HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

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HCP no. 95/2017
MP no.01/2017

Date of order: 09.06.2017

Imtiyaz Ahmad Khanday

Versus

State of J&K and others

Coram:

Hon'ble Mr Justice Tashi Rabstan, Judge

Appearing Counsel:

For Petitioner(s): Mr Shafqat Nazir, Advocate
For Respondent(s): Mr Hashim Hussaijn, Dy.AG vice Mr B.A.Dar, Sr. AAG

Whether approved for reporting? Yes/No

1. Detention order no.DIVCOM-"K"/51/2017 dated 08th March 2017, issued by Divisional Commissioner, Kashmir – respondent no.2 here, is called in question in this petition at pre-execution stage.
2. Respondents though given ample opportunities to file reply, have opted not to file reply. However, the record has been produced by learned counsel for respondents.
3. Heard learned counsel for the parties. Considered the matter.
4. Learned counsel for petitioner states that grounds of detention as formulated by Divisional Commissioner are vague, irrelevant, extraneous and non-existent in the eyes of law and allegations levelled against petitioner are false and fabricated and grounds of detention are ditto copy of dossier forwarded by Superintendent of Police, Sopore – respondent no.3 here, which demonstrates complete non-application of mind on part of authority and that no compelling reasons have been assigned therein. Petitioner is said to have been arrested on 11.06.2016 by police station Dangiwacha

and implicated in FIR no.46/2016 under Section 8/22 NDPS. He, however, has been enlarged on bail on 02.07.2016 by the court of Principal Sessions Judge, Baramulla. Learned counsel states that while petitioner was in custody respondent no.3 submitted a dossier to respondent no.2 on 20.06.2016. Respondent no.2 did not act upon recommendation, but after more than eight months, respondent no.2 passed impugned order. Learned counsel states that as order of detention is yet to be executed, the delay in its execution snatches live link between detention order and purpose sought to be achieved.

5. Learned counsel for petitioner also submits that the petition in the present form is maintainable and tenable both on law as well as on facts to substantively challenge the order of detention at pre-execution stage in view of the decision of the Apex Court in ***Deepak Bajaj v. State of Maharashtra and another (2008)16 SCC 14***. According to him, the Apex Court, considering its earlier decision in ***Additional Secretary to the Government of India and others V/s. Smt. Alka Subhash Gadia and another 1992 Supp. (1) SCC 496*** and objections taken at pre-execution stage by the other side therein, on identical ground, has held that "*we are of the opinion that the five grounds mentioned therein on which the Court can set-aside the detention order at pre execution stage are only illustrative not exhaustive*". Learned counsel for petitioner also relies upon the decision of the Supreme Court in ***Rajinder Arora v. Union of India & ors 2006 (2) Crimes (SC) 61*** and of this Court in ***Mohammad Ashraf Khan v. State & ors 2010 (I) SLJ 365***.

Lastly, he has submitted that it is an established law that detention in case of offence registered against petitioner under the Act, is against the law.

6. Learned counsel for respondents, on the other hand, insists that this petition is at pre-execution stage, without surrendering, before challenging order of detention. Unless and until petitioner surrenders, he would not be entitled to get the order as well as the grounds thereunder and petitioner would not be entitled to copies of the same by filing the present petition.

7. Before the petition is taken on merits, it is necessary to keep in mind that a pre-detention order can be quashed only on a limited ground. The Supreme Court in ***Alka Subhash Gadia*** case (supra) has laid down the criteria therefor upon a detailed consideration of the provisions of the Preventive Detention Laws and the right of individual to assail an order of detention without surrendering in the following terms:

> "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."

8. The three Judge Bench of the Supreme Court in ***Naresh Kumar Goyal v. Union of India & ors (2005) 8 SCC 276***, opined

> "It is trite law that an order of detention is not a curative or reformative or punitive action, but a preventive action, avowed object of which being to prevent the anti-social and subversive elements from imperiling the welfare of the country or the security of the nation or from disturbing the public tranquility or from indulging in smuggling activities or from engaging in illicit traffic in narcotic drugs and psychotropic substances etc. Preventive detention is devised to afford protection to society. The authorities on the subject have consistently taken the view that preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it, and to prevent him from doing so. It, therefore, becomes imperative on the part of the detaining authority as well as the executing authority to be very vigilant and keep their eyes skinned but not to turn a blind eye in securing the detenue and executing the detention order because any indifferent attitude on the part of the detaining authority or executing authority will defeat the very purpose of preventive action and turn the detention order as a dead letter and frustrate the entire proceedings. Inordinate delay, for which no adequate explanation is furnished, led to the assumption that the live and proximate link between the grounds of detention and the purpose of detention is snapped. (See: *P.U. Iqbal v. Union of India and Ors.,; Ashok Kumar v. Delhi Administration, and Bhawarlal Ganeshmalji v. State of Tamilnadu*)"

9. In that case, however, the order of detention had not been implemented for a long time and having considered *Alka Subhash Gadia* (supra) and several other decisions, it was held:

> "Coming to the facts of this case, at the highest the case of the appellant is that the order of detention was belatedly passed and the State of Bihar thereafter took no steps whatsoever to implement the order of detention. Counsel for the appellant sought to bring this case under the third exception enumerated in *Alka Subhash Gadia* (supra), namely, that the order was passed for a wrong purpose. In the facts and circumstances of this case, it is not possible to accept the submission that the order was passed for a wrong purpose.

> Apparently the order has been passed with a view to prevent the appellant from smuggling goods or abetting the smuggling thereof etc. The facts of the present case are no different from the facts in *Muneesh Suneja* (supra). We do not find that the case falls within any of the exceptions enumerated in *Alka Subhash Gadia* (supra). The High Court was, therefore, justified in refusing to exercise jurisdiction under Article 226 of the Constitution of India to quash the order of detention at the pre- arrest stage. This appeal is, therefore, devoid of merit and is dismissed."

10. In the present case, dossier has been submitted by respondent no.3 on 20.06.2016 when petitioner was in custody in connection with FIR no.26/2016. Petitioner was released on bail on 02.07.2016. Impugned detention order has been passed by respondent no.2, after lapse of eight months, on 08.03.2017. There is no grounds muchless cogent or material to show the reason for delay in arriving at subjective satisfaction for passing impugned detention order.

11. The question with regard to delay in issuing order of detention has been held to be a valid ground for quashing an order of detention by the Supreme Court in ***T.D. Abdul Rahman v. State of Kerala & ors AIR 1990 SC 225***, stating

> "The conspectus of the above decisions can be summarised thus: The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinize whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon

> to answer and further the court has to investigate whether the causal connection has been broken in the circumstances of each case.
> Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in a prejudicial manner."

12. The delay caused in this case in issuing the order of detention has not been explained. In fact, no reason in that behalf whatsoever has been assigned at all. The order of detention is passed on the basis of what has come to be known as the subjective satisfaction of the detaining authority. Such subjective satisfaction has to be arrived at on two points. Firstly, on the veracity of facts imputed to the person to be detained and secondly, on the prognostication of detaining authority that the person concerned is likely to indulge again in the same kind of notorious activities. Whereas, normal laws are primarily concerned with the act of commission of offence, the detention laws are concerned with character of the person who has committed or is likely to commit an offence. Detaining authority has, therefore, to be satisfied that the person sought to be detained is of such a type that he will continue to violate the laws of the land if he is not preventively detained. So, commission of infraction of law, not done in an organized or systematic manner, may not be sufficient for detaining authority to justifiably come to the conclusion that there is no alternate but to preventively detain petitioner.

13. No doubt, neither possibility of launching of a criminal proceedings nor pendency of any criminal proceedings is an absolute bar to an order of preventive detention. But, failure of detaining authority to consider possibility of either launching or pendency of criminal proceedings may, in the circumstances of a case, lead to the conclusions that detaining authority has not applied its mind to vital question whether it was necessary to make an order of preventive detention. Since there is an allegation that the order of detention is issued in a mechanical manner without keeping in mind whether it was necessary to make such an order when ordinary criminal proceedings could well serve the purpose. Detaining authority must satisfy the court that the question too was borne in mind before the order of detention was made. In the case on hand, the detaining authority has failed to satisfy the Court that detaining authority so bore the question in mind and, therefore, the Court is justified in drawing the inference that there was non-application of mind by detaining authority to vital question whether it was necessary to preventively detain the petitioner.

14. Having regard to the aforesaid discussion, 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*, Alka Subhas Gadia's cases (supra) rendered by the Supreme Court and *Mohammad Ashraf Khan's* case (supra) rendered by this Court, are squarely applicable to the facts of the present case.

15. 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 Divisional Commissioner, Kashmir, is not sustainable, therefore, deserves to be quashed.

16. Resultantly, the petition at hand is allowed as prayed for. Impugned order no.DIVCOM-"K"/51/2017 dated 08th March 2017, issued by Divisional Commissioner, Kashmir 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.

17. **Disposed of** along with MP(s).

18. Record be returned to counsel for respondents.

(Tashi Rabstan)
Judge

Srinagar
09th June, 2017
Ajaz Ahmad