HIGH COURT OF JAMMU, KASHMIR AND LADAKH
AT JAMMU

Reserved on : 24.04.2022
Pronounced on: 12.07.2022

WP (Crl) No. 02/2022(O&M)

Mohammad Yousaf …..Appellant(s)/Petitioner(s)

Through: Mr. Jagpaul Singh, Advocate

vs

Union Territory of J&K and others ….. Respondent(s)

Through: Mr. Amit Gupta, AAG

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGEMENT

1. The present petition has been filed by the petitioner through his brother, Mohd Aslam, for issuance of writ of certiorari for quashing of order No. 02 of 2022 dated 11.01.2022 issued by the respondent No. 2 by virtue of which the petitioner has been ordered to be detained under section 8 (1) (a) of the Jammu and Kashmir Public Safety Act, 1978 (hereinafter to be referred as the Act). It is stated that few days back, the petitioner came to know that the respondent No. 2 had issued order dated 11.01.2022 (supra) passed by the respondent No. 2 under the Act and the respondents are bent upon to arrest the petitioner in pursuance of the said order of detention. It is stated that the FIR No. 84/2008 for commission of offences under sections 376, 341 and 34 RPC of Police Station, Bahu Fort was closed as no case was made out against the petitioner. Further, for FIR No. 55/2010 for commission of offences under sections 353, 336 RPC of Police Station, Bahu Fort, the detention order could not have been passed after more than 10 years of the

said FIR. Similarly, same is true for FIR No. 26/2013 for commission of offences under sections 379 and 447 RPC and FIR No. 40/2013 for commission of offences under sections 379, 447 and 506 RPC, both registered with Police Station, Bahu Fort in the year, 2013. Likewise, the FIR No. 300/2015 for commission of offences under sections 341, 447, 188 RPC registered with Police Station, Bahu Fort too could not have been relied upon by the respondent No. 2 for issuance of order of detention as the incident pertained to more than 06 years back. More so, on the same grounds, FIR No. 21/2018 for commission of offences under sections 427, 336, 354, 147, 148 and 109 RPC of Police Station, Bahu Fort could not have been formed the basis for issuance of order of detention as it too pertained to the year, 2018.

2. The petitioner has impugned the order of detention on the ground that the order is unreasonable, arbitrary and *mala fide* and the grounds are vague, extraneous and irrelevant. Further stale instances have been relied upon by respondent No. 2 for issuance of order of detention. It is also stated that no case for issuance of detention order on the ground of public order is made out as the expression “law and order” and “public order” are different in nature and cannot be used interchangeably.

3. The respondents have filed the objections in which it has been stated that the dossier was submitted by the respondent No. 3 recommending the detention of the petitioner as he is a desperate character and is habitual of indulging in acts of violence such as attempt to murder, assault, land grabbing etc and is also history sheeter in Bundle-A activities of serious and heinous in nature by using dangerous weapons over a period of time and has spread a reign of terror amongst the peace loving people of the area and his anti-social

activities are prejudicial to the maintenance of public order. It is also stated that number of FIRs have been registered against the petitioner and the petitioner is indulging himself repeatedly in commission of heinous offences, as substantive laws have not proved as deterrent to the petitioner and hence the impugned order has been passed. It is also stated that the petitioner is an absconder and he has been intentionally avoiding the execution of detention order.

4. Mr. Jagpaul Singh, learned counsel for the petitioner has vehemently argued that the detention order has been illegally issued by respondent No. 2 and as such, the same is required to be quashed. He has placed reliance on the judgment of the Apex Court in "**Additional Secretary to the Government and others v Smt. Alka Subash Gadia and anr", 1992 Supp (1) SCC 496.**

5. On the contrary, Mr. Amit Gupta, learned AAG appearing for the respondents has vehemently submitted that the petitioner is an absconder and he is avoiding the execution of the detention warrant and as such, the present petition deserves to be dismissed on this ground only. He further argued that the order of detention cannot be interfered at pre-execution stage lightly and particularly when the petitioner has absconded. Mr. Gupta laid much stress that the brother of the petitioner has procured the order of detention by illegal means and it clearly shows the clout of the petitioner and his brother. He placed reliance upon the judgment of the Apex Court in "**Subhash Popatlal Dave v. Union of India", (2014) 1 SCC 280**.

