

**HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

...

WP (CrI) no.558/2019

Reserved on: 18.03.2020

Pronounced on: .04.2020

Shabir Ahmad Wani

..... Petitioner(s)

Through: MrWajidHaseeb, Advocate

Versus

State of J&K and another

....Respondent(s)

Through: Mr S.H. Naqashbandi, AAG

CORAM: HON'BLE MR JUSTICE TASHI RABSTAN, JUDGE

JUDGEMENT

1. District Magistrate, Kulgam, has, vide Order no.41/DMK/PSA/19 dated 08.08.2019, placed *Shabir Ahmad Wani* son of *Mohd Ashraf Wani* resident of *D.H.Pora District Kulgam* (for succinctness “*detenu*”), under preventive detention and directed his lodgement in Central Jail, Srinagar. It is this order, petitioner has challenged in this petition and seeks quashment thereof on grounds averred therein.
2. Respondents have filed Reply Affidavit in opposition to the petition.
3. I have heard learned counsel for parties. I have perused the detention record produced by learned counsel for respondents and considered the matter.
4. Learned counsel for petitioner has, to augment the case set up by petitioner in writ petition on hand, contended that *detenu* was already admitted to bail in the cases reflected in grounds of detention, but this important fact has not been mentioned by detaining authority. He has also stated that last alleged activity mentioned in grounds of detention, took place on 08.07.2016, whereas impugned order has been passed after three years, that is, on 08.08.2019. Unexplained delay between alleged activity and passing of detention order has rendered impugned detention unjustified. Besides, he has also averred that grounds of

detention are ditto copy of dossier and therefore again impugned order is liable to be quashed.

5. *Per contra*, learned counsel for respondents insists that detention order has been passed on subjective satisfaction by detaining authority and detention order is in accordance with law and there is no violation or infringement of rights guaranteed under the Constitution of India. Hence, he exhorts dismissal of petition.
6. Given the case set up and submissions made by learned counsel parties, it is apt to mention that whether a person, who is in jail, can be detained under preventive detention law, has been a subject matter of consideration before the Supreme Court very often. In *Dharmendra Suganchand Chelawat & anr v. Union of India*, AIR 1990 SC 1196, the Supreme Court, while considering the same issue has reconsidered its earlier judgments on the point in *Rameshwar Shaw v. District Magistrate, Burdwan*, AIR 1964 SC 334; *Masood Alam v. Union of India*, AIR 1973 SC 897; *Dulal Roy v. District Magistrate, Burdwan*, AIR 1975 SC 1508; *Alijan Mian v. District Magistrate, Dhanbad*, AIR 1983 SC 1130; *Ramesh Yadav v. District Magistrate, Etah*, AIR 1986 SC 315; *Suraj Pal Sahu v. State of Maharashtra*, AIR 1986 SC 2177; *Binod Singh v. District Magistrate, Dhanbad*, AIR 1986 SC 2090; *Smt Shashi Aggarwal v. State of U.P.*, AIR 1988 SC 596, and came to the conclusion that an order for detention can be passed against a person in custody and for that purpose, it is necessary that grounds of detention must show that (i) detaining authority was aware of the fact that detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that detenu is already in detention. The expression “compelling reasons” in the context of making an order for detention of a person already in custody implies that there must be cogent material before detaining authority on the basis whereof it may be satisfied that (a) detenu is likely to be released from custody in near future, and (b) taking into account the nature of antecedent activities of detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

7. When the above principles are applied to facts of instant case, there is no escape from the conclusion that impugned detention order cannot be sustained. Grounds of detention do not mention: whether detenu is in custody or not at the time of making of detention order; whether application for grant of bail has been made or not at the time detention order was made; whether bail has been granted by court of competent jurisdiction or not at the time of issuance of detention order. Thus, in the present case detaining authority has not drawn any subjective satisfaction vis-à-vis detention of detenu. There is no mention of the fact that detenu has applied for bail in criminal case(s) against him nor is there any satisfaction that detenu has been enlarged on bail before issuance of impugned order of detention. This clearly indicates and shows total absence of application of mind on the part of detaining authority while passing impugned detention order of detention. In that view of matter, impugned detention order is vitiated.
8. Another impact facet of the matter has unmasked while having a close peep of impugned order of detention. It intriguingly mentions that it is “*on the basis of grounds of detention placed before*” detaining authority “*by the Superintendent of Police Kulgam*” that detaining authority is satisfied to place detenu under preventive detention. It is made clear here that detaining authority may get inputs from different agencies, including 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 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 the order of preventive detention. However, in the present case, it is apparent and evident from impugned order of detention that grounds of detention have not been prepared by detaining authority and as a corollary thereof impugned detention order is vitiated.

9. For the foregoing reasons, the petition is disposed of and detention Order no.41/DMK/PSA/19 dated 08.08.2019, passed by District Magistrate, Kulgam, is quashed. Respondents, including Jail Superintendent concerned, are directed to release the detenu forthwith, provided he is not required in any other case. **Disposed of.**
10. Registry to return detention record to learned counsel for respondents.

**(TashiRabstan)
Judge**

Srinagar

.04.2020

Ajaz Ahmad, PS

Whether the order is reportable: No.