

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

...

WP (Crl) no.151/2020

Reserved on: 11.08.2021

Pronounced on: 24.09.2021

Mushtaq Hajam

..... Petitioner(s)

Through: Mr. M. Amin Khan, Advocate

Versus

Union Territory of J&K and ors.

.....Respondent(s)

Through: Mr. Mir Suhail, AAG

CORAM:

HON'BLE MR. JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. Challenge in this petition is thrown to the Order no.DMB/PSA/03 of 2020 dated 29.08.2020, passed by District Magistrate, Budgam, placing one, Mushtaq Hajam S/o Rafiq Hajam R/o Check Surasyar Tehsil Chadoora, (for short “*detenu*”) under preventive detention so as to prevent him from acting in any manner which is prejudicial to the preservation of forest wealth and directing his lodgement in Central Jail, Kotbhalwal Jail, Jammu.
2. Respondents have filed Reply Affidavit, in which it is stated that *detenu* is involved in timber smuggling by cutting green trees, instigating his associates to adopt the same trade and transporting the illicit material to Payeen belt. The *detenu* has been found involved in Case FIR Nos.55/2019, 60/2020 and 69/2020 registered at Police Station, Chadoora.
3. I have heard learned counsel for parties and considered the matter.
4. Learned counsel for petitioner has contended that impugned order of detention is unconstitutional, illegal and bad in law inasmuch as detaining authority has not followed the Constitutional and Statutory procedural safeguards as provided under Article 22(5) of the Constitution of India. It is stated in the petition that “the *detenu* has not been

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furnished the grounds of detention and other connected documents which has swayed the mind of the detaining authority”. This contention is baseless and unfounded. The reason being that perusal of Execution Report available in the Detention Record, made available by learned counsel for respondents, reveals that as many as 22 leaves, which includes grounds of detention, copy of dossier, and other related documents, have been furnished to detenu and he has also been informed to make the representation to the Government as well as detaining authority. Besides, petitioner has himself annexed with writ petition copies of impugned order of detention, grounds of detention, and dossier.

5. It is also stated by counsel for petitioner that detaining authority has not assigned any compelling and cogent reason for passing order of detention and that detaining authority has not specified the authority before whom the representation has to be made nor has detaining authority informed the detenu to make a representation to him before the order could be approved/confirmed by the Government. This submission is misconceived because perusal of grounds of detention reveals the compelling and cogent reasons having been given by detaining authority to pass order of detention. It is discernible from grounds of detention that detenu is engaged in timber smuggling by cutting green trees, instigating his associates to adopt the same trade and transporting the illicit material. Detenu is said to have turned habitual and generally nocturnal timber smuggler and over last nine years he has been involved in ruining forest with the help of his associates by felling of trees, camouflaging illicitly transported timber in selected hides, or in orchards under bunds, in way that it becomes difficult to locate such dumps during search operations. It is also mentioned in grounds of detention that on occasions, even in broad day light detenu has been found guiding smuggler groups, felling green trees, converting these trees into logs by use of axes and sawing, fashioning these to ‘*phad*’s and transporting this illegal material to Payeen belt on horses/ponies either reared by him or procured on hire basis. The detenu is also stated to be actively involved in timber smuggling, resulting in registration of Case FIR Nos.11/2019, 02/2020 and 03/2020 and finally lodged as case FIR Nos. 55/2019, 60/2020 and

69/2020 registered at Police Station, Chadoora. From these FIRs, it is evident that detenu and his associates were smuggling the illicit timber from compartments of Surasyar/Jabed Branwar Block and the cases registered against him makes it evident enough that he is mostly inflicting damage in Surasyar/Jabad Branwar Block of Doodganga Range and even lodging of FIR in the past nine years against him and his organised gang, normal law has not broken his activities neither restricted him from ruining the ecosystem. In that view of matter, sufficient grounds have been given by detaining authority to place detenu under preventive detention.

6. It is pertinent to mention here that detenu has been very well informed to make representation both to the Government and the detaining authority.
7. Another submission of counsel for petitioner is that subjective satisfaction has not been derived by detaining authority which is sine qua non for passing the order of detention and that grounds of detention are formulated by SSP/DFO concerned as the dossier submitted by SSP/DFO is the ditto copy of grounds of detention. Again, this submission has no substance. Perusal of grounds of detention reveals that subjective satisfaction has been derived by detaining authority after perusing the whole record and that grounds of detention is not ditto copy of dossier.
8. Counsel for petitioner has also stated that impugned order of detention has not been approved by the Government and that order of detention would remain in operation only for 12 days. This submission of learned counsel for petitioner has no force or substance as perusal of the detention record reveals that in terms of Government Order No. Home/PB-V/1623 of 2020 dated 09.09.2020, the detention order was approved and the case was referred to Advisory Board for its opinion. The Advisory Board in terms of its opinion dated 23.10.2020 observed that there was sufficient cause for detention of the detenu and accordingly, the detention order was confirmed vide Government Order No.Home/PB-V/1762 of 2020 dated 13.11.2020.
9. It may be mentioned here that the essential concept of preventive detention is that detention of a person is not to punish him for something he has done, but to prevent him from doing it. Its basis is the satisfaction

