

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 15.06.2023

Pronounced on: 11.07.2023

WP(Crl) No.225/2021

ABID HUSSAIN GANIE

...PETITIONER(S)

Through: - Mr. Shafqat Nazir, Advocate.

Vs.

U T OF J&K & anr.

...RESPONDENT(S)

Through: - Mr. Zahid Dar, Dy. AG.

**CORAM: HON'BLE MR. JUSTICE SANJAY DHAR,
JUDGE**

JUDGMENT

1) By the instant petition, the petitioner has challenged the veracity and legality of the detention order No.48/DMA/PSA/DET/2021 dated 25.10.2021, issued by District Magistrate, Anantnag (for brevity “*detaining authority*”). In terms of the aforesaid order, ***Abid Hussain Ganie son of Abdul Gani Ganie resident of Ahang Matipora District Anantnag*** (for short “*detenue*”) has been placed under preventive detention and lodged in Central Jail, Jammu (Kotbhalwal), in order to prevent him from indulging in the activities which are prejudicial to the security of the State.

2) The petitioner has contended that the detaining authority has issued the impugned detention order mechanically without application of mind, inasmuch as the allegations mentioned in the grounds of

detention have no nexus with the detenue and that the same have been fabricated by the police in order to justify its illegal action of detaining the detenue. It has been contended that the grounds of detention are vague, non-existent on which no prudent man can make a representation against such allegations. It has been further contended that the procedural safeguards have not been complied with in the instant case, inasmuch as whole of the material which formed basis of the impugned detention order has not been supplied to the petitioner. It has also been contended that the representation of the petitioner against the impugned order of detention has not been considered.

3) Upon being put to notice, the respondents appeared through their counsel and filed their reply affidavit, wherein they have disputed the averments made in the petition and insisted that the activities of detenue are highly prejudicial to the security of the State. It is pleaded that whole of the material relied upon by the detaining authority has been furnished to the detenue and the same were read over and explained to him; that the grounds urged by the petitioner are legally misconceived, factually untenable and without any merit and that the detenue was informed that he can make a representation to the government as well as to the detaining authority against his detention but despite that he has not chosen to file any representation. It is further contented in the reply affidavit that all statutory requirements and constitutional guarantees have been fulfilled and complied with by the detaining authority and that the impugned order has been issued validly and legally. The respondents

have produced the detention record to lend support to the stand taken in the counter affidavit.

4) I have heard learned counsel for parties and perused the record.

5) Learned counsel for the petitioner, while seeking quashment of the impugned order, projected various grounds but his main thrust during the course of arguments was on the following grounds:

- (I) That the detenu has not been provided the relevant material and that non-application of mind on the part of detaining authority while passing the impugned detention order, which prevented him from making an effective representation against his detention.
- (II) That the grounds of detention are vague and cryptic, which prevented him from making an effective representation against his detention.
- (III) That although a representation was submitted against the detention by the detenu through his father before the respondents yet the same was not considered rendering the detention order unsustainable in law.

6) The first ground projected by the petitioner is regarding non-supply of relevant material and non-application of mind on the part of detaining authority while passing the impugned detention order, which prevented him from making an effective representation against his detention. From a perusal of the grounds of detention, which forms part of the detention record produced by the learned counsel for the respondents, it transpires that no FIR has been shown to have been registered against the petitioner. However, two documents under the

heading “Receipt of Ground of detention & relevant record” and “Executive Report” that are annexed with the detention record, suggests that 36 leaves of material comprising detention order (01 leaf), Notice of detention (01 leaf), grounds of detention (02 leaves), dossier of detention (05 leaves), copies of FIR, statements of witnesses and other related relevant documents (27 leaves) have been furnished to the petitioner. Surprisingly, when no FIR is shown to have been registered against the petitioner, then how come 27 leaves of FIR etc. have been provided to him. This exhibits total non-application of mind and overzealousness on the part of the detaining authority, which casts serious doubt about the authenticity of the receipt. This contention gets further strengthened from the fact that as per the aforesaid “receipt of grounds of detention” the petitioner has been furnished with dossier of detention (05 leaves) whereas, as per the detention record, the police dossier comprises of only four leaves. These facts go on to show that the documents “Receipt of grounds of detention” and “Execution Report” appear to have been manipulated and, as such, the same cannot be relied upon. Thus, the contention of the petitioner that he has not been provided the relevant material appears to be well-founded. The aforesaid facts clearly show that there has been total non-application of mind on the part of the detaining authority which vitiates the impugned order of detention.

