

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

WP(Crl) No. 378/2022

Reserved on: 15.12.2023

Pronounced on: 22.12.2023

**Fayaz Ahmad Wani (49 Yrs.)
S/O Abdul Rashid Wani
R/O Cheeni Chowk Anantnag
Through his brother Gowhar Ahmad Wani .**

...Petitioner(s)

Through: Mr.Arshad Andrabi, Advocate.

Vs.

- 1. Principal Secretary to Govt. /Home Department
Civil Secretariat Srinagar 190009**
- 2. District Magistrate, Anantnag**
- 3. Superintendent Central Jail, Jammu-180001**
- 4. Superintendent Central Jail Agra U.P.**

...Respondent(s)

Through: Mr.Allah-ud-din Ganai,AAG

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

JUDGMENT

1. The petitioner has challenged the detention order bearing No.50/DMA/PSA/DET/2021 dated 22.12.2021, issued by District Magistrate, Anantnag-respondent No.2 herein, in terms whereof, Fayaz Ahmad Wani @ Talak (hereinafter referred to as the 'detenue'), has been placed under preventive custody and lodged in Central Jail, Jammu, for preventing him from acting in any manner prejudicial to security of the State.

2. It is alleged in the petition that the detainee was already in custody in connection with the investigation of various criminal cases and was lodged in District Jail Anantnag, since 15.06.2021 and there was no chance of his being released on bail, as he was already booked under non-bailable offences, however, he has been booked under the provisions of J&K Public Safety Act. The detaining authority has not shown any awareness about the fact that the FIRs were registered against unknown person, and as to how and when the name of the detainee was included in the FIRs and despite a lapse of more than six months, whether the police has completed investigation and any final report has been submitted in the concerned court of law. A mere mention of an incident having taken place somewhere on the basis of which some arrests were made but nothing has been proved till date. Therefore, how the persons in various cases can become the basis for invoking the provisions of preventive laws after six months when no other incident is attributed to the detainee. The passing of order of detention in this manner is abuse of process of law. There is no nexus between the incidents cited and the objects sought to be achieved by passing this order. There is no nexus between the incidents cited and the objects sought to be achieved by passing detention order. The illegal period of detention from the date of arrest w.e.f. 01.05.2021 to the date of issuance of the order of detention under the provisions of J&K Public Safety Act i.e. 22.12.2021 is unaccounted for.

3. The petitioner has challenged detention order on various grounds, one of which is that the detainee was already in custody on

the material date in a regular cases who had not moved even bail application. There was thus no reason for detaining authority to take the subject in preventive detention from his custody as under trial. It was contended that the detention of the detenue who was already under punitive custody in a regular case(s) is illegal particularly when he had not applied for bail and therefore, there were no compelling reasons to order preventive detention. It has been further contended that the procedural safeguards have not been complied with in the instant case, as whole of the material which formed basis of the impugned detention order was not supplied to the petitioner. Further, that the grounds of detention are non-existent and stale.

4. The respondents have resisted the petition by filing counter affidavit thereto, wherein they have disputed the averments made in the petition and insisted that the activities of detenue are highly prejudicial to the maintenance of Security of the State and his detention was found absolutely necessary, and accordingly, he was ordered to be detained by the respondent District Magistrate Anantnag, with a view to prevent him from acting in any manner prejudicial to the security of the State; that the detention order and grounds of detention along with the material relied upon by the detaining authority were handed over to the detenue and the same were read over and explained to him; that the grounds urged by the petitioner are legally misconceived, factually untenable and without any merit and that the detenue was informed that he can make a representation to the government as well as to the detaining authority against his detention. It is further claimed in the reply affidavit that all

statutory requirements and constitutional guarantees have been fulfilled and complied with by the detaining authority and that the order has been issued validly and legally. The respondents have produced the detention record to lend support to the stand taken in the counter affidavit.

