

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

Reserved on: 24.12.2024

Pronounced on: 27.12.2024

WP(Crl) No.56/2023

RAFIQ AHMAD THOKER

...PETITIONER(S)

Through: - Mr. H. Furrahi, Advocate.

Vs.

UT OF J&K & ORS.

...RESPONDENT(S)

Through: - Mr. Mubashir Majid Malik, Dy. AG.

Mr. Zahid Qais Noor, GA.

CORAM:HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has challenged detention order No.159/DMS/PSA/2023 dated 24.01.2023 issued by District Magistrate, Shopian (for brevity "*detaining authority*"). In terms of the aforesaid order, *Shri Rafiq Ahmad Thoker* (for short "*detenue*") has been placed under preventive detention and lodged in District Jail, Baramulla, in order to prevent him from indulging in the activities which are prejudicial to the security of the UT/Country.

2) The petitioner has contended that the impugned order has been issued without application of mind as the allegations mentioned in the grounds of detention have no nexus with the detenue and that the same have been fabricated by the police in order to justify its illegal action of detaining the detenue. It has been contended that the grounds of detention are vague, non-existent on which no prudent man can make a representation against such allegations. It has been further contended that the safeguards provided under law have not been complied with in the instant case, inasmuch as

whole of the material which formed basis of the impugned detention order has not been supplied to the petitioner. It has been further contended that the representation filed by the detenue against his detention has not been considered.

3) The respondents have resisted the petition by filing reply affidavit, wherein they have contended that the activities of detenue are highly prejudicial to the security of the State. It is pleaded that whole of the material relied upon by the detaining authority has been furnished to the detenue and the same was read over and explained to him 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 contended in the reply affidavit that all statutory requirements and constitutional guarantees have been fulfilled and complied with by the detaining authority and that the impugned 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.

4) I have heard learned counsel for parties and perused the record.

5) Learned counsel for the petitioner, while seeking quashment of the impugned order, projected various grounds but his main thrust during the course of arguments was on the following grounds:

- (I) *That the detenue has not been provided the whole of the material, which prevented him from making an effective representation against his detention.*
- (II) *That the grounds of detention are vague and cryptic, which prevented him from making an effective representation against his detention.*

(III) That representation of the petitioner against the impugned order of detention has not been considered by the respondents thereby violating his statutory and constitutional rights.

6) So far as the first ground of challenge is concerned, a perusal of the detention record would show that in terms of receipt executed by the petitioner, he has received only grounds of detention consisting of three leaves. That means, copies of PSA warrant, notice of detention and order of detention have not been provided to the petitioner. Even the copy of the dossier of detention has not been supplied to the petitioner. Thus, contention of the petitioner that whole of the material relied upon by the detaining authority, while framing the grounds of detention, has not been supplied to him, appears to be well-founded. Obviously, the petitioner has been hampered by non-supply of these vital documents in making an effective representation. Thus, vital safeguards against arbitrary use of law of preventive detention have been observed in breach by the respondents in this case rendering the impugned order of detention unsustainable in law.

7) It needs no emphasis that the detenu cannot be expected to make an effective and purposeful representation which is his constitutional right guaranteed under Article 22(5) of the Constitution of India, unless and until the material, on which the detention is based, is supplied to the detenu. The failure on the part of detaining authority to supply the material renders the detention order illegal and unsustainable in law. While holding so, I am fortified by the judgments rendered in **Sophia Ghulam Mohd. Bham V. State of Maharashtra and others (AIR 1999 SC 3051)** and, **Thahira**

Haris Etc. Etc. V. Government of Karnataka & Ors. (AIR 2009 SC 2184).

8) Next it has been contended by learned counsel for the petitioner that the grounds of detention are vague, inasmuch as there is no mention of the particulars of alleged terrorists, to whom the petitioner was allegedly providing the logistic support.

