Jammu & Kashmir High Court - Srinagar Bench
Jehangeer Ahmad Malik vs Ut Of J&K And Anr on 14 December, 2022
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HIGH COURT OF JAMMU &KASHMIR AND LADAKH
AT SRINAGAR

WP(Crl) No. 205 /2021
Reserved On : 03.11.2022
Pronounced On: 14.12.2022

Jehangeer Ahmad Malik
.....Petitioner(s)
Through: Mr.B.A.Tak, Advocate
Versus
UT of J&K and Anr..
.....Respondent(s)
Through: Mr. Asif Maqbool, Dy. AG

CORAM: HON'BLE MR JUSTICE M.A.CHOWDHARY, JUDGE

JUDGEMENT

1. District Magistrate, Shopian (hereinafter called „Detaining Authority) in exercise of powers under Section 8 of the Jammu & Kashmir Public Safety Act, 1978, passed the detention Order No. 94/DMS/PSA/2021 dated 18.10.2021 (for short „impugned order), in terms whereof the Petitioner namely Jahangeer Ahmad Malik S/O Gh. Qadir Malik R/O Kiloora Shopian District Shopian (for short „detenue) was ordered to be detained and lodged in District Jail, Kathua.

2. The impugned detention order has been challenged through the medium of the instant petition, being in breach of the provisions of Article 22(5) of the Constitution of India read with Section 13(1) of the J&K Public Safety Act, 1978. WP (Crl) No. 205/2021

3. It is pleaded in the petition that the detaining authority-

> respondent No.2 has not attributed any specific allegation against the detenue. Furthermore, it is stated that the detenue has been incapacitated in filing a representation as the grounds of detention are not in a language which could be understood by the detenue. It is also being stated that the detenue is not an English literate person and he understands only Urdu/Kashmiri languages but the order of detention is in English and it is not possible for him to understand such a hyper technical language. It is also the submission of learned counsel for the detenue that the order of detention and the connected documents annexed with the petition

clearly show violation of rights of the detenue guaranteed in terms of the Article 22(5) of the Constitution of India. Further it is contended that the detenue has been bailed out by the competent court but was not released and this important fact has not been mentioned in the grounds of detention.

4. Respondents in their counter affidavit have stated that the detenue was ordered to be detained for maintenance of „Security of the UT/Country and had he been let free there would have been every likelihood of his re-indulging in anti- national/anti-social activities. It is also being stated that the detaining authority has passed order of detention after deriving subjective satisfaction in the matter. Grounds of detention, order of detention as well as entire material relied WP (Crl) No. 205/2021 upon by the detaining authority came to be furnished to the detenue well within statutory period provided, as required under Section 13 of the Act. It is further stated that the contents of the detention order/warrant and the grounds of detention were read over and explained to the detenue in the language which he fully understood and in lieu whereof the detenue subscribed his signatures on the execution report.

5. Heard learned counsel for both the sides at length, perused the record and considered.

6. Though a number of grounds have been taken by petitioner in writ petition, yet one ground, which has been vehemently pressed by learned counsel for petitioner as well, is that detaining authority has based his detention order on the cases registered against the detenue vide FIR No. 74/2020 U/Ss 307 IPC & I.A.Act, 16,20 ULA(P) Act registered at P/S Imamsahib, FIR no. 376/2009 U/S 7/25 of Police station Shopian, FIR No. 138/2016 U/S, 7/25 I.A. Act, 4 Exp. Subs Act registered at Police Station Shopian, FIR No. 141/2003 U/Ss 302 RPC, 7/27 I.A.Act of P/S Shopian, FIR No. 267/2004 U/Ss 120,121 RPC 7/25 I.A.Act, 10 Telegraph Act registered at Police Station Shopian, and FIR No. 211/2009 U/S 307 RPC, 7/27 I.A.Act of Police Station Shopian, without mentioning the fact that detenu had already been released on bail in the aforesaid FIRs, by court of competent jurisdiction, which reflects non-application of WP (Crl) No. 205/2021 mind on the part of detaining authority.

7. It may not be out of place to mention here that whether a person, who is in jail, can be detained under preventive detention law has been a subject matter of consideration before the Supreme Court very often. In Dharmendra Suganchand Chelawat & Anr v. Union of India, (AIR 1990 SC 1196), the Supreme Court while considering the same issue has reconsidered its earlier judgments on the point in Rameshwar Shaw v. District Magistrate, Burdwan, AIR 1964 SC 334; Masood Alam v. Union of India, AIR 1973 SC 897; Dulal Roy v. District Magistrate, Burdwan, AIR 1975 SC 1508; Alijan Mian v. District Magistrate, Dhanbad, AIR 1983 SC 1130; Ramesh Yadav v. District Magistrate, Etah, AIR1986 SC 315; Suraj Pal Sahu v. State of Maharashtra, AIR 1986 SC 2177; Binod Singh v. District Magistrate, Dhanbad, AIR 1986 SC 2090; Smt Shashi Aggarwal v. State of U.P., AIR 1988 SC 596, and came to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose, it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for

detention of a person already WP (Crl) No. 205/2021 in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from the custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

8. When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that impugned order cannot be sustained. Grounds of detention do not mention that detaining authority is aware of the fact that detenu had already been released on bail by court of competent jurisdiction at the time of making detention order. In the present case detaining authority has not drawn any subjective satisfaction vis-à-vis detention of detenu. There is no mention of the fact that detenu has applied for bail in criminal case(s) against him nor is there any satisfaction that detenu has been enlarged on bail before issuance of impugned order of detention. Even there is no mention concerning any fresh activity of detenu from the date of release of detenu on bail till the time the order of detention was passed. This clearly indicates and shows total absence of application of mind on the part of detaining authority while passing impugned order of detention. In that view of matter, impugned detention order is vitiated. WP (Crl) No. 205/2021

