

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

WP (Crl) No. 188/2021

Date of Decision: 28.04.2022

Mohammad Yonus Bhat

.....Petitioner

Through: *Mr. Wajid Haseeb, Advocate*

Versus

UT of Jammu and Kashmir & another

.....Respondent(s)

Through: *Ms. Insha, GA.*

CORAM:

Hon'ble Mr. Justice Javed Iqbal Wani, Judge.

J U D G E M E N T (O R A L)

1. The instant writ petition arises out of the detention order bearing No. 47/DMA/PSA/DET/2021 dated 19.10.2021, (hereinafter for short the *impugned order*) passed against the detenu, namely, Mohammad Yonus Bhat, by respondent no.2-District Magistrate, Anantnag (for brevity *detaining authority*), under and in terms of provisions of the Jammu & Kashmir Public Safety Act, 1978 (for short the 'Act'). The detention order dated 19.10.2021 is challenged by the petitioner through the medium of instant petition and is seeking quashment of the same on the grounds taken in the writ petition.
2. It is being stated in the petition that the detenu is a law-abiding citizen and has never indulged in any subversive activity prejudicial to public order or security of the State. The detenu is stated to have been arrested and thereafter came to be detained under preventive custody by the respondents in terms of impugned order and lodged at Central Jail, Srinagar, without there being any compelling reasons thereof.
3. The impugned order is being challenged, *inter alia*, on the grounds that detenu had not been provided copies of the relevant material, like copy of dossier, details of any incidence with regard to the alleged

association of the detenu with the militant organizations or any particular incident regarding his links with secessionist organizations, date and year when the detenu has done that, not a single incident has been spelt out, referred to in the grounds of detention, material, if any, collected during the course of investigation, thus, depriving him to file an effective representation against his detention. The said failure is stated to have infringed the constitutional and statutory rights of the detenu guaranteed under Article 22(5) of the Constitution of India and Section 13 of Jammu & Kashmir Public Safety Act. A representation submitted against the detention by the petitioner is contended to have not been either considered or decided by the respondents.

4. On the other hand, respondents, in their reply affidavit filed, resist and controvert the contentions raised and grounds urged by the petitioner in the petition and have insisted that the order of detention is preventive and not punitive in nature, while it is being admitted by respondents that detenu was detained pursuant to impugned order. It is being stated that all statutory requirements and constitutional guarantees have had been fulfilled and complied with while detaining the detenu.
5. It is being contended by respondents that impugned order was executed in accordance with the relevant provisions of law and that the detenu was handed over to the Superintendent Central Jail, Kotbalwal, for lodgment and that the contents of detention order/warrant and grounds of detention were read over and explained to the detenu in the language which he fully understood and in lieu thereof the detenu subscribed his signatures on the execution report/order.
6. It is being next averred by respondents that impugned order was executed by ASI Mohammad Ashraf No. 479/CID, EXK-811421 of Police Station, Anantnag on 21.10.2021, in accordance with the relevant provisions of law and that the detenu was handed over to the Assistant Central Jail, Kotbalwal, Jammu, for lodgment.

7. It is being next stated that the Advisory Board, after considering the material placed before it, in terms of Section 14 of the Act, held that there is sufficient cause for detention of the detenu. On receipt of the opinion of the Advisory Board, the Government confirmed order of detention in terms of Government Order No. Home/PB-V/1126 of 2021 dated 18.11.2021. Respondents in the process are stated to have complied with all statutory, constitutional provisions, and followed all requisite formalities without violating any of them.
8. Heard learned counsel for the parties, perused the record and considered the matter.
9. While dealing with the contention/ground of challenge urged by the counsel for the petitioner *qua* non-recording of compelling reasons for detaining the detenu when he was already in custody, it would be appropriate to refer to the judgement of the Apex Court in this regard passed in case titled as ***Surya Prakash Sharma v. State of U.P and Others***, reported in **1994 (3) SCC 195**, wherein at paragraph 5 following has been noticed and laid down:

“5. The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in custody has had been engaging the attention of this Court since it first came up for consideration before a Constitution Bench in Rameshwar Shaw V. District Magistrate, Burdwan (1964) 4 SCR 92: AIR 1964 SC 334: (1964) 1Crl LJ 257. To eschew prolixity we refrain from detailing all those cases except that of Dharmendra Suganchand Chelawat V. Union of India (1990) 1 SCC 746: 1990 SCC (Crl) 249: AIR 1990 SC 1196, wherein a three Judge Bench, after considering all the earlier relevant decisions including Rameshwar Shaw answered the question in the following words(SCC 754 para 21:

“The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenue is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenue is already in detention. The expression ‘compelling reasons’ in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenue is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenue, it is likely that after his release from custody he

would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.”

10. Perusal of the grounds of detention/order of detention would manifestly reveal that the detaining authority has not drawn any satisfaction as per the mandate laid down by the Apex Court in the case of **Surya Parkash Sharma** (supra), while passing the impugned detention order against the detenu, so much so, the detaining authority has also failed to express any such compelling reason even in Reply Affidavit. The impugned order, thus in law, does not sustain on this count alone.
11. Another contention urged by learned counsel for petitioner as regards grounds of detention being the ditto copy of the dossier prepared by the Senior Superintendent of Police, Anantnag, has taken this Court to have a glimpse of the record produced by the respondents. A bare perusal thereof reveals that the grounds of detention are the ditto copy of the dossier. The detaining authority may get inputs from different agencies, including Senior Superintendent of Police of concerned District, but responsibility to formulate the grounds of detention, however, exclusively rests with the detaining authority. It is the detaining authority, who has to go through the reports and other inputs received by it from concerned police and other agencies and on such perusal arrive at a subjective satisfaction that a person is to be placed under the preventive detention. It is, thus, for the detaining authority to formulate the grounds of detention and satisfy itself that the grounds of detention so formulated warrant passing of the order of preventive detention. Perusal of the grounds of detention, in the present case, would demonstrate that it is a verbatim copy of dossier of Senior Superintendent of Police, Anantnag, submitted by him to the concerned District 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 detenu is a copy of the police dossier, which was placed before the District Magistrate for

his subjective satisfaction in order to detain the detenu. 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.”

