

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

**Reserved on : 21.08.2021
Pronounced on : 01.09.2021**

WP(Crl) No. 54/2020
CrlM No. 1873/2020
CrlM No. 922/2021

Balbir Chand

.....Petitioner(s)

Through: Mr. Mayank Gupta, Advocate
Vs.

UT of J&K and others

..... Respondent(s)

Through: Mr. Aseem Sawhney, AAG

Coram: HON'BLE MR. JUSTICE TASHI RABSTAN, JUDGE

JUDGMENT

1. District Magistrate, Kathua–respondent no.2 (for brevity “*detaining authority*”), has, by Order No. PSA/104 dated 16.10.2020, placed Balbir Chand S/o Rana R/o Chack Drab Khan, Tehsil and District Kathua (for short “*detenue*”) under preventive detention, with a view to prevent him from indulging in the criminal activities which are prejudicial and detrimental to the maintenance of public order. It is this order, of which petitioner is aggrieved and throws challenge thereto on the grounds tailored in petition on hand.
2. It is averred in the petition that the basis of detention of the petitioner is the involvement of the petitioner in some FIRs and in all the FIRs, the petitioner is either bailed out or the matter is disposed of by the Court

and the detaining authority has not taken into account the order of bail passed in the said FIRs. It is further stated that the detenu has been detained by the respondent No. 3 without providing any sufficient material, i.e., the copy of the FIRs, statement of witnesses, list of witnesses, statement before Judicial Magistrate and other relevant materials which is mandatory as per the provisions of J&K Public Safety Act, 1978.

3. It is stated that the grounds on which the detention order has been issued are false, frivolous and baseless and are influenced by the local politicians on the basis of political rivalry and the recommendation is an outcome of recent Panchayat elections. It is further stated that the petitioner is working as a plumber and was working hard to meet day to day needs of his family and it has become very difficult for the whole family to cope up with the prevailing situation.
4. It is averred in the petition that the detention order does not specify the period of detention of the petitioner and the grounds of detention only states that the detention is for the maximum period, which is impermissible under the law governing the preventive detention. It is also averred that and the detaining authority cannot be permitted to fix the period of detention on its own whims and fancies, discretion. It is stated that the impugned detention order has not been approved by the Advisory Board under the Public Safety Act (PSA) and the detenu has right to lead evidence in rebuttal before the Advisory Board. It is further stated that the District Magistrate, Kathua has failed to appreciate that the FIR which the District Magistrate is mentioning in the detention

order does not fit into the four corners of the Section 8 of the Public Safety Act.

5. Counter affidavit has been filed by respondent No. 4, stating therein that the petitioner has resorted to suppression of material facts in the writ petition and is misleading this Court to solicit orders. It is stated that the petitioner has been detained by the District Magistrate, Kathua due to his involvement in the commission of organized crime/manufacturing and smuggling of illicit liquor leading to spread of alcohol addiction among the general public, especially youth of the area and if the petitioner is left free then he may prove highly prejudicial to the maintenance of the public order and safety of the people and prays for dismissal of the present petition.
6. Heard learned counsel for parties and perused the record.
7. The impugned order of detention, on its plain reading, reflects that it has been issued by District Magistrate, Kathua (respondent no.2 herein) in exercise of powers conferred under Section 8 of J&K Public Safety Act, 1978. It is germane to say here that Subsection (1) of Section 8 of the Act provides that the Government may, if satisfied with respect to any person that with a view to prevent him from acting in any manner prejudicial to the security of the State or maintenance of public order, make an order directing that such person be detained. Subsection (2) of Section 8 provides that Divisional Commissioner and/or District Magistrate may exercise the powers conferred by Subsection (1). When counter affidavit is looked into the background of impugned order of detention and provisions of Section 8 of the Act, it becomes interesting,

rather startling, that in counter affidavit, filed in opposition to the instant writ petition, respondent no.4 (Senior Superintendent of Police, Kathua) has stated that he is empowered to invoke the provisions of the Public Safety Act against petitioner and book him under Preventive Detention Act. For facility of reference, relevant excerpt of para VI of Preliminary Objections of Counter Affidavit is reproduced herein below:

“...Hence the deponent/answering respondent is empowered to invoke the provisions of the Public Safety Act against the said individual/petitioner and book him under the Preventive Detention....”

8. Counter affidavit has been filed by respondent no.4 (Senior Superintendent of Police, Kathua), oblivious of the fact that it is District Magistrate, Kathua, who has issued impugned order of detention. It should have been District Magistrate, Kathua, to justify issuance of detention order, but in the present case it is respondent no.4, who says that he has issued impugned detention order, which shows and reflects non-application of mind on the part of respondents. In such circumstances, impugned order of detention is liable to be dismissed.
9. Perusal of communication No.DMK/JC/2020/3002-3007 dated 16.10.2020, addressed by detaining authority to detenué, reveals that detenué has been informed that his detention has been ordered on the grounds annexed therewith. Detenué has also been informed that he may approach Home Department, J&K Government, Jammu, if he would like to be heard in person by Advisory Board and make a representation to the Government against order of detention. Detenué has not been

informed that he has a right to make a representation to the Government as well as detaining authority in terms of Subsection (4) of Section 8 of the Act has also 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 detaining authority had power to revoke detention order, a representation could have been made to 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 *per se* 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.

10. While going through the file and the detention record produced by learned counsel for respondents, I have also an occasion to go through the Dossier prepared by 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 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.”

11. 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 detenu 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 detenu 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 detenu, 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.”

12. 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 tripled 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 of 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.”

13. Applying this settled legal position to the facts of the present case, I find that the order impugned cannot stand as it is based on grounds of detention, which is only verbatim copy of police dossier. The order of detention, for the reasons, exhibit total non application of mind on the part of detaining authority and therefore, the petition is allowed and the detention order No. PSA/104 dated 16.10.2020 passed by the District Magistrate, Kathua–respondent no.2 directing the detention of Balbir Chand S/o Rana R/o Chack Drab Khan, Tehsil and District Kathua is quashed. Respondents are directed to release the detenu forthwith, provided he is not required in connection with any other case.
14. **Disposed of** as above along with connected CrIM(s). Detention record be returned to learned counsel for the respondents.

Jammu
01.09.2021
Pawan Angotra

(**Tashi Rabstan**)
Judge

Whether the order is speaking? : Yes/No

Whether the order is reportable? : Yes/No