HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

HCP No.33/2013
Cr.MP No.14/2013

Date of order: 11/09/2013

Aijaz Ahmad Bhat

Versus

State of J&K and another

Coram:

Hon'ble Mr. Justice Tashi Rabstan, Judge

Appearing Counsel:
For Petitioner(s): Mr. Bakhat Parvez, Adv vice Mr.Mir Shafaqat Hussain, Advocate
For Respondent(s): Mr. R. A. Khan, Additional Advocate General

i.	Whether approved for reporting in Press/Media	: Yes/No/Optional
ii.	Whether to be reported in Digest/Journal	: Yes/No

1. Detention order No. DMS/PSA/53/2012 dated 13.03.2013, passed by District Magistrate, Srinagar – respondent no.2 in the petition, is called in question in this petition at pre-execution stage.

2. The Court, on 9th April 2013, while issuing notice to other-side, stayed the detention order.

3. Respondents filed their reply, resisting the petition on the averments made therein and seeking dismissal thereof.

4. Heard learned counsel for the parties. Considered the matter.

5. Learned counsel for petitioner states that in the grounds of detention, which has been made basis of passing the impugned order, there is a reference of case – FIR No.15/2013 under Section 147, 148, 336, 427, 307 RPC P/S Batamaloo, in

which petitioner is alleged to have been involved. It is contended that petitioner has been granted regular bail in the aforesaid FIR by the court of Judge Small Causes, Srinagar, on 11th March 2013. However, he was not released from the jail for the reason that the the petitioner was sent to different agencies including Counter Intelligence Kashmir (CIK) and ultimately on clearance from CIK, petitioner was released from jail 4th April 2013.

6. Learned counsel for petitioner next submits that before release of the petitioner from the jail in the aforesaid FIR, admittedly, impugned order was already passed on 13th March 2013, therefore, it could have been executed upon petitioner the moment he was released from the jail without waste of time or even when he was lodged in the jail. According to learned counsel, there is no considerable delay in execution of impugned order and this vital flaw, on the face of it, turns out to be fatal. He submits that there is no justification tendered by the Executing Agency for the delay caused in executing the impugned order and this fundamental defect crept in, defeats the basic purpose of the detention order.

7. Learned counsel for petitioner submits that if one looks at the grounds of detention, the purpose of passing the said order is to maintain public order as an immediate preventive measure which purpose, in any case, does not survive by afflux of time

when there is no adverse report against petitioner available with the State agency about his involvement in any activity prejudicial to the security of the State but for registration of the aforesaid case.

8. Learned counsel for petitioner draws the attention of this Court to various paragraphs, particularly paragraphs "2" and "4" of the Counter Affidavit filed by respondents, and states that Counter Affidavit depicts non-application of mind on the part of respondent no.2, in which it is mentioned that "*the warrant was executed and the detenue was taken into preventive custody after the contents of warrants were read over and explained to him, in lieu thereof the detenue has put his signature on the executed copy of detention warrant on its endorsement*" and that "*all the activities of the detenue were highlighted in the grounds of detention which are itself a compelling reasons to detain the detenue*". Thus, respondent no.2 appears to have not gone through the petition, in which petitioner has thrown challenge to detention order prior to its execution, which in itself shows that respondent no.2 has not applied his mind properly while filing counter affidavit in opposition to the petition on hand.

9. Learned counsel for petitioner, to lend support to his submissions, relies upon judgment passed in case titled ***Deepak Bajaj v. State of Maharashtra & another [AIR***

2009 S.C. 628], in which at paragraph 5, the Supreme court has observed:

> *"Neither the Constitution including the provisions of Article 22 thereof nor the Act in question places any restriction on the powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammeled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. However, the courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the courts. To accept Shri Jain's present contention would mean that the courts should disregard all these time-honoured and well-tested judicial self- restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibal for the appellants, as far as detention orders are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this is more important, it is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although*

> *such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question."*

10. Learned counsel for petitioner also relies upon a judgement of this court rendred in case titled ***Mohd Ashraf Khan v. State and others [SLJ 2010 (I) 365]***, in which as well this Court while noticing almost the similar facts, quashed the detention order at pre-execution stage finding it to be an exceptional case.

11. Per contra, Mr. Chashoo, learned Additional Advocate General, vehemently opposes the arguments advanced by learned counsel for petitioner, projecting the cause of petitioner for relief sought in the petition.

12. After hearing rival contentions of learned counsel for both the sides and going through the record, I find that petitioner has been able to make out a case for quashing the impugned order at its execution stage itself on the grounds projected herein. The ratio of *Deepak Bajaj's* case (supra) rendered by Hon'ble Supreme Court and *Mohd Ashraf Khan's* case (supra)

rendered by this Court, are squarely applicable to the facts of the present case.

13. In my view, the present case, on its own facts, falls within the category of an exceptional case, which warrants judicial review qua its sustainability. The net result is that the impugned order of detention passed by District Magistrate Srinagar is not sustainable, therefore, deserves to be quashed.

14. Resultantly, the petition at hand is allowed as prayed for. Impugned order No.DMS/PSA/53/2012 dated 13.03.2013 is quashed, losing its operational effect henceforth. This order does not, in any, way prevent the respondents from continuing with their prosecution and/or launching fresh prosecutions against petitioner in respect of alleged wrongs.

15. Disposed of along with CMP(s).

16. Record be returned to counsel for respondents.

(Tashi Rabstan)
Judge

Srinagar
11/09/2013
Ajaz Ahmad