IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

LPA No. No. 164/2021

Reserved on 13.04.2023
Pronounced on 27.04.2023

Muntazir Ahmad Bhat …Appellant(s)

Through: Mr. Junaid Rashid, Adv. &Mr Bakht Parvaiz, Adv.

Vs.

Union Territory of JK &Anr. ...Respondent(s)

Through: Mr. Furqan Yaqub, GA

CORAM

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE PUNEET GUPTA, JUDGE

J U D G M E N T

[N. Kotiswar Singh, CJ]

The present appeal has been preferred against the order dated 12th November 2021 passed by the learned Single Judge in WP (Crl) No. 105/2021 by which the petition filed by the petitioner-appellant herein challenging his detention in terms of Section 8 of the J&K Public Safety Act was dismissed.

2. The appellant has raised several grounds in assailing the order passed by the learned Single Judge.

3. It has been submitted by the learned counsel for the appellant that it can be seen from the detention order that the appellant was earlier booked under FIR No. 125/2019 under Sections 302, 307 RPC, 7/27 Arms Act and 4/2015 Explosive Substances Act in connection with which, he was granted bail as he was found to be a juvenile. Later, he was arrested in connection with FIR No. 54/2019 under Section 121-IPC, 18, 20 & 39 UA(P) Act registered in Police Station Rajpora, Pulwama, in which he was also granted bail on 22.06.2021. Thereafter, he was again arrested in connection with FIR No 29/2020 under Section 7/25 Arms Act and 23 UA(P) Act, but he did not apply for bail, and accordingly he remained in custody. While he was in

custody in connection with the said FIR No. 29/2020, the above detention order was passed on 12th July 2021 which he challenged by filing the writ petition, WP(C) No. 105 of 2021.

4. It is the plea of the appellant that if the appellant was already in custody on being detained in connection with the aforesaid FIR, there was no need nor occasion for the authorities to invoke the preventive detention law under the J&K Public Safety Act. It has been submitted that the detaining authority has not applied its mind on this critical aspect inasmuch as the appellant was not expected to engage in any activity which is prejudicial to the security of the State as contemplated under Section 8(1) of the J&K Public Safety Act, hereinafter referred to as the "Act", when he was already under detention.

5. Learned counsel for the appellant has also submitted that the detention order is vitiated for the reason that the same was not executed as per law. It has been submitted that Section 9 of the Act provides that "detention order may be executed at any place in the manner provided for the execution of warrant of arrest under the Code" and the "Code" has been defined under Section 2 (1) of the Act as to mean the "Code of Criminal Procedure Samvat 1989". Thus, unless the detention order is executed in the manner as contemplated under the Criminal Procedure Code (CrPC), the same cannot be said to have been validly executed.

6. According to learned counsel for the appellant, in the present case, the same was not done and as such, the detention order cannot be said to have been validly executed. It has been has also submitted that Section 76 of the CrPC provides that the police officer or other person executing a warrant of arrest shall without unnecessary delay bring the person arrested before the Magistrate before which he is required by law to produce such person within 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

It has been further submitted that in the present case, it can be seen from the record that the detention order was furnished by a Sub-Inspector of Police and not by the detaining authority which is required to be executed by the detaining authority i.e., District Magistrate and the District Magistrate could not have delegated his authority to execute the detention order to a Sub-Inspector. Further, as required under Section 76 of CrPC, the detenu was required to be produced before the nearest Magistrate within 24 hours or

to the person who is issuing the detention order. But in the present case, the appellant was neither produced before the District Magistrate nor before the person who has issued the detention order, and, as such, there is total violation of the provisions of Section 76 of the CrPC which is required to be followed in terms of Section 9 of Public Safety Act. Thus, having not followed the said procedure, the detention order cannot be sustained in law.

7. Learned counsel for the appellant submits that if the appellant was not produced before the Magistrate or before the detailing authority, the question of communicating the grounds of detention as contemplated under Section 13(1) cannot be said to have been complied with inasmuch as provisions of Section 13 will come into play only when the detenu is produced before the detaining authority or before the District Magistrate which having not been done, it cannot be said that provisions of Section 13 has been followed. Thus there is also an infraction of Section 13 of Public Safety Act.

8. It was also submitted that the detention order also mentions that normal laws are not sufficient to deter the appellant from indulging in anti-national and anti-social activities and, as such, in order to prevent him from indulging in such activities which are prejudicial to the security of the State, it has been felt necessary to detain the appellant under the provisions of J&K Public Safety Act. However, the said mere statement would not suffice in absence of proper material in this regard, and in fact, after the appellant was released on bail in connection with FIR No. 125/2019 as well as FIR No. 54/2019, the State never bothered to challenge the bail orders nor made any serious attempt to either deny bail to the appellant. As such, it cannot be said that the normal laws were not sufficient to prevent the appellant from indulging in such activities.