6. Heard and perused the record.

7. Admittedly, the detention order dated 11.01.2022 has not been executed. The Apex Court in **Additional Secretary to the Government and others v Smt. Alka Subash Gadia and anr" (supra)** has held that the grounds on

which a constitutional court can interfere with the order of detention at pre execution stage are very limited and the indulgence can be shown on the grounds once the court is satisfied that the impugned order is not passed under the Act under which it is purported to have been passed or it is sought to be executed against wrong person or it is passed for wrong purpose or it is passed on vague, extraneous and irrelevant grounds or the authority which passed it has no authority to do so.

8. It is also relevant to take note of para 15 of the judgment in **Deepak Bajaj v State of Maharashtra and anr, (2008) 16 SCC 14**, which reads as under:

> "15. If a person against whom a preventive detention order has been passed comes to court at the pre-execution stage and satisfies the court that the detention order is clearly illegal, there is no reason why the court should stay its hands and compel the petitioner to go to jail even though he is bound to be released subsequently (since the detention order was illegal)....."

9. A perusal of the record reveals that the present writ petition is a Writ of Certiorari and has been filed by the petitioner through his brother, namely, Mohd. Aslam. The affidavit too has been sworn in by the brother of the petitioner. The petitioner has not chosen to file the writ petition himself and also there is no power of attorney/authority, executed by the petitioner in favour of his brother to file the present writ of certiorari. It is not the case set up by any remote reference in the writ petition that the petitioner is under any disability that has incapacitated him to file the writ petition himself. It gives credence to the version of the respondents that the petitioner has absconded. It is only when the petitioner against whom the detention order has been passed, files a writ petition himself thereby assailing the order of detention at pre-execution stage that the Court can examine the same considering the prejudice suffered by him and not by his proxy, on the touch stone of the law laid down by the Apex Court. The present writ petition

cannot be considered as a writ petition filed by the petitioner but in fact a writ petition filed by the brother of the petitioner. It is settled law that the writ petition can be filed only by a person who falls within the category of "person aggrieved". It would be appropriate to take note of the observations made by Hon'ble Supreme Court in **Chiranjit Lal Chowdhuri v. Union of India, 1950 SCR 869,** wherein Apex court has observed as under:

> **"45. Thus anybody who complains of infraction of any of the fundamental rights guaranteed by the Constitution is at liberty to move the Supreme Court for the enforcement of such rights and this court has been given the power to make orders and issue directions or writs similar in nature to the prerogative writs of English law as might be considered appropriate in particular cases.** The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons. An incorporated company, therefore, can come up to this court for enforcement of its fundamental rights and so may the individual shareholders to enforce their own; but it would not be open to an individual shareholder to complain of an Act which affects the fundamental rights of the company except to the extent that it constitutes an infraction of his own rights as well. This follows logically from the rule of law that a corporation has a distinct legal personality of its own with rights and capacities, duties and obligations separate from those of its individual members. **As the rights are different and inhere in different legal entities, it is not competent to one person to seek to enforce the rights of another except where the law permits him to do so. A well-known illustration of such exception is furnished by the procedure that is sanctioned in an application for a writ of habeas corpus. Not only the man who is imprisoned or detained in confinement but any person, provided he is not an absolute stranger, can institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment."**

10. Other exception to the above Rule is a writ of quo-warranto as well as the writs filed in public interest. It would also be appropriate to take note of the judgement of apex court in case titled "**JM Desai versus Roshan Kumar"** reported in **1976 AIR Supreme Court 578**, the relevant portion is reproduced as under.

> **"13.** This takes us to the further question: Who is an "aggrieved person" and what are the qualifications requisite for such a status? The expression "aggrieved person" denotes an elastic, and to an extent, an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. At best, its features can be

described in a broad tentative manner. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the prejudice or injury suffered by him. English courts have sometimes put a restricted and sometimes a wide construction on the expression "aggrieved person". However, some general tests have been devised to ascertain whether an applicant is eligible for this category so as to have the necessary locus standi or "standing" to invoke certiorari jurisdiction.

