

HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

...

WP (Crl) no.121/2020

Reserved on: 24.02.2021

Pronounced on: 26.02.2021

Nisar Ahmad Rather

..... Petitioner(s)

Through: Mr N. A. Ronga, Advocate

Versus

Union Territory of J&K and another

.....Respondent(s)

Through: Mr Mir Suhail, AAG

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

26.02.2021

1. Impugned in this petition is Order no.DMB/PSA/07 of 2020 dated 02.03.2020, passed by District Magistrate, Budgam, placing one *Shri Nissar Ahmad Rather S/o Ghulam Mohammad Rather R/o Dalwan Charar-i-Sharief, Budgam* (for short "*detenu*") under preventive detention and directing his lodgement in Kotbhalwal Jail, Jammu, primarily on the grounds that detenu has not been informed that detenu while making a representation against his detention before the Government, has also a right to make a representation before detaining authority, thereby violating the Constitutional and Statutory rights guaranteed to him and that grounds of detention are replica of police dossier.
2. Respondents have filed Reply Affidavit in opposition to writ petition on hand, in which it is insisted by them that detenu is a chronic, habitual and hardcore stone pelter and found responsible for organising antinational protests and provoking youths of Humhama to pelt stones upon security forces and peace-loving citizens, which resulted in

serious law and order problem in the area. Detenu is stated to be involved in two cases/FIRs.

3. I have heard learned counsel for parties and considered the matter.
4. Perusal of the detention record reveals that a communication no.DMB/PSA/2020/07 dated 02.03.2020, was addressed to detaining authority, informing him to make a representation against his detention to the Government. However, detenu has not been informed that he has also a right to make a representation against his detention to detaining authority.

It is pertinent to mention here that prior to Government's approval of detention order, which is to be done within 12 days of detention order, in terms of Section 8 (4) of the J&K Public Safety Act, 1978 (for short "*Act of 1978*") detaining authority also has power to revoke detention order. This power is clearly relatable to Section 21 of the General Clauses Act, Samvat, 1977, which has been saved by virtue of Section 19 of the Act of 1978. Till the Government's approval to detention order is granted, since the detaining authority had the power to revoke the detention order, a representation could have been made to the detaining authority for revoking detention order. It was incumbent upon detaining authority to have informed detenu that he could also make a representation to detaining authority, if he so desired. Since detaining authority did not communicate to detenu that such a representation could be made to detaining authority, this in itself amounted to infraction of provisions of Section 13 of the Act of 1978 read with Article 22(5) of the Constitution of India. Reliance in this regard is placed on *State of Maharashtra and others v. Santosh Shankar Acharya, (2000) 7 SCC 463*. In the present case detaining authority did not inform detenu that detenu, independent of his right to file representation against his detention to the Government, has also right to submit a representation to detaining authority till detention was considered by the Government and accorded approval thereto. Detaining authority has, in essence, violated Constitutional and Statutory rights of detenu, guaranteed under Article 22(5) of the

Constitution of India and Section 13 of the Act of 1978 and resultantly vitiates impugned detention.

5. While going through the file, I have also an occasion to go through the Dossier prepared by the police. While comparing grounds of detention with dossier, it comes to fore that grounds of detention are *ditto* copy of dossier. It is made clear here that detaining authority may get inputs from different agencies, including Senior Superintendent of Police of concerned District, but responsibility to formulate grounds of detention, however, exclusively rests with detaining authority. It is detaining authority, who has to go through the reports and other inputs received by him from concerned police and other agencies and on such perusal arrive at a subjective satisfaction that a person is to be placed under preventive detention. It is, thus, for detaining authority to formulate grounds of detention and satisfy itself that grounds of detention so formulated warrant passing of order of preventive detention. Perusal of grounds of detention, in the present case, would show that it is a *verbatim* copy of Dossier of Senior Superintendent of Police, submitted by him to the concerned Magistrate. This Court as regards the *verbatim* reproduction of the Dossier in grounds of detention, in the case of ***Naba Lone v. District Magistrate 1988 SLJ 300***, while dealing with a case where a similar situation arose, has observed:

“The grounds of detention supplied to the detinue is a copy of the police dossier, which was placed before the District Magistrate for his subjective satisfaction in order to detain the detinue. This shows total non-application of mind on the part of the detaining authority. He has dittoed the Police direction without applying his mind to the facts of the case.”

10. This Court again in the case of ***Noor-ud-Din Shah v. State of J&K &Ors. 1989 SLJ 1***, quashed detention order, which was only a reproduction of Dossier supplied to detaining authority on the ground that it amounted to non-application of mind. The Court observed:

“I have thoroughly by examined the dossier submitted by the Superintendent of Police, Anantnag, to District Magistrate, Anantnag as also the grounds of detention formulated by the latter for the detention of the detinue in the present case, and I find the said grounds of detention are nothing but the *verbatim* reproduction of the dossier as forwarded by the Police to the detaining authority. He has only changed

the number of paragraphs, trying in vain to give it a different shape. This is in fact a case of non-application of mind on the detaining authority. Without applying his own mind to the facts of the case. He has acted as an agent of the police. It was his legal duty to find out if the allegations levelled by the police against the detainee in the dossier were really going to effect the maintenance of public order, as a result of the activities, allegedly, committed by him. He had also to find out whether such activities were going to affect the public order in future also as a result of which it was necessary to detain the detainee, so as to prevent him from doing so. After all, the preventive detention envisaged under the Act is in fact only to prevent a person from acting in any manner which may be prejudicial to the maintenance of public order, and not to punish him for his past penal acts. The learned District Magistrate appears to have passed the impugned order in a routine manner being in different to the import of preventive detention as or detained in the Act, Passing of an order without application of mind goes to the root of its validity, and in that case, the question of going into the genuineness or otherwise of the grounds does not arise. Having found that the detaining authority has not applied his mind to the facts of the case while passing the impugned order, it is not necessary to go to the merits of the grounds of detention, as mandated by Section 10-A of the Act.”

11. A similar situation arose in the case of *Jai Singh and ors. v. State of Jammu & Kashmir AIR 1985 SC 764*, before the Supreme Court. The Court quashed the detention as it found that there cannot be a greater proof of non-application of mind and that the liberty of a subject being a serious matter, it is not to be trifled with in this casual, indifferent and routine manner. The Court observed:

“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 Jail 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...” 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, 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 Jail Singh in the dossier is changed into ‘you’ in the grounds of detention. We are afraid it is difficult to find greater proof of non-application of mind. The liberty of a subject is a serious matter and it is not to be trifled with in this casual, indifferent and routine manner.”

12. Applying above settled legal position to the facts of the present case, I find the order impugned cannot stand as it is based on grounds of detention, which are only *verbatim* copy of police dossier. The order of

detention, for the said reasons, exhibits total non-application of mind on the part of detaining authority and, therefore, detention order is liable to be quashed.

13. For the reasons discussed above, the instant petition is disposed of and detention Order no.DMB/PSA/07 of 2020 dated 02.03.2020, passed by District Magistrate, Budgam, is quashed. Respondents, including Jail Superintendent concerned, are directed to release the detenu forthwith, unless he is required in any other case. **Disposed of.**
14. Detention record be returned to learned counsel for respondents.

(Vinod Chatterji Koul)
Judge

Srinagar
26.02.2021
Ajaz Ahmad, PS

Whether the order is reportable: No.