

(2023) 02 J&K CK 0022

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 279 Of 2021

Waheed Ahmad Khanday

APPELLANT

Vs

Union Territory Of J&K & Ors

RESPONDENT

Date of Decision : 02-02-2023

Acts Referred:

Constitution Of India, 1950 — Article 22(5)

Code Of Criminal Procedure, 1973 — Section 107, 151

Citation : (2023) 02 J&K CK 0022

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : M. A. Makroo, Sajad Ashraf

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

1) Impugned in this petition is order No.12-DMK/PSA of 2021 dated 19.10.2021, issued by District Magistrate, Kupwara (for brevity "Detaining Authority") whereby Shri Waheed Ahmad Khanday son of Ab. Rehman Khanday resident of Yaroo Tehsil Langate District Kupwara (for short "thedenue") has been placed under preventive detention, in order to prevent him from acting in any manner prejudicial to the security of the State.

2) The petitioner has contended that the Detaining Authority has passed the impugned detention order mechanically without application of mind, inasmuch as the grounds of detention are mere reproduction of the dossier. It has been further contended that the Statutory safeguards have not been complied with in the instant case. It has been also urged that the allegations made against the detenue in the grounds of detention are vague and that whole of the material which formed basis of the order of detention has not been provided to the detenue. It has been contended that the petitioner has not been informed as to before which authority he had to make a representation.

3) The respondents, in their counter affidavit, have disputed the averments made in the petition and stated that they have followed the provisions of J&K Public Safety Act. It is contended that the detainee has been detained only after following due procedure; that the grounds of detention were read over to the detainee; that there has been proper application of mind while passing the impugned order of detention and that the detainee has been provided all the material which has been relied upon by the detaining authority while passing the detention order. The respondents have placed reliance on the judgment of the Supreme Court in *Haradhan Saha v. State of W.B* (1975) 3 SCC 198. The respondents have produced the detention record to lend support to the stand taken in the counter affidavit.

4) I have heard learned counsel for parties and perused the detention record.

5) Learned counsel for the petitioner, while throwing challenge to the impugned order, projected various grounds but the main grounds that have prevailed during the course of arguments are:

(I) That the grounds of detention are verbatim copy of the dossier, which shows that the detaining authority has not applied its mind while framing the grounds of detention;

(II) That the detainee has been disabled from making an effective representation against his detention as whole of the material which has been relied upon by the detaining authority while making the impugned detention order has not been supplied to him;

6) While going through the detention records, the first ground projected by the learned counsel for the petitioner gets fortified from the material on record. The grounds of detention appear to be replica of the dossier with interplay of some words here and there, which exhibits non-application of mind on the part of detaining authority. In the process, the deriving of subjective satisfaction by the detaining authority has become a causality. While formulating the grounds of detention, the Detaining Authority has to apply its own mind. It cannot simply reiterate whatever is written in the police dossier. In my aforesaid view, I am supported by the judgment of the Supreme Court in the case of *Jai Singh and ors vs. State of J&K* (AIR 1985 SC 764).

7) The grounds of detention and the dossier if in similar language, go on to show that there has been non-application of mind on the part of the Detaining Authority. The similarity of the contents of grounds of detention and police dossier in the instant case clearly exhibits mechanical functioning of the detaining authority, thereby making the impugned order of detention unsustainable in law.

8) The second ground projected by the petitioner is that the detainee has been disabled from making an effective representation against the order of detention as the material, which formed basis of the impugned order of detention, has not

been furnished to him.

9) The detention record, as produced by learned counsel for the respondents, contains a copy of the Execution Report dated 30.10.2021, perusal whereof reveals that ten leaves comprising copy of detention order warrant (01 leaf), Notice of detention (01 leaf), grounds of detention (02 leaves), dossier of detention (05 leaves), copies of FIR, statements of witnesses and other relevant documents (06 leaves), in total 15, leaves been provided to the detainee and in token of receipt thereof, his signatures have been obtained on the said Execution Report.

10) It is interesting to note that no FIR has been shown to have been registered against the petitioner, at least the detention record depicts so. When this is the position, then wherefrom 06 leaves comprising copies of FIR and statements of witnesses have been provided to the petitioner, is not forthcoming from the detention record. This clearly exhibits casual and mechanical approach of the respondents, which casts doubts about the veracity of the execution report/receipt stated to have been signed by the petitioner.

11) Another strange position that emerges from the perusal of detention record is that the dossier consists of only 04 leaves but the execution record shows that 05 leaves have provided to the petitioner. The grounds of detention also bear reference to proceedings under Section 107 and 151 of the Cr.P.C but it seems that the documents relating to these proceedings have also not been supplied to the petitioner. Thus, contention of the petitioner that whole of the material relied upon by the detaining authority, while formulating the grounds of detention has not been supplied to him, appears to be well-founded. Obviously, the petitioner has been hampered by non-supply of these vital documents in making an effective representation before the Advisory Board, as a result whereof his case has been considered by the Advisory Board in the absence of his representation, as is clear from the detention record. Thus, vital safeguards against arbitrary use of law of preventive detention have been observed in breach by the respondents in this case rendering the impugned order of detention unsustainable in law.

12) It is a settled law that non-supply of the requisite/relevant material would amount to violation of right of detainee under Article 22 (5) of the Constitution of India and its deprivation renders the detention order unsustainable in law. In my aforesaid view, I am fortified by the judgments of the Supreme Court rendered in the cases of Sophia Gulam Mohd. Bham v. State of Maharashtra & ors (AIR 1999 SC 3051), Thahira Haris etc. etc. Vs. Government of Karnataka & Ors (AIR 2009 SC 2184) and Ibrahim Ahmad Bhatti alias Mohd. Akhtar Hussain alias Kandar Ahmad Wagher alias Iqbal alias Gulam Vs. State of Gujarat and others, (1982) 3 SCC 440.

13) The cumulative effect of the aforesaid discussion leads to the only conclusion that in the instant case, the respondents have not adhered to the legal and Constitutional safeguards while passing the impugned detention order against

the petitioner. The impugned order of detention is, therefore, unsustainable in law. Accordingly, the same is quashed. The detenue is directed to be released from the preventive custody forthwith provided he is not required in connection with any other case.

14) The detention record, as produced, be returned to the learned counsel for the respondents.