14. We will first take up that line of cases in which an "aggrieved person" has been held to be one who has a more particular or peculiar interest of his own beyond that of the general public, in seeing that the law is properly administered. The leading case in this line is *Queen* v. *Justices of Surrey* [(1870) 5 QB 466] decided as far back as 1870. There, on the application by the highway board the justices made certificates that certain portions of three roads were unnecessary. As a result, it was ordered that the roads should cease to be repaired by the parishes.

37. It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories: (*i*) "person aggrieved"; (*ii*) "stranger"; (*iii*) busybody or meddlesome interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no more than spoking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold.

38. The distinction between the first and second categories of applicants, though real, is not always well-demarcated. The first category has, as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outermost nebulous fringe of uncertainty. **Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of "persons aggrieved". In the grey outer circle the bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a centrifugal direction. All persons in this outer zone may not be "persons aggrieved"**.

39. To distinguish such applicants from "strangers", among them, some broad tests may be deduced from the conspectus made above. These tests are not absolute and ultimate. Their efficacy varies according to the circumstances of the case, including the statutory context in which the matter falls to be considered. These are: Whether the applicant is a person whose legal right has been infringed? Has he suffered a legal wrong or injury, in the sense, that his interest, recognised by law, has been prejudicially and directly affected by the act or omission of the authority, complained of? Is he a person who has suffered a legal grievance, a person "against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something?"

Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public? Was he entitled to object and be heard by the authority

> before it took the impugned action? If so, was he prejudicially affected in the exercise of that right by the act of usurpation of jurisdiction on the part of the authority? Is the statute, in the context of which the scope of the words "person aggrieved" is being considered, a social welfare measure designed to lay down ethical or professional standards of conduct for the community? Or is it a statute dealing with private rights of particular individuals?"

11. By applying the above test, the brother of the petitioner cannot be considered as "person aggrieved" having competence to file petition for issuance of writ of certiorari on behalf of his brother in absence of any authorisation. He has no locus to file the writ of certiorari on behalf of his brother/petitioner.

12. More so, there is force in the contention of the respondents that the petitioner is evading process of law. It is apt to take note of observations made in **Subhash Popatlal Dave v. Union of India, (2014) 1 SCC 280,** where in Apex Court has held as under:

> **"46. Therefore, I am of the opinion that those who have evaded the process of law shall not be heard by this Court to say that their fundamental rights are in jeopardy. At least, in all those cases, where proceedings such as the one contemplated under Section 7 of the COFEPOSA Act were initiated consequent upon absconding of the proposed detenu, the challenge to the detention orders on the live nexus theory is impermissible. Permitting such an argument would amount to enabling the law-breaker to take advantage of his own conduct which is contrary to law**.
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> **47. Even in those cases where action such as the one contemplated under Section 7 of the COFEPOSA Act is not initiated, the same may not be the only consideration for holding the order of preventive detention illegal.** This Court in *Shafiq Ahmad* v. *District Magistrate, Meerut* [(1989) 4 SCC 556], held so and the principle was followed subsequently in *M. Ahamedkutty* v. *Union of India* [(1990) 2 SCC 1], wherein this Court opined that in such cases, the surrounding circumstances must be examined ["*14.* In *Shafiq Ahmad* v. *District Magistrate, Meerut*, (1989) 4 SCC 556 relied on by the appellant, it has been clearly held that what amounts to unreasonable delay depends on facts and circumstances of each case. Where reason for the delay was stated to be abscondence of the detenu, mere failure on the part of the authorities to take action under Section 7 of the National Security Act by itself was not sufficient to vitiate the order in view of the fact that the police force remained extremely busy in tackling the serious law and order problem. However, it was not accepted as a proper