9. It has been further submitted that the allegations against the appellant relate to the period of 2020, however, he was detained in July 2021, as such fails to understand how he could have charged with subversive activities when he was already in jail and when bail granted to him was not seriously objected to by the authorities, nor challenged before the higher forum.

10. Further, it has been contended on behalf of the appellant that it is nowhere mentioned that the detenu can make a representation to the authority which is a requirement under the law as reiterated in various judicial pronouncements, in support of which, the appellant has relied on the following decisions.

(i) Yasir Majeed Mir vs. Union Territory of JK & Ors. decided on 9th December 2021 in WP (Crl) No. 39/2021.

(ii) Farooq Ahmad Sheikh vs. State of JK & Ors. decided on 31st October 2017 in LPA(HC) No. 107/2017.

Accordingly, it has been submitted that since such an opportunity to make representation against the detention was denied to the detenu, it will vitiate the detention order.

11. Lastly, it has been submitted that perusal of the detention order would indicate that all the allegations are concocted nor based on record.

12. In response, Mr. Furqan Yaqub, learned GA appearing for the respondents submits that most of the pleas in the present appeal were not taken by the appellant before the writ court and, as such, he cannot raise these pleas before the appellate forum, particularly with reference to the submissions advanced that provisions of Section 9 of Public Safety Act were not followed or that he was not afforded the opportunity to make his representation against the detention.

13. Learned counsel for the respondents submits that the authorities were aware that the appellant was already in custody and preventive order was issued to prevent him from indulging in prejudicial acts which subjective satisfaction is based on his past antecedents by invoking the "doctrine of anticipation" and not necessarily based on criminal acts which have been committed. Further, the submission advanced by the learned counsel for the appellant that after the arrest of the appellant, he was supposed to be produced before the District Magistrate or the detaining authority, as contemplated under Section 76 of the Cr.P.C. does not apply inasmuch as when a person detained under the Public Safety Act, he cannot be said to have been arrested and he has been detained to prevent him from acting in any manner prejudicial to the security of the State and the authorities always use the word "refrain" in the detention order. It has also been submitted on behalf of the respondents that the contention that the appellant was not communicated that he could make a representation to the authority was not raised before the learned Single Judge, though as per the record, it is clearly mentioned that he could make a representation to authorities, in connection with which, the learned counsel for the respondents has also produced the record in support of his contention that the appellant was indeed given an

opportunity to make a representation before the authorities as communicated to him on 12.07.2021.

14. It has been also submitted that all the materials which were the basis for arriving at the subjective satisfaction of the detaining authority that the detention of the appellant would be required to prevent him from indulging in activities prejudicial to the Security of the State and all the compelling reasons on the basis of such material to detain him under the Public Safety Act had been furnished to the appellant.

15. It has been submitted that as regards the contention of the appellant that the State Government did not seriously object to the bail application or the bail order granted by the Court, the same is within the domain of the judiciary as to whether the Court can grant bail or not. However, in the matters relating to preventive detention, the competent authority has to arrive at the subjective satisfaction based on the material records as to whether there is likelihood to the detenue of indulging in anti-national activities which are against the security of the State.

16. It has also been submitted that as far as the other grounds which have been raised are concerned, these have been dealt with by the learned Single Judge adequately and, accordingly, it has been submitted that there is no merit in the instant appeal.

17. Learned counsel for the respondents in support of his contention that a detention order could be passed even when the person is under arrest and detention, has placed reliance on the decision of the Supreme Court reported in ***AIR 1991 SC 2261 Abdul Sathar Ibrahim Manik etc. vs. Union of India &Ors.*** Reliance was also placed on ***Union of India v. Arvind Shergill, (2000) AIR (SC) 2924*** in which it was held that action by way of preventive detention is largely based on suspicion and the court is not an appropriate forum to investigate the question whether the circumstances of suspicion exist warranting the restraint on a person.

18. Having heard the learned counsel for the parties and on perusal of the records and keeping in mind the observations and findings arrived at by the Ld. Single Judge, we have noted that the some of the pleas taken up before us were indeed not raised before the Ld. Single Judge and as such we were not inclined to entertain the same at this stage.

Yet, we have opted to examine the same.

Coming to the contention of the appellant that the detention order was not validly served consonant with Section 76 of CrPC, the same is misplaced. The detention of a person under the Public Safety Act does not amount to *arrest* for commission of any offence under a penal statute but a preventive act to thwart any potential prejudicial act on the part of the person detained based on his antecedents and as such producing such a detenue before a Magistrate within 24 hours does not arise.

