

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

...

WP(CrI) No.74/2019

Reserved on: 19.03.2020

Pronounced on: 22.04.2020

Shakoor Ahmed

..... Petitioner(s)

Through: Mr. Waheed Choudhary, Advocate

Versus

State of J&K and others

.....Respondent(s)

Through: Mr. A.M.Malik, Dy.AG

CORAM:HON'BLE MR JUSTICE SANJEEV KUMAR, JUDGE

JUDGEMENT

1. This petition challenges the order passed by the District Magistrate, Rajouri (for short, 'the Detaining Authority') bearing No.DMR/INDEX-04 of 2019 dated 06.07.2019 whereby the petitioner (for short, 'the detenu') has been detained under Section 8 of the Jammu and Kashmir Public Safety Act, 1978 (for short, 'the PSA Act') with a view to prevent him from acting in any manner prejudicial to the maintenance of public order. The detention has been ordered by the Detaining Authority on the

grounds elaborately enumerated in the grounds of detention allegedly served upon the detenu at the time of execution of the detention order. As is apparent from the records, the provocation to slap detention order on the detenu is a dossier of criminal activities of the detenu, supplied by the Senior Superintendent of Police, Rajouri to the Detaining Authority.

2. The detention has been assailed on the following grounds:-
- (i) That the impugned detention order is primarily founded on five FIRs registered against the detenu in the Police Station, Dharamsal out of which, in two FIRs, i.e., FIR No. 26/2016 and FIR No.49/2017, the detenu stands acquitted;
 - (ii) That the detenu was arrested on 05.09.2019 and lodged in District Jail, Dhangri, Rajouri, but, neither he nor his family members were informed about the grounds of his arrest and detention. The arrest of the detenu was effected without serving order of detention and grounds of detention on him.
 - (iii) That there is clear non-application of mind on the part of the Detaining Authority, who has ordered the detention merely on the basis of the dossier supplied by the Senior Superintendent of Police, Rajouri.
 - (iv) That the activities alleged against the detenu may constitute a law and order problem, but, cannot be construed to be prejudicial to the maintenance of public order.
 - (v) That the Detaining Authority has relied upon the criminal cases falsely registered against the detenu, which are

otherwise, too remote in time to reflect upon any apprehension of breach of public order.

(vi) That the respondent No.2 has not shown any awareness about the detenu having been released on bail in all the cases. The Detaining Authority is also oblivious to the fact that in two of the cases, the detenu has already been acquitted.

3. The respondents have filed their counter-affidavit and defended the impugned order on the star point that, as laid down by the Hon'ble Supreme Court of India in the case of **Hardhan Saha V. State of West Bengal**, reported in **(1975)3 SCC 198**, there is no parallel between the prosecution in a court of law and preventive detention; one is punitive action whereas other is preventive act. The factual submissions made by the detenu have also been refuted by the respondents. With a view to substantiate their plea taken in the counter-affidavit, the respondents have also produced the original detention record.
4. Having heard learned counsel for the parties and perused the record, I am of the view that the order of detention impugned in this petition is not sustainable for more than one reasons.
5. On going through the record of detention, it is seen that the impugned order of detention was passed by the Detaining Authority on 06.07.2019, but, the same was executed only on 31.10.2019. The Detaining Authority has not spelled out any reasons in its reply affidavit, however, from the records, it is

evident that the order of detention remained unexecuted till 31.10.2019, though, the detenu was arrested by the Police on 05.09.2019 in case FIR No.29 of 2019 and he was in District Jail, Dhangri, Rajouri on judicial remand till 30.10.2019 wherefrom he was shifted to Central Jail, Kote Bhalwal, Jammu on 31.10.2019 in execution of the order of detention. It is, thus, not coming forth as to for what reasons the order of detention could not be executed between 05.09.2019 till 30.10.2019. That apart, it has not been explained by the Detaining Authority that when he was already arrested in the FIR No.29 of 2019 and had not been released on bail, where was the necessity to execute the order of detention. As a matter of fact, the Detaining Authority, as it appears from the records, treated itself as *functus officio* after passing the order of detention. From the perusal of different FIRs registered against the detenu, it comes to fore that the detenu has been constantly indulging in the activities related to bovine smuggling and his activities are such as may have potential of disturbing even tempo of life and, therefore, a threat to maintenance of public order. The registration of FIRs over a period of three years, speaks volume about the fact that the detenu is an incorrigible bovine smuggling accused and in case his activities are not checked and he is not prevented from indulging continuously in such activities, he would definitely pose threat to the maintenance of public order. I am, therefore, not impressed by the argument of learned counsel for the detenu that the activities alleged against the detenu in the

grounds of detention are only a law and order problem and do not constitute any threat to the maintenance of public order.

6. The distinction between the terms 'law and order' and 'public order' has been succinctly brought out by the Hon'ble Supreme Court of India in several judgments rendered in the context of preventive detention laws. To quote one, in the case of **Commissioner of Police Vs. C. Anita, (2004) 7 SCC, 467**, the Hon'ble Supreme Court of India dealt with the issue in the following manner:-

“The crucial issue is whether the activities of the detenu were prejudicial to public order. While the expression 'law and order' is wider in scope in as much as contravention of law always affects order. 'Public order' has a narrower ambit, and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specific locality. The distinction between the areas of 'law and order' and 'public order' is one of the degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise problem of law and order only. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps to distinguish it as an act affecting 'public order' from that concerning 'law and order'. The question to ask is, “Does it lead to disturbance of the current life of the community so as to amount to a disturbance of the public order or does it affect

merely an individual leaving the tranquillity of the society undisturbed”? This question has to be faced in every case on its facts.

