

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

WP(Crl) 248/2022

Jahangir Ahmad Dar (Aged: 25 years)

...Petitioner(s)

S/O Ghulam Mohammad Dar

R/O Saderbagh Serch Ganderbal.

Through his uncle, namely,

Ghulam Mohi-Ud-Din Dar (Aged: 51 years)

R/O Saderbagh Serch Ganderbal

Through: Mr. Lone Altaf, Advocate.

Vs.

1. Union Territory of Jammu and Kashmir
through its Principal Secretary to Home
Government of J&K at Civil Secretariat
Srinagar/ Jammu.

...Respondent(s)

2. District Magistrate, Ganderbal.

Through: None.

CORAM:

HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE.

JUDGMENT

01. The instant writ petition arises out of the detention order bearing No. 01-DMG-PSA-2022 dated 6th April, 2022, (the impugned order) passed against the detenu, namely, Jahangir Ahmad Dar, by Respondent No.2-District Magistrate, Ganderbal (the Detaining Authority), under and in terms of the Jammu & Kashmir Public Safety Act, 1978 (the Act). The detention order dated 6th April, 2022 is being challenged by the petitioner through the medium of instant petition and sought to be quashed on the grounds urged in the writ petition.

02. Heard learned counsel for the petitioner and perused the material on record.

03. According to learned counsel for the petitioner, the detenu was already in custody in connection with case FIR No. 55/2022 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 sections 7/27 IA Act; 307 IPC disclosed in the FIR No. 55/2022 registered at Police Station, Ganderbal.

04. Further, it is being contended by counsel for the petitioner that the relevant material, which has formed basis for detaining the detenu in terms of the impugned order, was never furnished to the detenu, thus, disabling him to make an effective representation against his detention

05. Perusal of the record reveals that the detenu prior to his detention was already in custody in connection with FIR No. 55/2022 registered at Police Station, Ganderbal, for the commission of offences covered under sections 7/27 IA Act and 307 IPC and the Detaining Authority despite having the knowledge of the said fact, has not recorded any compelling reason being *sine qua non* for detaining a person involving in a serious criminal case. The non-recording of compelling reasons, thus, vitiates the order of detention in view of the law laid down by the Apex Court 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 detainee is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detainee 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 detainee is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detainee, 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.”

06. 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.

07. The Hon'ble Supreme Court in case titled as "*Rahmatullah v. State of Bihar and Others*" reported in "*1979 (4) SCC 559*", observed as under: -

"4. The normal rule of law is that when a person commits an offence or a number of offences, he should be prosecuted and punished in accordance with the normal appropriate criminal law; but if he is sought to be detained under any of the preventive detention laws as may often be necessary to prevent further commission of such offences, then the provisions of Article 22(5) must be complied with. Sub-Article (5) of Article 22 reads:

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. This Sub-Article provides, *inter alia*, that the detaining authority shall as soon as may communicate the grounds of detention and shall afford him the earliest opportunity of making a representation against the order. The opportunity of making a representation is not for nothing. The representation, if any, submitted by the detenu is meant for consideration by the Appropriate Authority without any unreasonable delay, as it involves the liberty of a citizen guaranteed by Article 19 of the Constitution. The no consideration or an unreasonably belated consideration of the representation tantamount to non-compliance of Sub-Article (5) of Article 22 of the Constitution."

08. In a judgement passed by the Hon'ble Apex Court in case titled *"The State of Manipur & others v. Buyamayum Abdul Hanan"* reported as *"2022 SCC Online SC 1455"*, delivered on 19th of October, 2022 at Paragraph 24, following has been held:

"24. In other words, the right of personal liberty and individual freedom which is probably the most cherished is not, in any manner, arbitrarily to be taken away from him even temporarily without following the procedure prescribed by law and once the detenu was able to satisfy while assailing the order of detention before the High Court in exercise of jurisdiction Article 226 of the Constitution holding that the grounds of detention did not satisfy the rigors of proof as a foundational effect which has enabled him in making effective representation in assailing the order of detention in view of the protection provided under Article 22(5) of the Constitution, the same renders the order of detention illegal and we find no error being committed by the High Court in setting aside the order of preventive detention under the impugned judgment."