12. Perusal of impugned detention order reveals that on the basis of dossier placed before detaining authority by Senior Superintendent of Police, Anantnag, detaining authority was satisfied that with a view to prevent detenu from acting in any manner prejudicial to the security of the State / Country, it was necessary to detain the detenu under necessary provisions of law. So, it is on the basis of dossier and other connected material/documents that impugned detention order has been passed by detaining authority. All that was weighed with detaining authority in issuance of order of detention assumes significance in the facts and circumstances of the case. It needs no emphasis, that detenu cannot be expected to make a meaningful exercise of his Constitutional and Statutory rights guaranteed under Article 22(5) of the Constitution of India and Section 13 of the Jammu & Kashmir Public Safety Act, 1978, unless and until the material on which detention order is based, is supplied to him. It is only after detenu has all the said material available that he can make an effort to convince the detaining authority and thereafter the Government that their apprehensions vis-à-vis his activities are baseless and misplaced. If detenu is not supplied the material, on which detention order is based, he will not be in a position to make an effective representation against his detention order. Failure on the part of detaining authority to supply material, relied at the time of making detention order to detenu, renders detention order illegal and unsustainable. These views are fortified, given the law laid down by the Apex Court in *Thahira Haris Etc. Etc. v. Government of Karnataka*, AIR 2009 SC 2184; *Union of India v. Ranu Bhandari*, 2008, Cr. L. J. 4567; *Dhannajoy Dass v. District Magistrate*, AIR, 1982 SC 1315; *Sofia Gulam Mohd Bham v. State of Maharashtra and others* AIR 1999 SC 3051; and *Syed Aasiya Indrabi v. State of J&K &ors*, 2009 (I) S.L.J 219. My views are also cemented by the judgement dated 18.05.2021 delivered

in WP(Crl) No. 107/2020 titled *Mohammad Rafiq Mir v. UT of J&K and another*.

13. The Supreme Court in *Abdul Latief Abdul Wahab Sheikh v. B.K. Jha, 1987 (2) SCC 22* has made it clear that it is only the procedural requirements, which are the only safeguards available to detenu, that is to be followed and complied with as the Court is not expected to go behind the subjective satisfaction of detaining authority. In the present case, procedural requirements, as discussed above, have not been followed and complied with by respondents in letter and spirit and as a consequence thereof, petition on hand requires to be allowed.
14. Another ground of challenge urged in the petition is that the petitioner submitted a representation against the detention which had not been considered by the respondents.

Perusal of the record of the petition reveals that a representation has been made on behalf of the detenu through his wife, forming Annexure-IV to the instant writ petition, acknowledged to have been received by the office of District Magistrate, Anantnag. The said contention has not been denied by the respondents in their reply affidavit, thus, resulting into drawing an adverse inference against the respondents in this regard. The failure of the respondents to consider the representation submitted by the detenu indisputably amounts to violation of the provisions of Article 22(5) of the Constitution. A reference in this behalf to the judgement of the Apex Court passed in case titled as *Rahmatullah v. State of Bihar and others* reported in *1979 (4) SCC 559*, would be relevant and germane here wherein at paragraph 4, it is noticed and observed as under:-

“4. The normal rule of law 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 the provisions of Article 22(5) must be complied with. Sub-Article (5) of Article 22 reads:

When any person is detained in pursuance of an order made under any law providing for preventive detention, the

authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

This Sub-Article provides, inter alia, that the detaining authority shall as soon as may be communicate the grounds of detention and shall afford him the earliest opportunity of making a representation against the order. The opportunity of making a representation is not for nothing. The representation, if any, submitted by the detenu is meant for consideration by the Appropriate Authority without any unreasonable delay, as it involves the liberty of a citizen guaranteed by Article 19 of the Constitution. The non-consideration or an unreasonably belated consideration of the representation tantamount to non-compliance of Sub-Article (5) of Article 22 of the Constitution.”

15. In view of the aforesaid position obtaining in the matter the other grounds urged in the petition need not to be dealt with and essentially pale into insignificance.
16. It is germane to mention here that the judgements referred to and relied upon by the counsel for the respondents are not applicable to the facts and circumstances of the case being misplaced and misdirected and do not lend any support thereof to the case of the respondents.
17. Viewed thus, in the context of what has been observed, analyzed and considered in the preceding paragraphs, instant petition is allowed and consequent to which the impugned order of detention bearing No. 47/DMA/PSA/DET/2021 dated 19.10.2021, is quashed, with the direction to the respondents including the Jail authorities concerned to release the detenu forthwith from preventive custody unless required in any other case.
18. **Disposed of.**
19. No orders as to costs.

(Javed Iqbal Wani)
Judge

Srinagar
28.04.2022
TASADUQ
SAB: