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

Reserved on: 27.07.2022
Pronounced on:24.08.2022

WP(Crl.) No.147/2021

JALAL UD DIN GANAI ...Petitioner(s)

Through: - Mr. Adnan Fayaz Advocate.

Vs.

UNION TERRITORY OF J&K & ORS. …Respondent(s)

Through: - Mr. Asif Maqbool, Dy. AG.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner, by the medium of instant petition, has challenged order No.34/DMP/PSA/201 dated 14.09.2021, issued by District Magistrate, Pulwama (for brevity "*Detaining Authority*"), whereby *Vikas Ahmad Ganie son of Jalal ud Din Ganie resident of Chandrigam Awantipora Tehsil Tral District Pulwama* has been placed under preventive detention with a view to prevent him from acting in any manner prejudicial to the maintenance of public order.

2) It has been contended by the petitioner that the detaining authority, while passing the impugned order of detention, has not applied its mind. It is further contended that the material which forms basis of the grounds of detention has not been supplied to the petitioner and that representation against the impugned order of detention has not been considered by the Advisory Board. It is further contended that the

impugned order of detention has been made on the basis of stale and non-existent grounds.

3) The petition has been resisted by the respondents by filing a counter affidavit thereto. In their counter affidavit, the respondents have submitted that all the safeguards have been adhered to and complied with by the detaining authority and that the order has been issued validly and legally. It is pleaded that the detention order and grounds of detention along with the material relied upon by the detaining authority were handed over to the detenue and the same were read over and explained to him. It is contended that the grounds urged by the petitioner are legally misconceived, factually untenable and without any merit. That the detenue was informed that he can make a representation to the government as well as to the detaining authority against his detention. It is further averred that the impugned detention order has been passed after following the due procedure of law. In order to buttress the contentions raised in the counter affidavit, learned counsel for the respondents has also produced the detention record.

4) I have heard learned counsel for parties and perused the material on record.

5) Although a number of grounds have been urged by the petitioner in his petition, yet during the course of arguments the following grounds have prevailed:

(I) That there has been lack of application of mind on the part of the detaining authority, inasmuch as the detaining

authority was not sure as to whether the alleged acts of the petitioner fall under the category of the acts which are prejudicial to the maintenance of public order or prejudicial to the security of the State;

(II) That the whole of the material which has formed basis of the impugned order of detention has not been supplied to the petitioner.

6) So far as the first ground urged by the petitioner is concerned, there appears to be some merit in the same. If we have a look at the grounds of detention, the detaining authority has, after narrating the incidents reported in the police dossier and other material, observed that the activities of the petitioner are highly prejudicial to the security of the state but while framing the impugned order of detention, it has been stated that the said order is being passed in order to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order.

7) The expressions "security of the state" and "public order" are quite distinct from each other, inasmuch if contravention of law affects the community or public at large, it amounts to disturbance of public order whereas if the disturbance of public order is of grave nature which affects the security of the state, then the same constitutes an act that would affect the security of the state. Thus, every act which is prejudicial to the security of the state would qualify to be an act prejudicial to the public order but reverse is not true. It is only the acts prejudicial to the public order which are of grave nature that would qualify to be termed as acts prejudicial to the security of the state. The

concept has been explained by the Supreme Court in the case of **Dr. Ram Manohar Lohia v. State of Bihar and others, 1966 AIR SC 740**, by observing as under:

> *"51.We have here a case of detention under Rule 30 of the Defence of India Rules which permits apprehension and detention of a person likely to act in a manner prejudicial to the maintenance of public order. It follows that if such a person is not detained public disorder is the apprehended result. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. Does the expression "public order" take in every kind of disorder or only some? The answer to this serves to distinguish "public order" from "law and order" because the latter undoubtedly takes in all of them. Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival communities and one of them tried to raise communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances which subvert the public order are. A District Magistrate is entitled to take action under Rule 30(1)(b) to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances.*
>
> *52. It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. By using the expression*

> *"maintenance of law and order" the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules."*

From the above enunciation of law, it is clear that the act affecting public order and those affecting security of the state are different in nature and the detaining authority while framing an order of detention has to be absolutely clear in its mind as to the nature of the acts that are alleged to have been committed by the detenue.

8) In the instant case while summing up the grounds of detention, the detaining authority has concluded that the acts of the petitioner fall within the category of those acts which are prejudicial to the security of the state but while framing the impugned order it has concluded that the petitioner is required to be placed under preventive detention in order to prevent him from acting in any manner prejudicial to the maintenance of public order. This clearly indicates that the detaining authority has not applied its mind and it was unsure as to under what category the alleged acts of the petitioner fall. On this ground alone, the impugned order of detention becomes unsustainable in law. In this regard I am fortified by the judgment of the Supreme Court in the case of **G. M. Shah v. State of J&K, 1980 AIR 494.**

9) The second ground that has been urged by the learned counsel for the petitioner is that the detenue has not been furnished whole of the relevant material on the basis of which grounds of detention have been formulated by the detaining authority.

10) So far as this ground of challenge is concerned, a perusal of the detention record produced by learned counsel for the respondents reveals that the material is stated to have been received by the petitioner on 15.09.2021. Report of the Executing Officer in this regard forms part of the detention record, a perusal whereof reveals that it bears the signature of the petitioner and according to it, copy of detention order (01 leaf), notice of detention (01 leaf), grounds of detention (02 leaves), dossier of detention (Nil), copies of FIR, statements of witnesses and other related relevant documents (Nil), total 04 leaves, have been supplied to him.

11) It is clear from the execution report, which forms part of the detention record, that copy of the police dossier has not at all been supplied to the detenue. The record further shows that the copies of the FIR No.46/2021 of P/S Awantipora, mention whereof has been made in the grounds of detention, has not been furnished to the detenue. Thus, contention of the petitioner that whole of the material relied upon by the detaining authority, while framing the grounds of detention, has not been supplied to him, appears to be well-founded. Obviously, the petitioner has been hampered by non-supply of these vital documents in making an effective representation before the Advisory Board. Thus, vital safeguards against arbitrary use of law of preventive detention have been observed in breach by the respondents in this case rendering the impugned order of detention unsustainable in law.

12) It needs no emphasis that a detenue cannot be expected to make an effective and purposeful representation which is his constitutional and

statutory right guaranteed under Article 22(5) of the Constitution of India, unless and until the material, on which the order of detention is based, is supplied to the detenue. The failure on the part of detaining authority to supply the material renders the detention order illegal and unsustainable. While holding so, I am fortified by the judgments rendered in **Sophia Ghulam Mohd. Bham** V. **State of Maharashtra and others** (**AIR 1999 SC 3051**) and, **Thahira Haris Etc. Etc**. V. **Government of Karnataka & Ors. (AIR 2009 SC 2184**).

13) Viewed thus, the petition is allowed and the impugned order of detention is quashed. The detenue is directed to be released from the preventive custody forthwith provided he is not required in connection with any other case.

14) The detention record be returned to the learned counsel for the respondents.

(Sanjay Dhar)
Judge

SRINAGAR
24.08.2022
"Bhat Altaf, PS"

Whether the order is speaking: ***Yes/No***
Whether the order is reportable: ***Yes/No***