9) On perusal of the detention record produced by learned counsel for the respondents, the ground projected regarding vagueness of the averments made in the grounds of detention, appears to be forceful. In the grounds of detention, there is no mention of the particulars of the places and the identity of the terrorists, to whom the petitioner was allegedly providing logistic support. The particulars of the period when the detainee is alleged to have provided food, shelter and other logistic support to the alleged terrorists are also not mentioned in the grounds of detention. Thus, the grounds, being vague and lacking in material particulars, the detainee could not have made an effective representation against his detention. Therefore, there has been violation of constitutional guarantees envisaged under Article 22(5) of the Constitution. The detention order, as such, is illegal and unsustainable. In my aforesaid view, I am fortified by the judgments of the Supreme Court in the case of **Jahangirkhan Fazal Khan Pathan vs. Police Commissioner, Ahmadabad, (1989) 3 SCC 590**, **Abdul Razak Nane khan Pathan v. Police Commissioner, Ahmadabad, AIR 1989 SC 2265**, **Mohd. Yousuf Rather vs. State of J&K & Ors, 1979 4 SCC 370** and **Piyush Kantilal Mehta vs. The Commissioner of Police, Ahmedabad City and Ors. 1989 (1) Crimes 176 (SC).**

10) The next ground projected by learned counsel for the petitioner is that the that representation of the petitioner against the impugned order of detention has not been considered by the respondents thereby violating his statutory and constitutional rights.

11) In the above context, the petitioner has placed on record a copy of the representation dated 30.01.2023 along with his writ petition (Annexure-III). He has also placed on record postal receipts dated 06.02.2023, which indicates that the representation has been sent to the Additional Chief Secretary to Government, Home Department and District Magistrate, Shopian. A perusal of the detention record reveals that the respondents have received the representation of the petitioner. This is evident from communication dated 13.02.2023, addressed by Deputy Secretary to Government, Home Department, to the Special DIG of Police, CID, J&K, as also from the communication dated 20.05.2023, addressed by Special DIG of Police, CID, J&K to the Financial Commissioner (Addl. Chief Secretary) Home Department. The detention record suggests that the said representation has been considered by the Government. The record shows that report regarding representation of the petitioner was called by the Government, whereafter it has been rejected. This is evident from communication dated 24.05.2023 addressed by Home Department of the Government to the District Magistrate, Shopian.

12) The respondents have not placed on record anything to show that the order of rejection of representation was conveyed to the petitioner. The communication dated 24.04.2023 is an inter-departmental communication between Home Department and the District Magistrate. It is not coming

forth from the record produced by the respondents as to whether the result of the representation has been conveyed to the petitioner.

13) The Supreme Court in the case of **Sarabjeet Singh Mokha vs. District Magistrate, Jabalpur and others” (2021) 20 SCC 98**, while dealing with the effect of failure to communicate the result of the representation has held that failure in timely communication of the rejection of the representation is a relevant factor for determining the delay that the detainee is protected under Article 22(5). It has been further held that failure of the government to communicate rejection of detainee’s representation in a time bound manner is sufficient to vitiate the detention order.

14) In the said case, the Supreme Court has further held that the delay in decision on the representation of the detainee amounts to an infringement of a valuable right which is available to a detainee in terms of provisions contained in Section 13 of the Jammu & Kashmir Public Safety Act, which makes it obligatory on the detaining authority to communicate to the detainee the grounds on which the order of detention has been made within a maximum period of ten days from the date of detention and to afford him the earliest opportunity of making representation against the order of detention. The purpose of furnishing the grounds of detention within a maximum period of ten days is to enable a detainee to make a representation against the order of detention at the earliest opportunity. Thus, a duty is cast upon the detaining authority or the government to consider the said representation at the earliest opportunity. Failure to decide the representation of a detainee within a reasonable time in an expeditious manner strikes at the valuable right of a detainee emanating from the

provisions of Section 13 of the Jammu & Kashmir Public Safety Act. In my aforesaid view.

15) In the present case, the record shows that the respondents have received the representation of the petitioner at best in the second week of February, 2023 and the rejection of the representation has been conveyed to the District Magistrate on 24.05.2023 i.e. after more than three months. As already stated, the result of consideration of representation has not been conveyed to the detainee. Thus, besides there being undue delay in consideration of the representation of the detainee, even the result of the same has not been conveyed to him. This is sufficient to vitiate the impugned order of detention.

16) For the foregoing reasons, the petition is allowed and the impugned order of detention is quashed. The detainee is directed to be released from the preventive custody forthwith provided he is not required in connection with any other case.

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

(Sanjay Dhar)
Judge

SRINAGAR

27.12.2024

“Bhat Altaf-Secy”

<i>Whether the order is speaking:</i>	Yes
<i>Whether the order is reportable:</i>	Yes