“Public order” is what the French call ‘order publique’ and is something more than ordinary maintenance of law and order. The test to be adopted in determining whether an act affects law and order or public order, is: Does it lead to disturbance of the current life of the community so as to amount to disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed? (See-**Kanu Biswa v. State of West Bengal, AIR 1972 SC 1656**).

“Public order” is synonymous with public safety and tranquillity: “it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State”. 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. Disorder is not 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 happen dings (See-Sr. Ram Monthar Lohia V. State of Bihar and others, 1966 (1) SCR 709.”

7. In the backdrop of the aforesaid distinction drawn by the Hon’ble Supreme Court of India, I am of the considered view that what is relevant to determine is not the nature of act, but, its potentiality to disturb even tempo of life of the community, which makes it

prejudicial to the maintenance of the public order. In the instant case, the effect of alleged activities of the detenu is not limited to few individuals directly involved, but, would take within its sweep a wide spectrum of public. The bovine smuggling apart from being a criminal offence has the potential of creating a feeling of discontent and indignation amongst a particular community. The bovine animals include cows and calves and their illegal smuggling is always viewed by one community only for the purpose of slaughter and, therefore, there is a feeling amongst the people belonging to such community, that the activity hurts their religious sentiments. Without commenting on the merits of such apprehension, I am persuaded to hold that these activities of person, if not checked, may disturb even tempo of current life of the community and not only poses law and order problem but would also vitiate the public order.

8. That as noted above, I find, however, the order of detention vitiated on the ground that there is non-application of mind on the part of Detaining Authority. The detenu's claim that in two FIRs registered against him he has been acquitted, has not been taken note by the Detaining Authority. As per the grounds of detention, the detenu is facing trial in four FIRs whereas one FIR is at the stage of investigation. The order of detention would also be vitiated for the reason that the Detaining Authority, while conveying the detenu and his father that they have a right to make representation to the Government, has conspicuously omitted to

make the detenu aware of his right to make representation to the Detaining Authority itself. The detenu has, thus, been deprived of his right to make representation to the District Magistrate before order of detention was approved by the Government. A Division Bench's judgment of this Court in **Tariq Ahmed Dar Vs. State of J&K and others, 2017(3) JKJ (HC) 684**, relying upon the judgment of Hon'ble Supreme Court of India in the case of **State of Maharashtra V. Santosh Shankar Acharya, 2000(7)SCC 463**, while considering this issue, in paragraph Nos. 12 and 15 has laid down thus:-

“12. On examining the Supreme Court decision in the case of Santosh Shankar Acharya (supra), we find that the relevant provisions of the Maharashtra Prevention of Dangerous Persons Act, 1981 are in *pari materia* to the provisions of the Jammu and Kashmir Public Safety Act, 1978. For example, Section 3 of the Maharashtra Act is almost identical to Section 8 of the J&K Act, Section 8 of the Maharashtra Act corresponds to Section 13 of the J&K Act and, similarly Sections 14 and 21 of the Maharashtra Acts correspond to Sections 19 and 21 of the J&K Act.

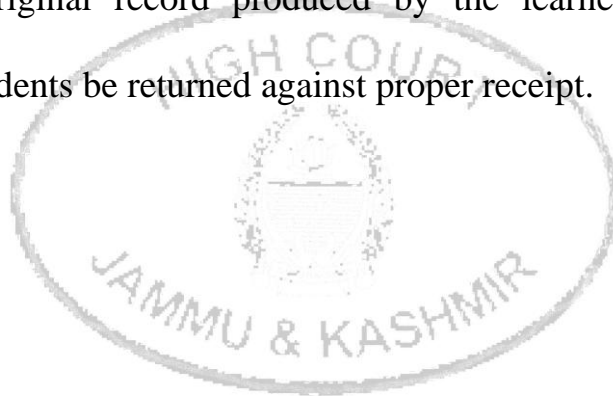
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14.

15. From a reading of the said decision, it is abundantly clear that non-communication of the fact that the detenu can make a representation to the Detaining Authority, till the detention order is not approved by the Government, would constitute an infraction of a valuable Constitutional right guaranteed under [Article 22\(5\)](#) of the Constitution of India as also of the right under [Section 13](#) of the Jammu and Kashmir

Public Safety Act, 1978. Failure of such non-communication would invalidate the order of detention.”

9. In view of the discussion made above and having found the order of detention vitiated in law on the grounds indicated above, I do not think it proper and desirable to deal with other grounds of challenge urged by the learned counsel for the detenu.
10. In the premises, this petition is allowed. The impugned order bearing No. DMR/INDEX-04 of 2019 dated 06.07.2019 is quashed. The respondents are directed to set the detenu at liberty from the preventive detention if not required in any other case.
11. The original record produced by the learned counsel for the respondents be returned against proper receipt.



(Sanjeev Kumar)
Judge

Jammu
22.04.2020
MadanVerma-PS

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