, but the detention order has been supplied to him in English language only, supply of the detention record/material in the language which the detainee understands is pre-requisite for maintainability of detention order, non-supply thereof, makes the detention order liable to quashed".

In 1992 Legal Eagle (J&K) 28 [Manzoor Ahmad Malik V. State and others] High Court of J&K quashed the detention order by observing that it is an established law that the grounds of detention are to be supplied to the detainee in the language which he knows, and if it is not done, it will deprive him of his legal and constitutional right to make an effective representation against his detention. In view of the settled legal position aforesaid, it apt to reiterate here, that the detention record submitted by learned GA demonstrates that there is no mention in the impugned detention order that petitioner/detainee has been informed of his right to make representation before the Government or the detaining authority. Execution report dated 30.10.2021 depicts that the detaining authority is not certain/sure as how many pages/leaves of detention order and the other material relied by the detaining authority have been furnished to the petitioner/detainee, moreso, the detention record has not been supplied to the detainee in Urdu/Kashmiri language which he understands. Execution report further spells out that the relevant material in regard to proceedings u/s 107/151 Cr.P.C relied by the detaining authority for issuance of impugned detention order has not been furnished to petitioner/detainee to enable him to make effective representation before the Government or the detaining authority. Non-supply of the whole of detention material viz the relevant documents/papers regarding proceedings u/s 107/151 Cr.P.C to the petitioner has debarred/prevented him from making effective representation to the detaining authority or the Government which is an infraction of the valuable constitutional right guaranteed to petitioner/detainee under Article 22 (5) Constitution of India r/w section 13 of Jammu and Kashmir Public Safety Act 1978, which makes the detention order invalid, bad in law, legally unsustainable and liable to quashed.

8. For what has been discussed above, the instant petition is allowed and impugned detention order bearing No. DMS/PSA/68/2021 dated 20.10.2021 passed by Respondent no. 2 (District Magistrate Srinagar) for detention of petitioner namely Umer Qayoom Malla S/o Qayoom Malla R/O Guzarbal Noorbagh Srinagar is quashed. Petitioner/detainee shall be released from preventive custody forthwith if not required in any other case. The relief claimed by the petitioner/detainee in regard to compensation amount stands disallowed. Detention record be handed to learned GA against proper receipt.

9. Disposed of alongwith connected CM(s), if any.