

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

...
WP (Crl) No. 163/2023

Reserved on: 19.12.2024

Pronounced on: 24.12.2024

Dawood Fayaz Zargar, aged 28 years S/o Fayaz Ahmad Zargar R/o Gani Mohalla Nowhatta, Srinagar.

..... Petitioner(s)

Through: Mr. Rehana, Advocate

Versus

1. Union Territory of J&K through Principal Secretary, Home Department , J&K Govt. Civil Sectt. Srinagar/Jammu
2. District Magistrate, Srinagar
3. Senior Superintendent of Police, Srinagar
4. Superintendent Central Jail , Kotbhalwal, Jammu.

....Respondent(s)

Through: Mr. Bikramdeep Singh, Dy. AG with
Ms. Nowbahar Khan, Assisting Counsel

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. Through the medium of this petition, Order no. DMS/PSA/26/2023 dated 12.04.2023 ("*impugned detention order*" hereinafter) passed by District Magistrate, Srinagar – respondent no. 2, (for short '*detailling authority*') whereby detenu Dawood Fayaz Zargar, S/o Fayaz Ahmad Zargar R/o Gani Mohalla Nowhatta, Srinagar, (for brevity "*detenu*") has been placed under preventive detention with a view to prevent him from indulging in the activities which are prejudicial to the maintenance of security of the State, is sought to be quashed and the detenu set at liberty on the grounds made mention of therein

2. The case set up by the petitioner in the petition is that the detenu was earlier arrested in the year 2017 in connection with FIR No 51/2017 under Section 13 ULA (P) Act, 302, 148, 149, 392 and 341 RPC, by Police Station Nowhatta, Srinagar. After completing the investigation of the case, challan was produced before the Court of competent jurisdiction and bail was granted. However, detenu was then placed under preventive detention vide

Order No.DMS/ PSA/36/2022 dated 09.04.2022 on the ground of preventing him from acting in any manner “*prejudicial to maintenance of public order*”. The said order of detention was challenged in WP (CrI) No.197/2022. The aforesaid detention order expired on 08.04.2023. However, detaining authority instead of releasing the detenu has passed impugned detention Order No.DMS/PSA/26/2023 dated 12.04.2023 on the same and similar grounds which were made use of in earlier detention order. It is also stated that in the earlier detention order, the detaining authority had shown that the activities of the detenu were highly “*prejudicial to the maintenance of public order*” while making reference to the FIR nos.54/2011; 85/2011; 14/2013 96/2015; 93/2016; 94/2016; 96/2016 and 51/2017, whereas in the impugned detention order the detaining authority has mentioned that activities of detenu are “*prejudicial to the maintenance of security of the State*” while making reference and relying upon the same FIRs, which had been mentioned in earlier detention order. This reflects total non-application of mind on the part of the detaining authority. It is also stated by petitioner that the detenu is neither involved in any fresh FIR nor any fresh prejudicial activity is alleged against him, as such, impugned detention order is in violation of Article 22(5) of Constitution of India deserves to be quashed. It is also averred that detaining authority has passed the impugned detention order mechanically without application of mind, inasmuch as the grounds of detention are vague, indefinite, cryptic, inasmuch as the detaining authority has not attributed any specific allegation against the detenu; that the detaining authority in the grounds of detention has mentioned involvement of detenu in FIR Nos. 54/2011; 85/2011; 14/2013 96/2015; 93/2016; 94/2016; 96/2016; 51/2017; 52/2017 and 19/2019 but has not furnished the material including dossier, copy of FIRs and copies of statements recorded under 161 or 164 Cr. P.C, relied upon by it, to detenu to enable him to make an effective representation by giving his version of facts attributed to him and make an attempt to dispel the apprehensions nurtured by detaining authority concerning involvement of detenu in alleged activities. It is further contended that the Constitutional and Statutory procedural safeguards have not been complied with in the instant case and unequivocally reflects and shows non-application of mind on the part of detaining authority.

3. Respondents have filed reply affidavit, insisting therein that the activities indulged in by detenu are highly prejudicial to the maintenance of security of the State and, therefore, his remaining at large is a threat to the security of State. The activities narrated in the grounds of detention have been reiterated in the reply affidavit filed by respondents. The factual averments that detenu was not supplied with relevant material relied upon in the grounds of detention have been refuted. It is insisted that all the relevant material, which has been relied upon by the detaining authority, was provided to the detenu at the time of execution of warrant.

4. I have heard learned counsel for parties and considered the matter. I have gone through the detention record produced by the counsel appearing for respondents.

5. Learned counsel for petitioner states that notwithstanding expiry of earlier detention order, respondents have again placed detenu under preventive detention in terms of impugned order of detention. His next submission is that same grounds of detention have been framed and relied upon by detaining authority to place detenu under preventive detention in terms of impugned order of detention, which had been relied upon by detaining authority while passing earlier detention order, which detention order had expired and activities alleged therein and reference made therein to FIRs could not have been again relied upon in fresh detention order. This, according to him, reflects non-application of mind on the part of detaining authority. Learned counsel also submits that detaining authority has not given any fresh grounds for detention of detenu although a passing reference has been made in the grounds of detention with respect to the report of Senior Superintendent of Police, Srinagar, that the activities of the detenu are highly prejudicial to the security of the State and normal law of land is not sufficient to deter the detenu from his nefarious activities and that during his detention period, detenu continued propagation of secessionist ideology and motivating jail inmates to rise against Government by whatever means. Moreover, he did not show signs of any change of ideology during his lodgement and used to discuss the future strategy for carrying forward the secessionist activities in the valley which itself does not amount to fresh ground when most of the incidents or facts/ grounds are taken from earlier grounds of detention and, therefore, impugned detention order is bad in law because no fresh ground has been mentioned in second detention order.

6. The earlier detention order No.DMS/ PSA/36/2022 dated 09.04.2022 had outlived its life upon completion of one year because detenu in terms of said order had been placed under detention to prevent him from acting in any manner “*prejudicial to maintenance to public order*”. The same grounds could not have been relied upon for making a fresh detention order, impugned herein. The authoritative judicial pronouncements on the subject are that even if the order of detention comes to an end either by revocation or by expiry of the period of detention, there must be fresh facts for passing a subsequent detention order. In ***Chotka Hembram v. State of West Bengal and others, AIR 1974 SC 432***, it was observed that if no fresh fact comes into being after the date of revocation or expiry as may warrant the making of an order of detention, the requisite condition precedent to the making of the subsequent detention order would be non-existent and it would not be permissible to make a subsequent order of detention.

7. For the foregoing reasons and in view of settled legal position, the fresh order of detention on the self-same and identical grounds, is vitiated in the law and, therefore, could not sustain. My views are supported by a three Judge Bench judgement of the Supreme Court rendered in the case of ***Ibrahim BachuBafan v. State of Gujarat (1985) 2 SCC 24***. While noticing similar provisions of the Conservation of Foreign Exchange and provisions of Smuggling Activities Act 1974 (COFEPOSA), Supreme Court in paragraph 10 has held thus:

“ ...The power conferred under clauses (a) and (b) of sub-section (1) of Section 11 is in fact extension of the power recognized under Section 21 of the General Clauses Act and while under the General Clauses Act, the power is exercisable by the authority making the order, the named authorities under clauses (a) and (b) of Section 11 (1) of the Act are also entitled to exercise the power of revocation. When the High Court exercises jurisdiction under Article 226 of the Constitution it does not make an order of revocation. By issuing a high prerogative writ like habeas corpus or certiorari it quashes the order impugned before it and by declaring the order to be void and striking down the same it nullifies the order. The ultimate effect of cancellation of an order by revocation and quashing of the same in exercise of the high prerogative jurisdiction vested in the High Court may be the same but the manner in which the situation is obtained is patently different and while one process is covered by Section 11(1) of the Act, the other is not known to the statute and is exercised by an authority beyond the purview of sub-section (1) of Section 11 of the Act. It is, therefore, our clear opinion that in a situation where the order of detention has been quashed by the High Court, sub-section (2) of Section 11 is not applicable and the detaining authority is not entitled to make another order under Section 3 of the Act on the same grounds”.

8. The above judgement was subsequently followed by the Supreme Court in the case of *Chhagan Bagwan Kahar v. N. L. Kalna and otehrs, 1989 AIR 1234*. Referring to the earlier judgement in *Ghulam Nabi Zaki v. State of Jammu and Kashmir, 1970 (3) SCR 35: 1971 CriLJ (N) 24*, which was rendered in the context of J&K Public Safety Act, 1978, and also taking note of the Constitution Bench judgement in the case of *Hadibandhu Das v. District Magistrate Cuttak AIR 1969 SC 43*, the Supreme Court in the case supra concluded thus:

“... It emerges from the above authoritative judicial pronouncements that even if the orders of detention come to an end either by revocation or by expiry of the period of detention there must be fresh facts of passing a subsequent order. A fortiori when a detention order is quashed by the Court issuing a high prerogative writ like habeas corpus or certiorari the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the Court strikes down an earlier order by issuing rule it nullifies the entire order. In the present case, no doubt, the order of detention contains fresh facts. In addition to that the detaining authority has referred to the earlier detention order and the judgement of the High Court quashing it, presumably for the purpose of showing that the detenu in spite of earlier detention order was continuing his bootlegging activities”.

9. It is, thus, seen that detaining authority, while arriving at subjective satisfaction, has not only to take into consideration future prospectus of detenu indulging in similar activities but has also to take into consideration the grounds on which earlier orders of detention had been passed. The judgement referred to above lends support to the contention of learned counsel for petitioner that the detention order, without fresh material, was not sustainable.

10. In addition to above, taking into account the rival contentions of parties and submissions made by learned counsel for parties vis-à-vis furnishing of the material relied upon by detaining authority, it would be relevant to go through the detention record produced by counsel for respondents. The detention record, *inter alia*, contains “*Execution Report*” and “*Receipt of Grounds of detention*”. It would be advantageous to reproduce relevant portion of *Execution Report* hereunder:

“The 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 (05 leaves), (Total 10 Leaves) have been handed over to the above said detenu.....”

11. It would also be appropriate to reproduce relevant portion of “*Receipt of Grounds of Detention*” herein:

“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 (05) Total 08 leaves through executing officer.....”

Thus, it is evident from perusal of Execution Report and Receipt of grounds of detention that only 10 leaves have been given to detenu.

12. Perusal of impugned detention order reveals that on the basis of dossier placed before detaining authority by Senior Superintendent of Police, Srinagar vide no. LGL/Det-3176/2023/9343-46 dated 08.04.2023; detaining authority was satisfied that with a view to prevent detenu from acting in any manner prejudicial to the security of the State, it was necessary to detain him under necessary provisions of law. So, it is on the basis of dossier and other connected material/documents that impugned detention order has been passed by detaining authority. The grounds of detention, when looked into, gives reference to various alleged activities of detenu, including registration of 10 FIRs, that appears to have weighed with detaining authority, while making detention order. The detention record, as noted above, does not indicate that copies of dossier, copies of FIRs, material collected during investigation of these FIRs, and other connected material was ever supplied to detenu, on the basis whereof impugned detention order has been passed. The aforesaid material, thus, assumes importance in the facts and circumstances of the case. It needs no emphasis, that detenu cannot be expected to make a meaningful exercise of his Constitutional and Statutory rights guaranteed under Article 22(5) of the Constitution of India and Section 13 of the J&K Public Safety Act, 1978, unless and until the material on which detention order is based, is supplied to him. It is only after detenu has all the said material available that he can make an effort to convince detaining authority and thereafter the Government that their apprehensions vis-à-vis his activities are baseless and misplaced. If detenu is not supplied the material, on which the detention order is based, he will not be in a position to make an effective representation against his detention order. The failure on the part of the detaining authority to supply the material, relied at the time of making the detention order to the detenu, renders the detention order illegal and unsustainable. In this regard, I may draw support from the law laid

down in the cases of *Thahira Haris Etc. Etc. v. Government of Karnataka*, AIR 2009 SC 2184; *Union of India v. Ranu Bhandari*, 2008, Cr. L. J. 4567; *Dhannajoy Dass v. District Magistrate*, AIR, 1982 SC 1315; *Sofia Gulam Mohd Bham v. State of Maharashtra and others* AIR 1999 SC 3051; and *Syed Aasiya Indrabi v. State of J&K & ors*, 2009 (I) S.L.J 219.

13. The Supreme Court in *Abdul Latief Abdul Wahab Sheikh v. B.K. Jha*, 1987 (2) SCC 22 has held that it is only the procedural requirements, which are the only safeguards available to the detenu, that is to be followed and complied with as the Court is not expected to go behind the subjective satisfaction of the detaining authority. In the present case, the procedural requirements, as discussed above, have not been followed and complied with by the respondents in letter and spirit and resultantly, the impugned detention needs to be quashed.

14. For the reasons discussed above, the detention Order no. DMS/PSA/26/2023 dated 12.04.2023, passed by District Magistrate, Srinagar, is quashed. Respondents, including Superintendent Jail concerned, are directed to release the detenu forthwith, provided he is not required in any other case.

15. **Disposed of.**

16. Registry to return detention record to learned counsel for respondents.

(Vinod Chatterji Koul)
Judge

Srinagar

24.12.2024

(Qazi Amjad, Secy)

Whether the order is reportable: Yes/No.