5. Learned counsel for the petitioner has vehemently argued that the only ground taken by the detaining authority to detain the detenu is that the ordinary law of the land will not serve as a corrective; hence his detention has become imperative. He has referred to the judgment of this Court delivered in [*Gh. Nabi Dar v. State of J & K and Ors.*](#), 2002 KLJ 637 and has argued that in view of this authority the ground is no more available to the State to detain the present detenu.

6. Learned counsel for the respondents, ex adverso, submits that the activities of the detenu are prejudicial to the security of the State and his detention was found absolutely necessary and, accordingly, he was ordered to be detained by the detaining authority vide order No. 50/DMA/DET/2021 dated 22.12.2021 with a view to prevent the detenu from acting in any manner prejudicial to the security of the State.

7. Heard learned counsel for the parties and also perused the record.

8. Having heard learned counsel for the parties and on perusal of the record, it is seen in the grounds of detention as well as in dossier that the detenu as a local trained terrorist of HM outfit, indulged in

anti-national activities and used to provide logistic support and shelter to the militants, besides keeping an eye on movement of security forces. The deteune has been detained under Public Safety Act in a number of times; however, he is still working with the militant organizations with the aim and object of creating a feeling of insecurity, pain and fear in the minds of general public and to secede the Jammu & Kashmir from Union of India. It is also mentioned in the grounds of detention that the detenue was found involved in Grenade attack on security forces at Main Chowk Achabal on 20.12.2020 and actively involved in providing a variety of logistic support to the militants. The detenue was apprehended on 15.6.2021 and was lodged in District Jail Anantnag. He was also involved in following cases registered at Police Station Anantnag:

- (1) FIR No. 431/2004 U/S 7/25 A.Act.
- (2) FIR No. 39/2008 U/S 4 Exp. Act, 7/25 A.Act.
- (3) FIR No. 492/2009 U/S 148,149,336,427,332 153 RPC.
- (4) FIR No. 331/2010 U/S 148,149,307,325,336 RPC,3/4 PPP (D) Act
- (5) FIR No. 437/2010 U/s 7/25 A.Act.
- (6) FIR No. 304/2011 U/S 148,149,307,325,325,336 RPC.
- (7) FIR No. 132/2019 U/S 13,18,19 ULA(P) Act.

9. It is further stated that the detenue is actively involved in various terrorist pursuits and worked in close co-ordination with Hizbul Mujahideen Terrorist namely Junaid Ahmad Bhat of Hangalgund Kokernag. The activities of the subject were highly prejudicial to the security of the State and Senior superintendent of Police, therefore, recommended preventive detention of the detenue to prevent him from

acting in any manner prejudicial to the Security of the State and in view of the involvement of the detenu in the aforementioned activities it is clear that the detenu is threat to the security of the State as he was working on the directions of militants whose aim is to disrupt the peaceful atmosphere and to secede the UT of J&K from rest of the counter therefore, his immediate detention was warranted.

10. This Court has in case relied upon and referred as 2002 KLJ 637 the above cited case observed as under:

"The compelling reasons spelled out by the detaining authority are, that ordinary criminal law is not enough to prevent detenu from such subversive activities. Similar proposition of law was also in **HCP No. 97/2000 titled Bilal Ahmad Bhat v. State** and Ors. Wherein while dealing with it, satisfaction and the reasons disclosed by the detaining authority while directing the preventive detention of the detenu is that the ordinary law of the land is not sufficient to deter the detenu from his activities. This cannot be accepted either, as a ground of detention."

11. It is also notable that normal law in the instant case had to be assumed to be sufficient to disable the detenu to indulge in any such activity which may have been in the estimation of the detaining authority to be treated prejudicial to the security of the State. It is being admitted by the detaining authority that the custody of the detenu had been already with the State in FIRs registered against him but how could the detenu indulge in any unlawful activity, nonetheless, such custody has not been indicated.

12. The Apex court in **Dharmendra Suganchand Chelawat & Anr. Vs. Union of India & Ors., 1990 SCC (1) 746**, has enunciated as under:-

"....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...."