7) Next it is contended that the grounds of detention are vague and cryptic, inasmuch as the material particulars of the active militants of TRF, as mentioned in the grounds of detention, have not been disclosed.

8) On perusal of the detention record produced by learned counsel for the respondents, the ground projected regarding vagueness of the averments made in the grounds of detention, appears to be forceful. There is no mention of the particulars of the place and the identity of the militants/terrorists, on whose directions the detinue is alleged to have been working. The particulars of the period when the detinue is alleged to have offered support to the terrorists are also not mentioned in the grounds of detention. Thus, the grounds, being vague and lacking in material particulars, the detinue could not have made an effective representation against his detention. Therefore, there has been violation of constitutional guarantees envisaged under Article 22(5) of the Constitution. The detention order, as such, is illegal and unsustainable. In my aforesaid view, I am fortified by the judgments of the Supreme Court in the case of **Jahangirkhan Fazal Khan Pathan vs. Police Commissioner, Ahmadabad, (1989) 3 SCC 590, Abdul Razak Nane khan Pathan v. Police Commissioner, Ahmadabad, AIR 1989 SC 2265, , Mohd. Yousuf Rather vs. State of J&K & Ors, 1979 4 SCC 370 and Piyush Kantilal Mehta vs. The Commissioner of Police, Ahmedabad City and Ors. 1989 (1) Crimes 176 (SC).**

9) The next ground projected by the petitioner is that he had submitted a representation against his detention but the same has not been considered by the respondents.

10) It has been specifically contended by the petitioner that he had made a representation against his detention through his father, which,

seemingly, has been addressed the office of District Magistrate, Anantnag, on 08.11.2021. The petitioner has specifically pleaded in ground (xii) of his petition that he made a representation before the detaining authority but the same has not been placed before the Advisory Board. These assertions have gone un rebutted as there is no denial to the same by the respondents in the counter affidavit. Though the respondents, in their counter affidavit, have contended that the petitioner did not intentionally and deliberately make any representation, but from a perusal of the detention record, it is revealed that the respondents have received the representation of the petitioner, as is evident from communication dated 09.12.2021, addressed by Deputy Secretary to Government, Home Department, to the Special DIG of Police, CID, J&K. The detention record does not suggest that the said representation has been considered by the Government. The record shows that report regarding representation of the petitioner was called by the Government but there is nothing on record to suggest as to what decision has been taken on the said representation nor decision thereof seems to have been conveyed to the petitioner. The non-consideration of the representation indisputably amounts to violation of constitutional safeguards provided the provisions of Article 22(5) of the Constitution. A reference in this behalf to the judgment of the Apex Court in the case of **Rahmatullah Vs. State of Bihar and Ors., 1979 (4) SCC 559**, would be relevant. In Para 4 of the aforesaid judgment, the Court observed as under:-

“4. The normal rule of law is that when a person commits an offence or a number of offences, he should be prosecuted and punished in accordance with the normal appropriate criminal law; but if he is sought to be detained under any of the

preventive detention laws as may often be necessary to prevent further commission of such offences, then the provisions of Article 22(5) must be complied with. Sub-Article (5) of Article 22 reads:

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

This Sub-Article provides, inter alia, that the detaining authority shall as soon as may communicate the grounds of detention and shall afford him the earliest opportunity of making a representation against the order. The opportunity of making a representation is not for nothing. The representation, if any, submitted by the detenu is meant for consideration by the Appropriate Authority without any unreasonable delay, as it involves the liberty of a citizen guaranteed by Article 19 of the Constitution. The non-consideration or an unreasonably belated consideration of the representation tantamount to non-compliance of Sub-Article (5) of Article 22 of the Constitution.”

11) From the aforesaid legal position on the subject, it is clear that non-consideration or an unreasonably belated consideration of the representation tantamounts to non-compliance of Article 22(5) of the Constitution, which in turn renders the detention unsustainable in law.

12) Viewed thus, the petition is allowed and the impugned order of detention is quashed. The detenu is directed to be released from the preventive custody forthwith provided he is not required in connection with any other case.

13) The detention record be returned to the learned counsel for the respondents.

(Sanjay Dhar)
Judge

SRINAGAR
11.07.2023
“Bhat Altaf, PS”

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