9. It is pertinent to mention here that preventive detention is not a quick alternative to normal legal process, is what is held by the Supreme Court in V. Shantha v. State of Telangana & Ors, AIR 2017 SC 2625. The Supreme Court has held that preventive detention of a person by a State after branding him a 'goonda' merely because the normal legal process is ineffective and time-consuming in 'curbing the evil he spreads', is illegal and that the detention of a person is a serious matter affecting the liberty of the citizen. Preventive detention cannot be resorted to when sufficient remedies are available under general laws of the land for any omission or commission under such laws, the Supreme Court observed. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detenu from indulging in further prejudicial activities, affecting security of the State, and that there was no other option except invoking the provisions of preventive detention Act as an extreme measure to insulate. No doubt the offences alleged to have been committed by detenu are such as would attract punishment under the prevailing laws but that has to be done under the said prevalent laws and taking recourse to preventive detention laws would not be warranted. Preventive detention involves detaining of a person without trial in order to prevent him from committing certain types of offences. But such detention cannot be made a substitute for ordinary law and absolve investigating authorities of their normal functions of WP (Crl) No. 205/2021 investigating the crimes which the detenu may have committed. After all, preventive detention cannot be used as an instrument to keep a person in perpetual custody without trial. Reference in this regard may be had to Rekha v. State of Tamil Nadu & Anr. (2011) 5 SCC 244 and V. Shantha v. State of Telangana (supra) and Sama Aruna v. State of Telengana AIR 2017 SC 2662.

10. Given the case set up and submissions made by counsel for parties, it would be appropriate to go through the detention record, produced by counsel for respondents, so as to ascertain as to whether the material, relied upon by detaining authority while issuing impugned detention order, has been

furnished to detenu or not. The detention record, inter alia, contains "Execution Report" which shows that only detention warrant and grounds of detention (11) leaves have been provided to the detenue which indicates that the whole material was not supplied to the detenu.

11. Perusal of impugned detention order reveals that Superintendent of Police, Shopian, vide his letter No.CS/D- 1/2021/5957 dated 18.10.2021, produced material record, such as dossier in respect of detenu and it was only after its perusal that impugned detention order has been issued by detaining authority. Grounds of detention make reference of six FIRs to have been registered against detenu. Involvement of detenu in aforesaid cases appears to have weighed with WP (Crl) No. 205/2021 detaining authority, while making detention order. The record, as noted above, does not indicate that copies of aforesaid First Information Reports, statements recorded under Section 161 Cr.P.C. and other material collected in connection with investigation of aforesaid cases, was ever supplied to detenu. The abovementioned material, thus, assumes significance in the facts and circumstances of the case. It needs no emphasis, that detenu cannot be expected to make a meaningful exercise of his Constitutional and Statutory rights guaranteed under Article 22(5) of the Constitution of India and Section 13 of the J&K Public Safety Act, 1978, unless and until the material on which detention order is based, is supplied to detenu. It is only after detenu has all the said material available that he can make an effort to convince firstly detaining authority and thereafter the Government that their apprehensions concerning activities of detenu are baseless and misplaced. If detenu is not supplied the material, on which detention order is based, he will not be in a position to make an effective representation against his detention order. Failure on part of detaining authority to supply material, relied at the time of making detention order to detenu, renders detention order illegal and unsustainable. While saying so, I draw the support from the law laid down in Thahira Haris Etc. 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 WP (Crl) No. 205/2021 Gulam Mohd Bham v. State of Maharashtra & Ors. AIR 1999 SC 3051; and Syed Aasiya Indrabi v. State of J&K & Ors, 2009 (I) S.L.J 219.

12. The Supreme Court in Abdul Latief Abdul Wahab Sheikh v. B.K. Jha, 1987 (2) SCC 22 has made it clear that it is only the procedural requirements, which are the only safeguards available to detenu, that is 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 respondents in letter and spirit and as a corollary thereof, petition requires to be allowed.

13. The detention order dated 18.10.2021 has been based on the alleged involvement of the detenue in six criminal cases registered vide FIR No. 74/2020 at Police Station Imamsahib and FIR Nos. 141/2003, 267/2004, 211/2009, 376/2009 & 138/2016 registered at Police Station Shopian. It apapears that the detaining authority has taken note of these stale incidents of criminal activities of the detenue to base his detention as such, the detention order gets vitiated for non- application of mind.

14. The detenue who is stated to be a school dropout was not furnished relevant record which was used to base his detention has thus been incapacitated from making an effective and meaningful

representation to the detaining WP (Crl) No. 205/2021 authority or to the Government against his detention. On this count also the detention order gets vitiated and cannot be sustained. Having regard to the aforestated discussion, it has thus been proved that the respondents have not observed the safeguards available to the detenue, rendering his detention as illegal and unsustainable, as such, the impugned order being vitiated is liable to be quashed.

15. For the foregoing reasons, writ petition is disposed of and detention Order no.94/DMS/PSA/2021 dated 18.10.2021, passed by District Magistrate, Shopian is quashed. Respondents, including concerned Jail Superintendent, are directed to release the detenu forthwith, provided he is not required in any other case(s). Xerox copy of Detention record, as produced, be returned to the learned GA.

16. Disposed of, accordingly.

Srinagar
14.12.2022 (M. A. Chowdhary)
Judge

Mujtaba

Whether the order is reportable: Yes/No.

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