09. It is significant to notice that the Apex Court in case titled *"Amrit Lal and others v. Union of India and others"* reported as *"AIR 2000 SC 3675"* has laid down that if a person is already in custody and when there is no imminent possibility of his release therefrom, the person be not detained arbitrarily under the provisions of the Public Safety Act. In the instant case as well, the detenu is allegedly involved in FIR No. 55/2022, Police Station, Ganderbal, for the commission of offences covered under sections 7/27 IA Act and 307 IPC, wherein there was no imminent possibility of release of the detenu on bail, as such, the detaining authority ought not to have exercised the power of detaining the detenu under the provisions of the Jammu & Kashmir Public Safety Act.

Reference in this regard is appropriate to be made to the judgement of the Apex Court in a case titled *“Amrit Lal and others v. Union of India and Others”* reported as *“AIR 2000 SC 3675”* and the relevant paragraphs thereof are extracted hereunder:

“4..... In Augustin's decision (1994 Supp (1) SCC 597 (supra) this Court also placed strong reliance on an earlier but oft-cited decision of this Court in Binod Singh v. District Magistrate, Dhanbad, [1986] 4 SCC 416: (AIR 1986 SC 2090: 1986 Cri LJ 1959) wherein it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. This Court held that there must be cogent materials before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. It is in this perspective as above, that the recording of the concerned officer in the matter under reference ought to be noticed....

6. The requirement as noticed above in Binod Singh's case, (supra) that there is 'likelihood of the petitioners being released on bail' that however is not available in the reasonings as provided by the concerned officer. The reasoning available is the 'likelihood of his moving an application for bail' which is different from 'likelihood to be released on bail'. This reasoning, in our view, is not sufficient compliance with the requirements as laid down.

7. The emphasis however, in Binod Singh's case (supra) that before passing the detention order the concerned authority must satisfy himself of the likelihood of the petitioner being released on bail and that satisfaction ought to be reached on cogent material. Available cogent material is the likelihood of having a bail application moved in the matter but not obtaining a bail order.....”

On the same context, the Apex Court *in Sushanta Kumar Banik*

v. The State of Tripura, 2022 SCC Online SC 1333, has held as under:

“26. From the above decisions, it emerges that the requisite subjective satisfaction, the formation of which is a condition precedent to passing of a detention order will get vitiated if material or vital facts which would have bearing on the issue and weighed the satisfaction of the detaining authority one way or the other and influence his mind are either withheld or suppressed by the sponsoring authority or ignored and not considered by the detaining authority before issuing the detention order.

27. It is clear to our mind that in the case on hand at the time when the detaining authority passed the detention order, this vital fact, 2023:JKLHC-SGR:824 6 WP (Crl) No.245/2022 namely, that the appellant detenu had been released on bail by the Special Court, Tripura despite the rigours of Section 37 of the NDPS Act, 1985, had not been brought to the notice and on the other hand, this fact was withheld and the detaining authority was given to understand that the trial of those criminal cases was pending.

28. The preventive detention is a serious invasion of personal liberty and the normal methods open to a person charged with commission of any offence to disprove the charge or to prove his innocence at the trial are not available to the person preventively detained and, therefore, in prevention detention jurisprudence whatever little safeguards the Constitution and the enactments authorizing such detention provide assume utmost importance and must be strictly adhered to.”

11. Having regard to the above well settled legal position, the contention of the counsel for the petitioner that there was no material before the detaining authority to the effect that the detenu was likely to be

released on bail in the case in which he stood arrested is well founded, therefore, the order of detention cannot sustain.

12. In view of the aforesaid analysis, the other grounds of challenge urged in the petition need not to be addressed to.

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. 01-DMG-PSA-2022 dated 6th April, 2022 passed by the Detaining Authority, is quashed, with the direction to the respondents including the Jail authorities concerned to release the detenu forthwith from preventive custody, provided he is not required in any other case.

12. Disposed of.

(SANJEEV KUMAR)
JUDGE

SRINAGAR:
27.12.2023
“Hamid”

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| i. | Whether the Judgement is Reportable? | Yes/No |
| ii. | Whether the Judgment is Speaking? | Yes/No |