of the Executive of a reasonable probability of detenu acting in a manner similar to his past acts, and preventing him by detention from so doing. Preventive detention, an anticipatory measure, is resorted to when the executive is convinced that such detention is necessary to prevent a person detained from acting in a manner prejudicial to certain objects which are specified by the law. In preventive detention no offence is proved, and justification of such detention is suspicion or reasonable probability. The order of detention is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of surrounding circumstances. The power of preventive detention is exercised in reasonable anticipation. It may or may not relate to an offence. It does not overlap with the prosecution even if it relies on certain facts for which prosecution may be, or may have been, launched. An order of preventive detention may be made before or during prosecution. It may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.

Reference made by counsel for petitioner to *Zakir Hussain Ganai & ors vs. State of J&K & ors, 2009 (3) JKJ 430 [HC]*, and *Jehangir Ahmad Khan vs. State of J&K, 2003 (2) JKJ 62 [HC]*, in view of the distinguishable facts and circumstances of the case in hand, will not give any aid or assistance to the case of petitioner.

10. The scope of subjective satisfaction arrived at by the detaining authority is extremely limited and the Court, while examining the material, which is made basis for subjective satisfaction of detaining authority, would not act as a court of appeal to find fault with the said satisfaction on the ground that on the basis of the material before detaining authority, another view was possible. Such being the scope of enquiry in this field, and the contention of counsel for petitioner, therefore, cannot be accepted. All the procedural requirements in the present case have been fulfilled by respondents.
11. It is pertinent to mention here that the powers of preventive detention under the Act of 1978 are in addition to those contained in the Criminal

Procedure Code, where preventive detention is followed by an inquiry or trial. By its very nature, preventive detention is aimed at preventing commission of an offence or preventing detained person from achieving certain end. The authority, making the order, therefore, cannot always be in possession of full detailed information when it passes the order and the information in its possession may fall far short of legal proof of any specific offence, although it may be indicative of a strong probability of impending commission of a prejudicial act. The Act of 1978, therefore, requires that the State Government must be satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to public order, security of State, or preservation of forest wealth, it is necessary so to do, make an order directing that such person be detained.

12. In terms of Section 8 of the Act, before the Government can pass an order of preventive detention it must be satisfied with respect to the individual person that his activities are directed against one or other of the objects mentioned in the section, and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. Section 8, thus, clearly says that it is the satisfaction of the State Government on the point which alone is necessary to be established. The satisfaction of the Government, however, must be based on some grounds. There can be no satisfaction if there are no grounds for the same. There may be a divergence of opinion as to whether certain grounds are sufficient to bring about the satisfaction required by the section. One person may think one way, another the other way. If, therefore, the grounds on which it is stated that the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of *mala fides* cannot be challenged in a court. Whether in a particular case the grounds are sufficient or not, according to the opinion of any person or body other than the State Government, is ruled out by the wording of the section. It is not for the court to sit in the place of the Government and try to determine if it would have come to the same conclusion as the

Government. As has been generally observed, this is a matter for subjective decision of the Government and that cannot be substituted by an objective test in a court of law. Such detention orders are passed on information and materials which may not be strictly admissible as evidence under the Evidence Act in a court, but which the law, taking into consideration the needs and exigencies of administration, has allowed to be considered sufficient for subjective decision of the Government.

13. To sum up, it is relevant to refer to the observations of the Supreme Court while dealing with the question of preventive detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, in the case of *Prakash Chandra Mohan v. Commissioner, 1986 Cr.L.J. 786*. The Supreme Court observed that it must be remembered that observance of written law about the procedural safeguards for protection of individual is normally the high duty of public official but in all circumstances not the highest. The law of self-preservation and protection of the country and national security may claim in certain circumstances higher priority.
14. For the reasons discussed above, the instant writ petition is without any merit and is, accordingly, **dismissed** with connected CM(s).
15. Detention record be returned to learned counsel for respondents.

(Vinod Chatterji Koul)
Judge

Srinagar
24.09.2021
(Qazi Amjad, Secy)

Whether the order is reportable: Yes/No.