IN THE HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

Reserved on: 07.09.2022
Pronounced on: 20.09.2022

WP(Crl) No.324/2022

Khursheed Ahmad Bhat **...PETITIONER(S)**

Through: -Mr. N. A. Ronga, Advocate.

Vs.

UT OF J&K & ORS **…RESPONDENT(S)**

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

CORAM: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE.

JUDGMENT

1. Petitioner, through his maternal uncle Fayaz Ahmad Dar, has assailed his detention ordered by District Magistrate, Pulwama (the detaining authority) vide its order No. 36/DMP/PSA-22 dated 19.05.2022 (the impugned order). In terms of the impugned order aforesaid, the petitioner has been put under preventive detention with a view to preventing him from acting in any manner prejudicial to the maintenance of the public order.

2. Before adverting to the grounds of challenge urged by the learned counsel for the petitioner ('the detenue') to assail the impugned order, it is necessary to notice the material facts on the basis of which the detaining authority has derived its subjective satisfaction for placing the detenue under the preventive detention.

3. As per the grounds of detention served upon the detenue, which are framed by the detaining authority on the basis of Police report dated 18-05-2022, he is alleged to be involved in motivating and provoking the innocent youth, young and tender-aged boys for resorting to anti-social activities and that he is an active member of the gang "TRATH GOLA" which is headed by Abdul Hamid Dar R/O Tujan Pulwama along with some other associates and is active in many Districts of the Valley. After the information was received by the police about the illegal activities of the detenue, FIR No. 123/2022 under Sections 420, 120-B IPC was registered and at the time of framing the grounds of detention, the detenue was shown to be on Police Remand. As it reveals from the grounds of detention, the detenue had been active member of the gang since 2012, which was dishonestly and fraudulently extorting money worth Crores of rupees from gullible people on the pretext of paying returns in double and triple under the " TRATH GOLA" a scam. It is also stated that the detenue had lured the people into the trap and the amount so collected was used in illegal, illegitimate and illicit activities. It is further alleged that the detenue along with his other associates hatched a conspiracy to loot the general masses and persuaded many to sold their properties to invest in "TRATH GOLA" the scam, and that, since the detenue had applied for bail in the aforesaid FIR, therefore, the detaining authority was of the opinion that remaining at large of the detenue would be detrimental to the maintenance of peace and public order.

4. It is on the basis of these allegations contained in the FIR, the detaining authority arrived at subjective satisfaction to detain the detenue in

order to restrain him from acting in any manner prejudicial to the maintenance of public order. The detaining authority, thus, found it imperative to detain the detenue by invoking Section 8 of the J&K Public Safety Act and it is in the aforesaid backdrop, the impugned detention order has been passed against the detenue and he has been lodged in District Jail Bhaderwah.

5. Despite opportunity granted, counter affidavit on behalf of the respondents has not been filed. Mr. Asif Maqbool, Dy. AG, has provided scanned copy of the detention record.

6. The impugned order of detention has been challenged by the Detenue on several grounds. Learned counsel for the Detenue, however, laid much emphasis on the following grounds:

(I) That the detaining authority has relied upon the allegations contained in FIR No.123/2022 registered under Section 420, 120B IPC for indulging in cheating which, if found proved against the detenue, would constitute a criminal act and said criminal act can, by no means, be treated as an act to harm to public order;

(II) That the material relied upon by the detaining authority to derive subjective satisfaction with regard to necessity of putting the detenue under preventive detention was not supplied to the detenue in the language, which he could understand or read, thereby incapacitating him from making an effective

representation to the detaining authority/government against his detention;

(III) That the grounds of detention are vague, irrelevant and non-existent and, therefore, on the basis thereof, no prudent and reasonable man can make an effective and purposeful representation.

7. Having heard learned counsel for the parties and perused the record, I am of the considered view that the detention of the detenue is not sustainable in law for more than one reason.

8. From perusal of grounds of detention, it clearly transpires that the petitioner has been put under preventive detention primarily for his involvement in FIR No.123/2022. The allegations contained in the aforesaid FIR, which is made basis of the detention order, even if taken to be true on their face value, do not constitute an act which has the potentiality of disturbing the public order. The term “law and order” and “Public order” look deceptively similar but both have different connotations. While former is a continual ongoing term, the latter is more temporal in nature. In the case of public order, the community or the public at large is affected by a particular action whereas the act or acts that affect only few individuals may be a case of law and order. Mere contravention of law such as indulging in cheating or criminal breach of trust certainly affects ‘law and order’ but before it can be said to affect public order, it must affect the community or public at large. The nature of criminal act, the manner in which it is committed and its impact are some of the factors that determine whether a

particular act would fall within the realm of "public order" or " law and order". What is alleged in the FIR, which is sole basis of putting the detenue under preventive detention, clearly falls within the ambit of term "Law and Order". Unless the criminal act attributed to the detenue has the effect of disturbing the even tempo of life of community or public at large, it would remain in the realm of "Law and order" and thus cannot be made the basis of preventive detention.

