

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

...

WP(Crl) no.194/2022

Reserved on: 11.07.2023

Pronounced on: 14.07.2023

Shafayat Amin Shah

.....Petitioner(s)

Through: Mr Molvi Aijaz, Advocate

Versus

Union Territory of J&K and others

.....Respondent(s)

Through: Mr Sajad Ashraf, GA

CORAM:

HON'BLE MR JUSTICE SANJEEV KUMAR, JUDGE

JUDGEMENT

1. This is a petition under Article 226 of the Constitution of India filed by one Shafayat Amin Shah ("the detenu") through his father seeking quashment of his detention order no.113/DMS/PSA of 2022 dated 09.04.2022, issued by District Magistrate, Shopian, whereby the detenu has been put under preventive detention with a view to prevent him from acting in any manner prejudicial to the security of the UT/Country.
2. The impugned order is assailed by the detenu on the ground that the detaining authority has not shown its awareness as to whether the detenu has applied for the bail or not in connection with case FIR no.130/2020 under Section 20, 23, 38, 39 ULA(P) Act police station Zainapora, inasmuch as there is no explanation in the grounds of detention as to why the detenu has not been arrested for long two years if the disclosures were available to them two years before.
3. The detenu has also challenged the impugned order on the ground that the relevant material, viz. dossier, FIR, statements of witnesses, disclosure statement etc. relied upon by the detaining authority was never served on the detenu, which disabled him to make an effective and meaningful

representation against his detention. It is also urged that a single belated allegation concerning a case registered two years before cannot be basis for detention of the detenu after lapse of two years.

4. Respondents have filed the reply affidavit of the District Magistrate, stating therein that having regard to the nature of activities that the detenu had been indulging in over a period of time, the detaining authority was of the opinion that remaining of detenu at large was detrimental to the security of UT/country. The detenu is highly inclined towards secessionist ideology and is a highly motivated radicalized OGW deeply involved in antinational activities which are highly prejudicial to the sovereignty and territorial integrity of the UT/country and that the detenu is always involved in activities that create a sense of insecurity among the peace loving and law-abiding citizens.
5. Having heard learned counsel for parties and perused the material on record, I am of the view that this petition is liable to succeed as the impugned order of detention does not sustain in the eye of law, in that there is non-application of mind on the part of detaining authority. It is nowhere discernible from perusal of the grounds of detention as to whether the detenu had been arrested in connection with case FIR no.130/2020 or not, and/or in the event of his arrest he had applied for bail before the competent court of law or bail had been granted in his favour. It is worth mentioning that Senior Superintendent of Police, Shopian, who forwarded the record including dossier and other connected documents to the detaining authority vide his communication dated 08.04.2022, did not bring the fact to forefront as to when detenu was arrested in connection with case FIR no.130/2020 and/or as to whether the detenu had applied for bail before the court of law or not, to the notice of detaining authority. It is because of this omission on the part of the Senior Superintendent of Police that the detaining authority did not voice his apprehension of likelihood of detenu being released on bail. That being the situation, it was incumbent upon the detaining authority to indicate the compelling reasons for resorting to provisions of Clause (a) of Section 8 of J&K Public Safety Act, 1978, and put the detenu under preventive detention. If the idea of issuing the detention order was to prevent the detenu from acting in any manner

prejudicial to the security of the State, that objective stood already achieved with the arrest of the detenu in connection with commission of substantive offences. In these circumstances, the detaining authority could not have absolved itself of the responsibility to, at least, indicate the compelling circumstances for taking such a decision. In that view of the matter, the detention of detenu, when he was already in custody, cannot be said to have been made because of any undisclosed compelling reason and, therefore, cannot be justified in view of the law laid down by the Supreme Court in *Surya Prakash Sharma v. State of U.P. and others, 1994 Supp (3) SCC 195*.

6. A Division Bench of this Court in the case of Nissar Ahmad Qazi v. State of Jammu and Kashmir (LPAHC no.06/2019 decided on 27.11.2020), has already drawn a distinction between the grounds of detention on the basis of which a citizen is detained under the preventive detention law and the grounds of challenge urged by the detenu to assail his detention order. What is envisaged under Section 10A of the J&K Public Safety Act is a situation where detention is ordered on two or more grounds, which are severable and independent of each other. In these circumstances, the Section provides that order of detention shall not be deemed invalid or inoperative merely because one or some of the grounds is or are vague, non-existent, not relevant, not connected or not proximately connected with such person or invalid for any other reason whatsoever etc. etc.
7. Viewed thus, in the light of the distinction drawn in the case of Nissar Ahmad Qazi (supra), it is seen that in the instant case the subjective satisfaction is fundamentally based on one ground, i.e., the activities the detenu has been persistently involved in over a period of time, if not prevented by putting him under preventive detention, would pose serious threat to the security of the State. All other details, including reference to involvement of the detenu in FIR etc. only constitute subsidiary facts giving rise to a substantive ground on the basis of which the detaining authority has arrived at a satisfaction that the detention of the detenu under preventive law is necessary and imperative.
8. The plea of the petitioner that the subjective satisfaction of the detaining authority, which is *sine quo non*, for ordering detention under preventive

law is vitiated by non-application of mind, is strictly speaking not a ground of detention but a specific ground of challenge raised to assail the order of detention itself. Subjective satisfaction without taking relevant material into consideration and non-application of mind by the detaining authority are the grounds that go to the root of detention and vitiates it *ab initio*. In that view of the matter, the order of detention is clearly vitiated by total non-application of mind by the detaining authority.

9. Both the sides have relied upon several judgements to make good their points. Suffice it to say that the legal position is well settled. The detention order is vitiated if the requisite material relied upon is not supplied to the detenu, in that, it affects the vital constitutional rights of the detenu to make an effective and meaningful representation. Simply because a communication has been issued to the detenu informing him about his right to make a representation is not sufficient. As is evident from perusal of the xerox copy of the detention record produced by learned counsel for respondents, the material relied upon by the detaining authority has not been supplied to detenu so as to enable him to make a representation against his detention.
10. It is equally well settled that the order of detention must have proximate and live link with the activities of the detenu. The detention based on stale incident is vitiated in law. I do not require many judgements to hammer this settled legal position.
11. For the foregoing reasons and without specifically dealing with the judgements referred to by the learned counsel for the petitioner, I find substance in this petition and the same is, accordingly, allowed. The impugned order of detention is quashed. Direction is issued to the respondents to release the detenu from the preventive custody forthwith provided he is not required in connection with any other case.
12. The detention record be returned to the counsel for respondents.

(Sanjeev Kumar)
Judge

Srinagar

14.07.2023

Ajaz Ahmad, PS

Whether approved for reporting? Yes/No