

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

...
WP(Crl) No.545/2022

Reserved on: 18.12.2023

Pronounced on: 30.12.2023

Musaib Aziz Gojree

.....Petitioner(s)

Through: Ms. Asma Rashid, Advocate

Versus

Union Territory of J&K and others

.....Respondent(s)

Through: Mr. Zahid Noor, GA

CORAM:

HON'BLE MS. JUSTICE SINDHU SHARMA, JUDGE

JUDGEMENT

1. By way of this petition, the order of detention No. 13/DMP/PSA/22 dated 07.04.2022, passed by District Magistrate, Pulwama, vide which the detenu has been detained under Section 8 of J&K Public Safety Act, 1978, to prevent him from acting in any manner in the activities which are prejudicial to the security of the State. The said order has been assailed through his father-Abdul Aziz Gojree.

2. The order of detention has been assailed by the detenu on the grounds that (i) the material relied upon by the detaining authority to pass the order of detention has not been furnished to the detenu; (ii) once the detenu was already in detention in FIR no.28/2021 under Section 16, 18, 20 ULA(P) Act and 4/5 Explosive Substances Act registered in police station Pampore, there was no compelling reason to detain the detenu as there was no possibility of release of detenu from custody on account of offences covered in the said FIR. It is further submitted that all the constitutional and procedural safeguards provided to the detenu have not been complied with in this case as the material which form the basis of the impugned detention has not been provided to the detenu. Lastly it was submitted that there is delay in the execution of the detention order which has rendered the detention order unsustainable.

3. Mr. Zahid Noor, GA, has filed counter affidavit as well as produced the detention record. The respondents in their counter affidavit have submitted that the detenu was detained under the provisions of Jammu and Kashmir Public Safety Act, 1978 validly and legally by virtue of detention order dated 07.04.2022 issued by the District Magistrate, Pulwama. All the statutory requirements and constitutional guarantees have been fulfilled and complied with by the detaining authority, keeping in view the fact that the grounds of detention, order of detention as well as entire material relied upon by the detaining authority has been furnished to the detenu within the statutory period provided under the Act and he was also informed of his right to make an effective representation against the order of detention.

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

5. So far as the ground of challenge that material relied upon by detaining authority was not furnished to the detenu, is concerned, the perusal of the record reveals that the detenu has not been provided all the material relied upon by the detaining authority while passing the order of detention. The receipt of the grounds of detention and other relevant record reveals the detenu has received copies of detention order (01 leaf), Notice of detention (01 leaf) grounds of detention (03 leaves), Dossier of detention (Nil), Copies of FIR, Statements of Witnesses and other related relevant documents (03 leaves) (Total 08 leaves). Thus the detenu has not been provided the Dossier and precluded from making an effective representation. The detenu had to consider what made the detaining authority to pass the order of detention in order to make an effective representation. Therefore, the contention of the detenu that all the relevant material was not provided to him by the detaining authority is apparent from the record. The detenu has been hampered by non-supply of these documents for making an effective representation before the authorities. This has resulted in violation of the safeguards provided to the petitioner and, as such, the impugned order is unsustainable in law. In **Sophia Gulam Mohd. Bham vs. State of Maharashtra and others, AIR**

1999 SC 3051 the Supreme Court has held as under:

“The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the grounds are based flows from the right given to the detenu to make a representation against the order of detention. A representation can be made and the order of detention can be assailed only when all the grounds on which the order is based are communicated the detenu and the material on which those grounds are based are also disclosed and copies thereof are supplied to the person detained, in his own language.”

The failure on the part of detaining authority to supply the material to the detenu renders the detention order illegal and unsustainable.

6. In view of the aforesaid position, it is clear that the non consideration of the representation amounts to non-compliance of Article 22(5) of the Constitution which has rendered the detention order unsustainable in law.

7. The second ground of detenu is that there was no compelling reason for detaining the detenu as he was already in custody in FIR no.28/2021 under Section 16, 18, 20 ULA(P) Act and 4/5 Explosive Substances Act registered in police station Pampore, and there was no likelihood of release of the detenu in the said FIR. The Apex Court in *Surya Prakash Sharma v. State of U.P. and others*, 1994 (3) SCC 195, has noticed and laid down:

“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 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 implied 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."

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 detenu 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'.

8. In view of the aforesaid reasons, there is no need to advert to other grounds raised in this petition. This petition is allowed. Impugned Detention Order No.13/DMP/PSA/22 dated 07.04.2022, is quashed. Respondents are directed to release forthwith the detenu, namely, Musaib Aziz Gojree S/o Abdul Aziz Gojree R/o Namlabal Pampore District Pulwama, from preventive custody, if he is not required in any other case.

8. Record be returned back.

(Sindhu Sharma)
Judge

Srinagar
30.12.2023
Manzoor

Whether approved for reporting? Yes/No