13. Hon'ble the Supreme Court in the case of **Surya Prakash Sharma v. State of U P and Ors 1994 SCC (Cri) 1691**, wherein the Court has again laid down as under:

"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 921. To eschew prolixity we refrain from detailing all those cases except that of [Dharmendra Suganchand Chelawat v. Union of India](#), AIR (1990) SC 1196 wherein a three Judge Bench, after considering all the earlier relevant decisions including *Rameshwar Shaw* (supra) answered the question in the following words:

"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 implied 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."

6. When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be sustained. Though the grounds of detention indicate the detaining authority's awareness of the fact that the detainee was in judicial custody at the time of making the order of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of the averment: made in grounds of detention that if the aforesaid Surya Prakash Sharma is released on bail 'he may again indulge in serious offences causing threat to public order', (emphasis supplied), To put it differently,

the satisfaction of the detaining authority that the detainee might indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified.

14. The detainee in the present case was, at the time of his detention, already in custody in connection with the criminal cases mentioned in the grounds of detentions. In view of the law laid down by the Apex Court in [T.P. Moideen Koya v. Govt. of Kerala](#) 2004 (8) 106, if a person is in custody and there is no imminent possibility of his being released from such custody, the power of detention should not ordinarily be exercised. There must be cogent material before the authority passing the detention order for inferring that the detainee was likely to be released on bail. The court held:-

"The very object of passing a detention order being to prevent the person from acting in any manner prejudicial to maintenance of public order or from smuggling goods or dealing in smuggled goods, etc. normally there would be no requirement or necessity of passing such an order against a person who is already in custody in respect of a criminal offence where there is no immediate possibility of his being released. But in law there is no bar in passing a detention order even against such a person if the detaining authority is subjectively satisfied from the material placed before him that a detention order should be passed."

15. As already noted, the Supreme Court in a catena of judgments has clearly held that unless there are compelling circumstances and cogent material before the Detaining Authority for passing a detention order against a person who is already in custody or is facing criminal prosecution in a substantive offence, the Detaining Authority cannot pass an order of detention against such a person.

16. From the perusal of material/record produced, it is clear that the detainee has been shown involved in substantive offences. When it is so, the Detaining Authority was bound to record the compelling reasons as to why the detainee could not be deterred from indulging in

subversive activities by resorting to normal law and, as already discussed, there is no such material available on record. The impugned order of detention of the detainee is, therefore, unsustainable in law.

17. Another important aspect of the case is that there was inordinate and unexplained delay in execution of the impugned order. Detention order was passed by the detaining authority on 22.12.2021, however, the same was executed on 24.05.2022, after an inordinate delay of five months, without any difficulty faced in execution thereof. Resort to preventive detention has to be taken only in cases where there is an urgent need to detain a person so as to prevent him from indulging in activities which are prejudicial to the maintenance of public order or security of the State. When there is unsatisfactory and unexplained delay in executing the order of detention, such delay would throw considerable doubt on the genuineness of the subjective satisfaction recorded by the detaining authority. This would lead to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detainee.

18. The Supreme Court has, in the case of ***Manju Ramesh Nahar vs. Union of India and others, AIR 1999 SC 2622***, while considering a similar situation observed as under:

“This object can be achieved if the order is immediately executed. If, however, the authorities or those who are responsible for the execution of the order, sleep over the order and do not execute the order against the person against whom it has been issued, it would reflect upon the satisfaction of the detaining authority and would also be exhibit of the fact that the immediate necessity of passing that order was wholly artificial or non-existent”.

In another decision in ***SMF Sultan Abdul Kader vs. Jt. Secy, to Govt. of India & Ors., (1998) 8 SCC 343***, the Supreme Court has

held unexplained delay in execution of the order of detention to be fatal.

19. For the afore-stated reasons, the petition is allowed and the impugned detention order being unsustainable hereby quashed. The respondents are directed to release the detenue from the preventive custody forthwith, provided he is not required in connection with any other case(s).

20. The detention record be returned to learned counsel for the respondents.

(M. A. CHOWDHARY)
JUDGE

Srinagar
22.12.2023
Mujtaba.

Whether the order is reportable: Yes / No