

Jammu & Kashmir High Court - Srinagar Bench

Waheed Majeed Wagay vs Ut Of Jammu And Kashmir& Another on 21 November, 2022

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

WP (Crl) No. 312/2021

Reserved on: 03.11.2022

Date of Pronouncement:21.11.2022

Waheed Majeed Wagay

.....Petitioner

Through:Mr. Mukhtar A. Makroo, Advocate
Versus

UT of Jammu and Kashmir& Another

.....Respondents

Through:Mr. Usman Gani, GA.

CORAM:

Hon'ble Mr. Justice Javed Iqbal Wani, Judge.

JUDGEMENT

1. The instant writ petition arises out of the detention order bearing No. 12/DMK/PSA/2021 dated 18.10.2021, (hereinafter for short the impugned order) passed against the detenu, namely, Waheed Majeed Wagay, by respondent no.2-District Magistrate, Kulgam (for brevity detaining authority), under and in terms of provisions of the Jammu & Kashmir Public Safety Act, 1978 (for short the „Act). The detention order dated 18.10.2021 is challenged by the petitioner through the medium of instant petition and is seeking quashment of the same on the grounds taken in the writ petition.

2. It is being stated in the petition that the detenu is a law-abiding citizen and has never indulged in any subversive activity prejudicial to public order or security of the State. The detenu is stated to have been arrested on 06.07.2021 and was falsely implicated in case FIR No. 15/2021 registered at Police Station, Yaripora District Kulgam, and while being in custody therein in the said FIR he came to be detained under preventive custody by the respondents in terms of impugned order and lodged at Central Jail, Srinagar.

WP (Crl) No.312/2021

3. The impugned order is being challenged, inter alia, on the grounds that detenu was already in custody in connection with case FIR No. 15/2021 and the detaining authority, despite having the knowledge of the said fact, detained the detenu without spelling out any compelling reason therefor in the grounds of detention, more so, when there was no possibility of the release of the detenu from the custody on account of offences mentioned in the FIR particularly offences covered under section 13, 18-B, 39 of UA(P) Act.

4. It is being further urged in the grounds that the detenu had not been provided copies of the relevant material, like copy of dossier, copy of FIR, statements recorded under Section 161, 164-A Cr.P.C., referred to in the grounds of detention, material, if any, collected during the course of investigation, thus, depriving him to file an effective representation against his detention. The said failure is stated to have infringed the constitutional and statutory rights of the detenu guaranteed under Article 22 (5) of the Constitution of India and Section 13 of J&K Public Safety Act.

5. On the other hand, respondents, in their reply affidavit filed have resisted and controverted the contentions raised and grounds urged by the petitioner in the petition and have averred that the order of detention is preventive and not punitive in nature, while it is being admitted by respondents that detenu was detained pursuant to impugned order. It is being stated that all statutory requirements and constitutional guarantees have had been fulfilled and complied with while detaining the detenu.

6. It is being contended by respondents that impugned order was executed in accordance with the relevant provisions of law and that the custody of detenu was handed over to the Superintendent, Central Jail, Srinagar, for lodgment and that the contents of detention order/warrant and grounds of detention were read over and explained to the detenu in the language which he fully understood and in lieu thereof the detenu subscribed his signatures on the execution report/order.

WP (Crl) No.312/2021

7. It is being next averred by respondents that impugned order was executed in accordance with the relevant provisions of law.

8. It is being next stated that the Advisory Board, after considering the material placed before it, in terms of Section 14 of the Act, held that there is sufficient cause for detention of the detenu and on receipt of the opinion of the Advisory Board, the Government confirmed order of detention.

Heard learned counsel for the parties, perused the record and considered the matter.

9. While dealing with the contention/ground of challenge urged by the petitioner qua non-recording of compelling reasons for detaining the detenu when he was already in custody, it would be appropriate to refer to the judgement of the Apex Court being relevant herein passed in case titled as Surya Prakash Sharma v. State of U.P and others, reported in 1994 (3) SCC 195, wherein at paragraph 5 following has been noticed and laid down:

"5. The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in custody has had been engaging the attention of this Court since it first came up for consideration before a Constitution Bench in Rameshwar Shaw V. District Magistrate, Burdwan (1964) 4 SCR 92: AIR 1964 SC 334: (1964) 1Crl LJ 257. To eschew prolixity we refrain from detailing all those cases except that of Dharmendra Suganchand Chelawat V. Union of India (1990) 1 SCC 746: 1990 SCC (Crl) 249: AIR 1990 SC 1196, wherein a three

Judge Bench, after considering all the earlier relevant decisions including Rameshwar Shaw answered the question in the following words (SCC 754 para 21:

"The decisions referred to above lead 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 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 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."

WP (Crl) No.312/2021

10. Perusal of the grounds of detention/order of detention would manifestly reveal that the detaining authority has not recorded any compelling reasons as per the mandate laid down by the Apex Court in the case of Surya Parkash Sharma (supra), while passing the impugned detention order against the detenu, so much so, no such compelling reason even in reply affidavit have been detailed out. The impugned order, thus in law, does not sustain on this count alone.

11. Intriguingly, perusal of impugned order of detention reveals that "on the basis of grounds of detention placed before" detaining authority "by the Superintendent of Police Kulgam" that detaining authority was satisfied that with a view to prevent detenu "from acting in any manner prejudicial to security, sovereignty and integrity of State", it is necessary to place detenu under preventive detention.

It is worthwhile to mention here that detaining authority may get inputs from sponsoring agencies / authorities for detaining any person but responsibility to formulate grounds of detention exclusively rests with detaining authority. It is the detaining authority, who has to go through the reports and other inputs received by him from the concerned agencies and on such perusal arrive at a subjective satisfaction that a person is to be placed under preventive detention. It is, therefore, for the detaining authority to formulate the grounds of detention and satisfy itself that the grounds of detention so formulated warrant passing of the order of preventive detention. However, in the instant case, it is evident from the impugned order of detention that the grounds of detention have not been prepared by the detaining authority but by the sponsoring agency which is against the mandate of law, thus, the impugned detention order is vitiated on this count as well.

12. It is germane to mention here that the judgement referred to and relied upon by the counsel for the respondents are not applicable to the facts and circumstances of the case being misplaced and

misdirected and do not lend any support thereof to the case of the respondents.

WP (Crl) No.312/2021

13. Viewed thus, in the context of what has been observed, analyzed and considered in the preceding paragraphs, instant petition is allowed and consequent to which the impugned order of detention bearing No. 12/DMK/PSA/2021 dated 18.10.2021, is quashed, with the direction to the respondents including the Jail authorities concerned to release the detenu forthwith from preventive custody unless required in any other case.

14. Disposed of.

15. No orders as to costs.

(Javed Iqbal Wani) Judge Srinagar 21.11.2022 TASADUQ SAB: