

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

Reserved on: 17.12.2020
Pronounced on: 31.12.2020

LPA No.208/2019

Amir Shafi Bhat

...Appellant(s)

Through: - Mr. Wajid Haseeb, Advocate.

Vs.

State of J&K & others.

...Respondent(s)

Through: - Mr. Mir Suhail, AAG.

CORAM:

**Hon'ble Mr. Justice Sanjeev Kumar, Judge.
Hon'ble Mr. Justice Rajnesh Oswal, Judge**

JUDGMENT

Sanjeev Kumar 'J'

01. This intra-court appeal is directed against the judgment dated 22nd July, 2019 passed by the learned Single Judge of this Court in HCP No.120/2019 titled Amir Shafi Bhat v. State of J&K and others, whereby the petition filed by the appellant for quashing his detention under the Jammu & Kashmir Public Safety Act, 1978, has been dismissed.

02. With a view to appreciate the grounds of challenge urged by Mr Wajid Haseeb, learned counsel for the appellant, in support of the appeal, brief reference to the background facts would be worthwhile.

03. The appellant who was facing criminal charges in several FIRs registered in the Police Station Pulwama, for various offences, including

Sections 307 and 427 RPC and 7/27 Arms Act, etc., was placed under preventive detention by the District Magistrate, Pulwama (Detaining Authority), vide its order bearing No. 1/DMP/PSA/19 dated 17th January, 2019 as is evident from the order placed on record. The detention of the appellant was necessitated with a view to prevent him from acting in any manner prejudicial to the security of the State and the requisite satisfaction was drawn by the detaining authority purportedly on the basis of material supplied by the Sr. Superintendent of Police, Pulwama, vide his communication dated 7th December, 2018. This order of detention was assailed by the appellant in HCP No.22/2019. The detenu, it is contended, was however released from the preventive detention during the pendency of the aforesaid petition.

04. The detenu was once again slapped with another order of detention issued by the detaining authority vide his No.17/DMP/PSA/19 dated 15.03.2019 virtually on identical grounds. It is this order of detention which was impugned by the appellant before the Writ Court on various grounds.

05. The Writ Court upon hearing both the sides and going through the detention record came to the conclusion that the detention of the detenu in terms of the impugned order was necessary to prevent him from acting in any manner prejudicial to the security of the State and that all the procedural safeguards including providing of relevant material to the detenu enabling him to make an effective representation had been adhered to. The Writ Court did not agree with the contention of the appellant (detenu) that the impugned order of detention was bad for

non-application of mind and had been passed without deriving requisite subjective satisfaction. The contention of the appellant was rejected on the ground that in view of the settled legal position that if a detention order is issued on more than one ground, independent of each other, the same will survive even if one of the grounds is found to be unfounded or legally unsustainable. Placing reliance upon the judgment of the Supreme Court in *Gautam Jain v. Union of India and anr. : 2017 (1) Jammu Kashmir Law Times 1*, the Single Bench dismissed the petition in terms of its judgment dated 22nd July, 2019 which is assailed by the appellant before us in this appeal.

06. Having heard learned counsel for the parties and perused the record, we are of the view that impugned judgment of the learned Single Judge is not sustainable in law and deserves to be set aside.

07. The Single Bench has not taken into consideration a very vital ground of challenge urged by the appellant to assail his detention. It was a very specific case set-up by the appellant before the Single Bench that he was initially detained in preventive custody in terms of order dated 17th January, 2019, which the appellant had assailed in HCP No.22/2019 and, therefore, there was no fresh material with the detaining authority to pass another order of detention on 15th March, 2019 on selfsame grounds. It was also the contention of the appellant before the learned Single Judge that in the subsequent order passed on 15th March, 2019 which was impugned in the writ petition, the detaining authority had made no mention to the earlier order of detention issued on 17th January, 2019. Even in the grounds of detention served pursuant to order dated

17th January, 2019, there was reference to the involvement of the appellant in three FIRs whereas in the impugned order of detention dated 15th March, 2019, the detaining authority had indicated the involvement of the appellant in two FIRs. This aspect would have gone to root of the detention. As is already held by this Court, the non-application of mind vitiates the whole detention even if it is made on more than one ground.

08. From the reply of the detaining authority, it is not gatherable as to what were the compelling reasons to issue the order of detention when the appellant had already been detained pursuant to the order of detention issued on 17th January, 2019. It is also not clear to us as to whether the order of detention issued on 17th January, 2019 was withdrawn or it did not meet the approval of the Government.

09. Absent, any specific stand taken by the detaining authority, this court is left with no option but to presume that second detention order was issued on 15th March, 2019, by the detaining authority without being aware that the detainee was already under detention pursuant to the first order of detention passed on 17th January, 2019. The grounds of detention purportedly served upon the detainee pursuant to the order of detention dated 17th January, 2019, make mention of three FIRs i.e., FIR Nos.167/2018, 223/2018 and 235/2018 whereas, the grounds of detention served pursuant to the impugned order of detention passed on 15th March, 2019, refer to only two FIRs i.e., FIR Nos. 167/2018 and 223/2018. It is not thus clear what happened to FIR No.235/2018.

10. From the aforesaid facts, it transpires beyond any doubt that in the instant case, the detaining authority acted in a mechanical manner and, therefore, failed to take into consideration the relevant material for deriving its subjective satisfaction. This single ground would be sufficient to vitiate the detention whether it is made on one or more than one grounds.

11. The reliance by the Writ Court on the judgment of the Supreme Court in *Gautam Jain v. Union of India & anr*, (supra) was also misplaced. The said judgment was clearly not applicable in the given facts and circumstances of the instant case. The distinction between the grounds of detention on the basis of which detinue is detained and the grounds of challenge taken by the detinue to assail his detention has already been explained by a Division Bench of this Court in the case of *Nisar Ahmad Qazi v. State of J&K and another (LPAHC No.06/2019)* decided on 27th November, 2020.

12. What was held by the Division Bench of this Court in the aforesaid judgment is summarized in paras 10 and 11 which are reproduced hereunder:

“10. With a view to understand this fine distinction between the grounds of detention and grounds of challenge to the detention order, it is necessary to refer to the observations of the Supreme Court made in para 17 of the judgment rendered in the case of Hansmukh v. State of Gujarat and others, (1981) 2 SCC 175:

“17.Earlier, in Prabhu DayalDeorah etc. v. District Magistrate, Kamrup and Ors, Mathew, J., speaking for the majority, elucidated the position, thus:

The detenu has a right under Article 22(5) of the Constitution to be afforded the earliest opportunity of making a representation against the order of detention. That constitutional right includes within its compass the right to be furnished with adequate particulars of the grounds of detention order.

From these decisions it is clear that while the expression "grounds" in Article 22(5), and for that matter, in Section 3(3) of the COFEPOSA, includes not only conclusions of fact but also all the 'basic facts' on which those conclusions are founded, they are different from subsidiary facts or further particulars of the "basic facts. The distinction between "basic facts" which are essential factual constituents of the "grounds" and their further particulars or subsidiary details is important. While the "basic facts" being integral part of the "grounds" must, according to Section 3(3) of COFEPOSA "be communicated to the detenu, as soon as may be, after the detention, ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than 15 days from the date of detention", further particulars of those grounds, in compliance with the second constitutional imperative spelled out from Article 22(5) in Khudi Ram's case, are required to be communicated to the detenu, as soon as may be practicable, with reasonable expedition. It follows, that if in a case the so called "grounds of detention" communicated

to the detenu lack the basic or primary facts on which the conclusions of fact stated therein are founded, and this deficiency is not made good and communicated to the detenu within the period specified in Section 3(3), the omission will be fatal to the validity of the detention. If however, the grounds communicated are elaborate and contain all the "basic facts" but are not comprehensive enough to cover all the details or particulars of the "basic facts", such particulars, also must be supplied to the detenu, if asked for by him, with reasonable expedition, within a reasonable time. What is "reasonable time conforming with reasonable expedition", required for the supply of such details or further particulars, is a question of fact depending upon the facts and circumstances of the particular case. In the circumstances of a given case, if the time taken for supply of such additional particulars, exceeds marginally, the maximum fixed by the statute for communication of the grounds it may still be regarded "reasonable", while in the facts of another case, even a delay which does not exceed 15 days, may be unjustified, and amount to an infraction of the second constitutional imperative pointed out in Khudi Ram's case"

11. Viewed thus, it is seen that in the present case the subjective satisfaction is based primarily on one ground i.e. the activities the detenue has been persistently involved in over a period if not prevented by putting him under preventive detention would pose serious threat to the security of the State. All other details including reference to involvement of the detenue in FIRs etc. only constitute subsidiary facts giving rise to a substantive ground on the basis of which the detaining authority is of the view that the detention under

preventive law should be ordered. The plea of the appellant that the subjective satisfaction of the detaining authority, which is sine qua non for ordering the detention under preventive law, is vitiated by non-application of mind, is, strictly speaking, not a ground of detention but a ground of challenge raised to assail the order of detention itself. Subjective satisfaction without taking relevant material in consideration and the non-application of mind by the detaining authority are the grounds that go to the root of the detention and vitiates it completely. In that view of the matter we are of the firm view that the judgment of Gautam Jain (supra) is not attracted in the case in hand. The order of detention is clearly vitiated by total non-application of mind by the detaining authority and should have been held so by the Writ Court.

13. In view of the foregoing, we find merit in this appeal and accordingly the same is allowed. The order of the Writ Court is set aside and the detention of the appellant made pursuant to order of detention dated 15th March, 2019 is found to be bad in the eyes of law and is, therefore, quashed. The detenue shall be released from the detention forthwith provided he is not required in any other case(s).

(Rajnish Oswal)
Judge

(Sanjeev Kumar)
Judge

Srinagar
31.12.2020
"Abdul Qayoom, PS"

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