9. To understand the concept better, here is an example: when two drunkards quarrel and fight in the public street, there is disorder but not public disorder. They can be dealt with under powers of maintenance of law and order but cannot be detained for disturbing public order. However, where two fighters are of rival communities and one of them tries to raise communal passions, the problem is still of law and order but raises apprehension of public disorder.

10. Recently in **Banka Sneha Sheela v. State of Telangana and ors, (2021) 9 SCC 415,** Hon'ble the Supreme Court was confronted with a case of preventive detention ordered by the State of Telangana on almost similar grounds. There were as many as five FIRs all registered against the detenue therein under Sections 420, 406 and 506 IPC and in all the FIRs the detenue was granted anticipatory bail. The detention was ordered primarily on the ground that remaining at large of the detenue would be detrimental to public order. The Hon'ble the Supreme Court, in paragraphs No. 14, 15 and 19 has held thus:-

> " 14. There can be no doubt that for 'public order' to be disturbed, there must in turn be public disorder. Mere contravention of law such as indulging in cheating or criminal breach of trust certainly affects 'law and order' but before it can be said to affect 'public order', it must affect the community or the public at large.
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> 15. There can be no doubt that what is alleged in the five FIRs pertain to the realm of 'law and order' in that various acts of cheating are ascribed to the Detenu which are punishable under the three sections of the Indian Penal Code set out in the five FIRs. A close reading of the Detention Order would make it clear that the reason for the said Order is not any apprehension of widespread public harm, danger or alarm but is only because the Detenu was successful in obtaining anticipatory bail/bail from the Courts in each of the five FIRs. If a person is granted anticipatory bail/bail wrongly, there are well-known remedies in the ordinary law to take care of the situation. The State can always appeal against the bail order granted and/or apply for cancellation of bail. The mere successful obtaining of anticipatory bail/bail orders being the real ground for detaining the Detenu, there can be no doubt that the harm, danger or alarm or feeling of security among the general public spoken of in Section 2(a) of the Telangana Prevention of Dangerous Activities Act is make believe and totally absent in the facts of the present case.
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> 19. To tear these observations out of context would be fraught with great danger when it comes to the liberty of a citizen under Article 21 of the Constitution of India. The reason for not adopting a narrow meaning of 'public order' in that case was because of the expression "in the interests of" which occurs to Article 19(2) to 19(4) and which is pressed into service only when a law is challenged as being unconstitutional for being violative of Article 19 of the Constitution. When a person is preventively detained, it is Article 21 and 22 that are attracted and not Article 19. Further, preventive detention must fall within the four corners of Article 21 read with Article 22 and the statute in question. To therefore argue that a liberal meaning must be given to the expression 'public order' in the context of a preventive detention statute is wholly inapposite and incorrect. On the contrary, considering that preventive detention is a necessary evil only to prevent public disorder, the Court must ensure that the facts brought before it directly and inevitably lead to a harm, danger or alarm or feeling of insecurity among the general public or any section thereof at large."

11. Earlier Hon'ble the Supreme Court in the case of **Rekha v. State of T. N, (2011) 5 SCC 244** also discussed the nature and scope of preventive detention. Paragraphs No. 29 and 30 of the judgment are relevant and, therefore, set out below:-

> "29. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the

> Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.
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> 30. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is: was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal. In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in question was illegal."

12. This case is fully covered by the **Banka Sneha Sheela** (supra). The allegations in the FIR registered against the detenue may be a problem of law and order but would not certainly come within the purview of the term 'public order'. There is nothing mentioned in the grounds of detention to demonstrate that the activities of the detenue, on the basis of which the FIR for cheating and fraud came to be registered against him, had an impact of disturbing even the tempo of life of the community or had the effect of affecting the public at large. The offences with which the detenue has been charged in the FIR are substantive offences and the ordinary law of the land is sufficient to deal with the detenue, if he is ultimately found guilty of the allegations leveled against him in the FIR. The apprehension of the detaining authority that the detenue was likely to get bail and in that event, his remaining at large would be detrimental to the maintenance of peace and public order, cannot be basis of putting the detenue under preventive detention. The detaining authority as also the State machinery is well within its rights to oppose the bail and, if granted, take remedial measures by way of approaching the higher forum. The simplicitor case of cheating and fraud,

without having wider ramifications, cannot be made the basis of issuing the detention order in the name of maintaining the public order.

13. For the foregoing reasons, this petition is allowed. The impugned order of detention is set aside and the detenue is directed to be released from the preventive detention forthwith, unless, of course, not involved in any other case.

(Sanjeev Kumar)
Judge

Srinagar
20.09.2022
Anil Raina, Addl. Reg/Secy

Whether the order is speaking: ***Yes***
Whether the order is reportable: ***Yes***