Further, the detention order was issued by the detaining authority, i.e., the District Magistrate and as such executing the detention order by a Sub-Inspector on the strength of the detention order passed by the District Magistrate would not in any way affect the validity of the detention order.

19. The contention of the appellant that since the appellant was already in detention, invoking preventive detention was not warranted in as much he being under detention, the appellant could not have carried out any prejudicial act also is devoid of merit as the detaining authority based on his recent past activities and antecedents arrived at the subjective satisfaction that the normal laws would not be sufficient to deter from carrying out prejudicial activities.The subjective satisfaction of the detaining authority on the propensity and likelihood of the appellant to engage in prejudicial acts is based on germane materials of his recent activities as evident from the involvements in the aforesaid FIR No. 125/2019 under Sections 302, 307 RPC, 7/27 Arms Act and 4/2015 Explosive Substances Act, FIR No. 54/2019 under Section 121-IPC, 18, 20 & 39 UA(P). As also rightly observed by the Ld. Single Judge, the purpose of invoking law of preventive detention to detain a person is not to punish for any alleged illegal act but to prevent him from engaging in any act prejudicial to the security of the State or public order or such act contemplated under the J & K Public Safety Act, 1978. If such subjective satisfaction is based on the past conduct and relevant materials, detention of such person will be permissible.

20. As regards the submission that since the appellant was under arrest in connection with FIR No. 29/2020 under Sections 7/25 of Arms Act and 23 UA(P) Act, he could not have engaged in acts prejudicial to the security of the State, is misconceived as it is on

record that he was arrested in connections with two FIR cases earlier but was released on bail.

It is seen from the records that after he was released on bail in connection with the first FIR Case No. 125/2019U/Ss 302. 307-RPC, 7/27 A Act and 4/5 Expl.Sub. Act, he continued to engage in subversive acts prejudicial to the security of the State and accordingly, was arrested in connection with FIR No. 54/2019U/Ss 121 IPC, 18,20 & 39 UA(P) Act, P/S Rajpora, in which case he was granted bail. It was during this period after he was again granted bail that the detention order was issued on 12.07.2021. It is a different aspect that he might have been also found involved in another FIR also, i.e., FIR No. 29/2020 under Sections 7/25 of Arms Act and 23 UA(P) Act when he was detained under the preventive detention. Thus, from the conduct of his recent past, it can be reasonably inferred that he would continue to engage in prejudicial act once he is released on bail, warranting his preventive detention under the Act.

21. The Ld. Single Judge in paragraph no. 19 of the impugned judgment has also dealt with this issue by observing that the satisfaction of the detaining authority that the detenu is already in custody and he is likely to be released on bail, and on being released, he is likely to indulge in the same prejudicial activities is the subjective satisfaction of the detaining authority and referred to the decision of the Supreme Court in the case of ***Senthamilseli v. State of T.N. and another, 2006 (5) SCC 676,***in which it was held that satisfaction of detaining authority, coming to conclusion that there is likelihood of detenu being released on bail is "subjective satisfaction", based on materials and such subjective satisfaction is not to be interfered with normally.

Thus, we have observed that the Ld. Single Judge had taken due notice of this submission and considered the same.

22. As regards the contention of the appellant that it was nowhere mentioned in the detention order that the detenue could make a representation to the authority, which is the requirement of law, on perusal of the records, as also observed by the Ld. Single Judge in

paragraph no. 10 of the impugned judgment wherein it was observed that the record so produced by the State reveals that in terms of Order dated 12th July, 2021, a notice was issued under Section 13 of the J&K Public Safety Act whereby the detenu was informed to make a representation to the detaining authority as also to the Government against his detention order if the detenu so desires. In view of the aforesaid finding by the Ld. Single Judge based on records, we do not find any merit in this contention.

22. As regards the contention that the allegations made in the detention order are concocted and not based on records, we are not able to accept the same for the reason that the records do indicate involvement of the appellant in serious offences as mentioned in the FIRs referred to above and we are not called upon to examine the correctness of the allegations made in the aforesaid FIRs, not being within the scope of our scrutiny under the law of preventive detention.

23. For the forgoing reasons, we do not find any irregularity in the observations and conclusion arrived by the Ld. Single Judge which would warrant our interference and accordingly, dismiss this appeal.

(PUNEET GUPTA)
JUDGE

(N. KOTISWAR SINGH)
CHIEF JUSTICE

SRINAGAR:
27.04.2023
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Whether approved for reporting? Yes/No