HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

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WP(Crl) no.632/2022

Reserved on: 03.04.2024

Pronounced on: 17.05.2024

Mubashir Ishrat Hakeem Aged 33 years S/o Hakeem Ishrat Jeelani R/o Pinglena, Pulwama through his father

…….Petitioner(s)

Through: Ms Fiza Khurshid, Advocate

Versus

1. UT of J&K through Prpl. Secy. to the Govt Home Deptt. J&K Civil Sectt. Sgr/Jmu
2. Distt Magistrate, Pulwama

……Respondent(s)

Through: Mr Zahid Qaid Noor, GA

***CORAM*:**
HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. Through the medium of this writ petition, petitioner prays for quashing Order no.71/DMP/PSA/22 dated 31.08.2022, passed by District Magistrate, Pulwama (respondent no.2), by virtue of which *Mubashir Ishrat Hakeem Aged 33 years S/o Hakeem Ishrat Jeelani R/o Pinglena, Pulwama* (detenu) has been detained to prevent him from acting in any manner prejudicial to security of the State, on the grounds made mention of therein.
2. Reply affidavit has been filed by the respondents, in which they state that the activities indulged in by detenu are highly prejudicial to the security of the State and, therefore, his remaining at large is a threat to the security of the State. The activities narrated in grounds of detention have been reiterated in the reply affidavit filed by respondents. Factual averments that detenu was not supplied with relevant material relied upon in grounds of detention have been refuted. It is insisted that all

relevant material, which has been relied upon by detaining authority, was provided to detenu at the time of execution of warrant.

3. I have heard learned counsel for parties and considered the matter.

4. The case set up by petitioner in the instant petition is that the grounds of detention are vague, indefinite, cryptic, inasmuch as detaining authority has not attributed any specific allegation against the detenu; that grounds of detention have not been prepared by detaining authority itself, which is a prerequisite to him before passing any detention order; that non-preparation of grounds of detention renders detention order bad; that representation was made by the father of detenu to the respondents for releasing the detenu, yet the same was neither considered and decided by respondents nor detenu was produced before the Advisory Board for providing him an opportunity of being heard so that he could explain to the members of the Board that detenu is innocent and his order of detention deserves to be revoked and he be set at liberty.

5. Perusal of grounds of detention reveals that the same are replica of dossier with interplay of some words here and there. This, thus, portrays non-application of mind and in the process of deriving of subjective satisfaction, has become causality. While formulating grounds of detention, detaining authority has to apply its own mind. It cannot simply reiterate whatever is written in the dossier. It will be apt to notice that the observations of the Supreme Court in the case of ***Jai Singh and others v. State of J&K, AIR 1985 SC 764,*** which are reproduced hereunder:

> "First taking up the case of Jai Singh, the first of the petitioners before us, a perusal of the grounds of detention shows that it is a verbatim reproduction of the dossier submitted by the Senior Superintendent of Police, Udhampur, to the District Magistrate requesting that a detention order may kindly be issued. At the top of the dossier, the name is mentioned as Sardar Jai Singh, father's name is mentioned as Sardar Ram Singh and the address is given as village Bharakh, Tehsil Reasi. Thereafter it is recited "The subject is an important member of ……"
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> Thereafter follow various allegations against Jai Singh, paragraph by paragraph. In the grounds of detention, all that the District Magistrate has done is to change the first three words "the subject is" into "you Jai Singh, S/o Ram Singh, resident of village Bharakh, Tehsil Reasi". Thereafter word for word the police dossier is repeated and the word "he" wherever it occurs referring to Jai Singh in the dossier is changed into "you" in the grounds of detention. We are afraid it is difficult to find proof of non-application of mind. The liberty of a

subject is a serious matter and is not to be trifled with in this casual, indifferent and routine manner."

6. From the above settled position of law, it is crystal clear that grounds of detention and dossier, if in similar language, go on to show that there has been non-application of mind on the part of detaining authority. As already noted, in the instant case, it is clear from the record on the file that the dossier and the grounds of detention contain almost similar expressions and words which shows that there has been non-application of mind on the part of detaining authority. Impugned order of detention is, therefore, unsustainable in law on this ground alone.
7. Perusal of concluding paragraph of grounds of detention mention that "*The activities as projected in the forgoing Paras of the instant dossier run heavily against you and are highly prejudicial to the Security of the State.*" This also reflects non-application of mind on the part of detaining authority and suggests that grounds of detention have not been prepared by detaining authority, thereby vitiating impugned order of detention.
8. The law is well settled that in case of preventive detention of a citizen, the obligation of the government is two-fold. One is to afford detenu opportunity to make a representation and to consider representation which may result in release of detenu. Second is to constitute a Board and to communication representation of detenu along with other materials to the Board to enable it to form its opinion and to obtain such opinion. The former is distinct from the latter. Since there is two-fold obligation of the government, so there is a two-fold right in favour of detenu to have his representation considered by the government and to have representation once again considered by the government in the light of circumstances of the case considered by the Board for the purpose of giving its opinion. In ***Dr. Rahamatullah v. State of Bihar and another, 1981 AIR SC 2069***, the Supreme Court said that normal rule 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 provisions of Article 22 (5) of the Constitution must be complied with inasmuch as it provides that detaining authority shall, as soon as may be, communicate grounds of detention and shall afford him earlier opportunity of making a representation against the order. The opportunity of making a representation is not nothing. The representation made by detenu is meant for consideration by appropriate authority without any unreasonable delay as it involves liberty of a citizen guaranteed by Article 19 of the Constitution. Non-consideration or an unreasonably belated consideration of representation tantamounts to non-compliance of Article 22(5).

9. A detenu, in case of preventive detention under J&K Public Safety Act, has a right to submit a representation to detaining authority, Government, and Advisory Board, which then, as per Article 22(5) of the Constitution of India, must be decided at the earliest opportunity possible. If representation is accepted either by Government or by detaining officer, the detenu is being released, however, if representation is rejected, then detention period is continued. In the present case, detenu through his uncle submitted a representation to detaining authority. It is the case of petitioner that detaining authority has not considered the representation of detenu nor any consideration order has been made available to him, which, according to petitioner, is fatal to the case of respondents, and constitutes sufficient ground for quashing impugned detention order.

10. In the case of ***Pankaj Kumar Chakraborty and others v. State of West Bengal (1969) 3 SCC 400***, a Constitution Bench of the Supreme Court held that the Government must act independently from the Advisory Board, and that there exists no mandate on the Government to wait for the decision of the Advisory Board. The relevant paragraphs of the said judgment are being extracted herein:

> "It is true that clause (5) does not in positive language provide as to whom the representation is to be made and by whom, when made, it is to be considered. But the expressions "as soon as may be" and "the earliest opportunity" in that clause clearly indicate that the grounds are to be served and the opportunity to make a representation are provided for to enable the detenu to show that his detention is unwarranted and since no other authority

who should consider such representation is mentioned it can only be the detaining authority to whom it is to be made which has to consider it.

Though clause (5) does not in express terms say so it follows from its provisions that it is the detaining authority which has to give to the detenu the earliest opportunity to make a representation and to consider it when so made whether its order is wrongful or contrary to the law enabling it to detain him. The illustrations given in Abdul Karim case [Abdul Karim v. State of W.B., (1969) 1 SCC 433] show that clause (5) of Article 22 not only contains the obligation of the appropriate Government to furnish the grounds and to give the earliest opportunity to make a representation but also by necessary implication the obligation to consider that representation.

Such an obligation is evidently provided for to give an opportunity to the detenu to show and a corresponding opportunity to the appropriate Government to consider any objections against the order which the detenu may raise so that no person is, through error or otherwise, wrongly arrested and detained. If it was intended that such a representation need not be considered by the Government where an Advisory Board is constituted and that representation in such cases is to be considered by the Board and not by the appropriate Government, clause (5) would not have directed the detaining authority to afford the earliest opportunity to the detenu.

In that case the words would more appropriately have been that the authority should obtain the opinion of the Board after giving an opportunity to the detenu to make a representation and communicate the same to the Board. But what would happen in cases where the detention is for less than 3 months and there is no necessity of having the opinion of the Board? If counsel's contention were to be right the representation in such cases would not have to be considered either by the appropriate Government or by the Board and the right of representation and the corresponding obligation of the appropriate Government to give the earliest opportunity to make such representation would be rendered nugatory.

In imposing the obligation to afford the opportunity to make a representation, clause (5) does not make any distinction between orders of detention for only 3 months or less and those for a longer duration. The obligation applies to both kinds of orders. The clause does not say that the representation is to be considered by the appropriate Government in the former class of cases and by the Board in the latter class of cases.

In our view it is clear from clauses (4) and (5) of Article 22 that there is a dual obligation on the appropriate Government and a dual right in favour of the detenu, namely, (1) to have his representation irrespective of the length of detention considered by the appropriate Government and (2) to have once again that representation in the light of the circumstances of the case considered by the Board before it gives its opinion. If in the light of that representation the Board finds that there is no sufficient cause for detention the Government has to revoke the order of detention and set at liberty the detenu.

Thus, whereas the Government considers the representation to ascertain whether the order is in conformity with its power under the relevant law, the Board considers such representation from the point of view of arriving at its opinion whether there is sufficient cause for detention. The obligation of the appropriate Government to afford to the detenu the opportunity to make a representation and to consider that representation is distinct from the Government's obligation to constitute a Board and to communicate the representation amongst other materials to the Board to enable it to form its opinion and to obtain such opinion.

This conclusion is strengthened by the other provisions of the Act. In conformity with clauses (4) and (5) of Article 22, Section 7 of the Act enjoins upon the detaining authority to furnish to the detenu grounds of

> detention within five days from the date of his detention and to afford to the detenu the earliest opportunity to make his representation to the appropriate Government. Sections 8 and 9 enjoin upon the appropriate Government to constitute an Advisory Board and to place within 30 days from the date of the detention the grounds for detention, the detenu's representation and also the report of the officer where the order of detention is made by an officer and not by the Government.
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> The obligation under Section 7 is quite distinct from that under Sections 8 and 9. If the representation was for the consideration not by the Government but by the Board only as contended, there was no necessity to provide that it should be addressed to the Government and not directly to the Board. The Government could not have been intended to be only a transmitting authority nor could it have been contemplated that it should sit tight on that representation and remit it to the Board after it is constituted. The peremptory language in clause (5) of Article 22 and Section 7 of the Act would not have been necessary if the Board and not the Government had to consider the representation.
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> Section 13 also furnishes an answer to the argument of the counsel for the State. Under that section the State Government and the Central Government are empowered to revoke or modify an order of detention. That power is evidently provided for to enable the Government to take appropriate action where on a representation made to it, it finds that the order in question should be modified or even revoked.
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> Obviously, the intention of Parliament could not have been that the appropriate Government should pass an order under Section 13 without considering the representation which has under Section 7 been addressed to it. For the reasons aforesaid we are in agreement with the decision in Abdul Karim case [Abdul Karim v. State of W.B., (1969) 1 SCC 433].
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> Consequently, the petitioners had a Constitutional right and there was on the State Government a corresponding Constitutional obligation to consider their representations irrespective of whether they were made before or after their cases were referred to the Advisory Board and that not having been done the order of detention against them cannot be sustained. In this view it is not necessary for us to examine the other objections raised against these orders. The petition is therefore allowed, the orders of detention against Petitioners 15 and 36 are set aside and we direct that they should be set at liberty forthwith."

11. In ***Jayanarayan Sukul v. State of West Bengal***, reported in ***(1970) 1 SCC 219***, the same issue was considered by Constitution Bench of the Supreme Court, in which it went on to reiterate the principles in ***Pankaj Kumar*** case (supra), and held that government must act independently of the Advisory Board, and can decide a representation made by detenu without hearing from the Advisory Board. Four principles have been enunciated by the Court in ***Jayanarayan Sukul*** (supra) aimed at shielding personal freedom against indifference, insensibility, routine and red tape and thus to secure to the detenu the right to make an effective representation, which are that: (1) the detaining authority must provide the detenu a very early opportunity to make a representation, (2) the detaining authority must consider the representation as soon as

possible, and this, preferably, must be before the representation is forwarded to the Advisory Board, (3) the representation must be forwarded to the Advisory Board before the Board makes its report, and (4) the consideration by the detaining authority of the representation must be entirely independent of the hearing by the Board or its report, expedition being essential at every stage.

12. In ***Harardhan Saha and another v. State of West Bengal and others*** reported in ***1974 AIR SC 2154***, yet another Constitution Bench of the Supreme Court considered the distinction between consideration of representation made by detenu in cases of preventive detention and it was stated that if representation was made before the matter is referred to Advisory Board, detaining authority must consider such representation, but if representation is made after the matter is referred to Advisory Board, the detaining authority would first consider it and then send it to the Advisory Board.

13. At the stage of consideration of representation by the State Government, the obligation of the State Government is such as Article 22(5) implies. If the representation of the detenu is received before the matter is referred to the Advisory Board, the detaining authority considers the representation. If a representation is made after the matter has been referred to the Advisory Board, the detaining authority will consider it before it sends representation to the Advisory Board.

14. In the case of ***Francis Coralie Mullin v. W.C. Khambra and others***, reported in ***1980 AIR SC 849***, the Supreme Court considered the principles laid down in the case of ***Jayanarayan Sukul*** (supra), and while it agreed with the principles of said case, it however made an observation stating that when it was said that the Government must decide on representation before forwarding it to the advisory board, the emphasis was not on time, but on the onus of the Government to decide the representation independently. This essentially meant that the Government must act independently of the Advisory Board. Relevant paragraphs from said judgment are being extracted herein:

> "We have no doubt in our minds about the role of the Court in cases of preventive detention : it has to be one of eternal vigilance. No freedom is higher than personal freedom and no duty higher than to maintain it unimpaired. The Court's writ is the ultimate insurance against illegal

detention. The Constitution enjoins conformance with the provisions of Article 22 and the Court exacts compliance. Article 22(5) vests in the detenu the right to be provided with an opportunity to make a representation. Here the Law Reports tell a story and teach a lesson.

It is that the principal enemy of the detenu and his right to make a representation is neither high-handedness nor mean-mindedness but the casual indifference, the mindless insensibility, the routine and the red tape of the bureaucratic machine. The four principles enunciated by the Court in Jayanarayan Sukul v. State of W.B. [Jayanarayan Sukul v. State of W.B., (1970) 1 SCC 219 : 1970 SCC (Cri) 92] as well as other principles enunciated in other cases, an analysis will show, are aimed at shielding personal freedom against indifference, insensibility, routine and red tape and thus to secure to the detenu the right to make an effective representation.

We agree : (1) the detaining authority must provide the detenu a very early opportunity to make a representation, (2) the detaining authority must consider the representation as soon as possible, and this, preferably, must be before the representation is forwarded to the Advisory Board, (3) the representation must be forwarded to the Advisory Board before the Board makes its report, and (4) the consideration by the detaining authority of the representation must be entirely independent of the hearing by the Board or its report, expedition being essential at every stage. We, however, hasten to add that the time imperative can never be absolute or obsessive.

The Court's observations are not to be so understood. There has to be lee-way, depending on the necessities (we refrain from using the word "circumstances") of the case. One may well imagine a case where a detenu does not make a representation before the Board makes its report making it impossible for the detaining authority either to consider it or to forward it to the Board in time or a case where a detenu makes a representation to the detaining authority so shortly before the Advisory Board takes up the reference that the detaining authority cannot consider the representation before then but may merely forward it to the Board without himself considering it.

Several such situations may arise compelling departure from the time-imperative. But no allowance can be made for lethargic indifference. No allowance can be made for needless procrastination. But, allowance must surely be made for necessary consultation where legal intricacies and factual ramifications are involved. The burden of explaining the necessity for the slightest departure from the time-imperative is on the detaining authority.

We have already expressed our agreement with the four principles enunciated in Jayanarayan Sukul v. State of W.B. [Jayanarayan Sukul v. State of W.B., (1970) 1 SCC 219 : 1970 SCC (Cri) 92] We would make one observation. When it was said there that the Government should come to its decision on the representation before the Government forwarded the representation to the Advisory Board, the emphasis was not on the point of time but on the requirement that the Government should consider the representation independently of the Board."

15. The Supreme Court in ***Pramod Singla v. Union of India and others***, reported as ***AIR Online 2023 SC 344***, has held and concluded that preventive detention laws in India are a colonial legacy, and as such, are extremely powerful laws that have ability to confer power to the state. In such circumstances, where there is a possibility of an unfettered discretion of power by the government the court must analyze cases arising from such laws with extreme caution and excruciating detail, to

ensure that there are checks and balances on the power of the government. Every procedural rigidity must be followed in entirety by the government in cases of preventive detention and every lapse in procedure must give rise to a benefit to the case of detenu. The courts, in circumstances of preventive detention, are conferred with the duty that has been given the utmost importance by the Constitution, which is the protection of individual and civil liberties. This act of protecting civil liberties, is not just the saving of r5rights of individuals in person and the society at large, but is also an act of preserving our Constitutional ethos.

16. From above legal position, it is clear that non-consideration or an unreasonably belated consideration of the representation tantamount to non-compliance of Article 22(5) of the Constitution, which in turn renders the detention unsustainable in law.

17. For the reasons discussed above, writ petition is disposed of and detention Order no.71/DMP/PSA/22 dated 31.08.2022, passed by District Magistrate, Pulwama, is quashed. Respondents, including Superintendent Jail concerned, are directed to release the detenu forthwith, provided he is not required in any other case. Disposed of.

(Vinod Chatterji Koul)
Judge

Srinagar
17.05.2024
"Imtiyaz"

Whether approved for reporting? Yes/No.