explanation for the delay in arresting the detenu. In that case the alleged incidents were on 2-4-1988/3-4-1988/9-4-1988. The detention order was passed on 15-4-1988 and the detenu was arrested on 2-10-1988. The submission was that there was inordinate delay in arresting the petitioner pursuant to the order and that it indicated that the order was not based on a bona fide and genuine belief that the action or conduct of the petitioner were such that the same were prejudicial to the maintenance of public order. Sabyasachi Mukharji, J., as my Lord the Chief Justice then was, observed that whether there was unreasonable delay or not would depend upon the facts and circumstances of a particular situation and if in a situation the person concerned was not available and could not be served, then the mere fact that the action under Section 7 of the Act had not been taken, would not be a ground for holding that the detention order was bad. Failure to take action even if there was no scope for action under Section 7 of the COFEPOSA Act, would not by itself be decisive or determinative of the question whether there was undue delay in serving the order of detention." (*M. Ahamedkutty case,* p. 10, para 14)] . In both *Shafiq Ahmad* [(1989) 4 SCC 556] and *Ahamedkutty* [(1990) 2 SCC 1] cases, these questions were examined after the execution of the detention order. Permitting an absconder to raise such questions at the pre-execution stage, I am afraid would render the jurisdiction of this Court a heaven for characters of doubtful respect for law.

48. This Court in *Alka Subhash Gadia* [*Govt. of India* v. *Alka Subhash Gadia*, 1992 Supp (1) SCC 496 :] , emphatically asserted that "it is not correct to say that the courts have no power to entertain grievances against detention order prior to its execution". **This Court also took note of the fact that such an inquiry had indeed been undertaken by the courts in a very limited number of cases and in circumstances glaringly untenable at the pre-execution stage.** ["*30*. … Thirdly, and this is more important, it is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number viz. where the courts are prima facie satisfied (*i*) that the impugned order is not passed under the Act under which it is purported to have been passed, (*ii*) that it is sought to be executed against a wrong person, (*iii*) that it is passed for a wrong purpose, (*iv*) that it is passed on vague, extraneous and irrelevant grounds, or (*v*) that the authority which passed it had no authority to do so."

49. The question whether the five circumstances specified in *Alka Subhash Gadia case* [*Govt. of India* v. *Alka Subhash Gadia*, 1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] are exhaustive of the grounds on

> which a pre-execution scrutiny of the legality of preventive detention order can be undertaken was considered by us earlier in the instant case. We held that the grounds are not exhaustive. [*Subhash Popatlal Dave* v. *Union of India*, (2012) 7 SCC 533] **But that does not persuade me to hold that such a scrutiny ought to be undertaken with reference to the cases of those who evaded the process of law."**

13. As the writ petition has not been filed by the petitioner himself but by the brother of the petitioner without there being any proper authorisation and further when the petitioner is evading the process of law, this Court does not find any reason to show indulgence at this stage in view of law laid down in abovementioned judgments.

14. Further, a perusal of the record reveals that the brother of the petitioner has placed on record the order of detention dated 11.01.2022 and communications dated 11.01.2022 addressed to petitioner and Principal Secretary to the Government, Home Department by the District Magistrate Jammu. This Court is at a loss as to how the order of detention as also the communications addressed to the petitioner and Principal Secretary to the Government, Home Department, landed in the hands of the petitioner or his brother without there being any execution of the said detention order. There is no averment in the petition that the detention order and communications mentioned above, were obtained by any legitimate means such as under Right to Information Act etc. Rather there is averment in para 5 of the petition that few days back, the petitioner came to know about the detention order, but there is no averment as to how the petitioner obtained the order of detention and the communications mentioned above. This is a very serious matter and it surely points to the connivance of the officials at the respondents' end either with the petitioner or his brother. In view of this, the Court deems it proper to direct the Director, Anti-Corruption Bureau, Union

Territory of J&K to enquire the issue with regard to the connivance of the officials of the respondents with regard to fact as to how these documents landed with the petitioner or his brother without execution of the detention order and if *prima facie* found to be involved in the acts of omission/commission amounting to offence, then to investigate by registering FIR against all the involved persons.

15. In view of all what has been discussed above, the present petition has no merit and as such, the same is **dismissed**.

16. The Director, Anti-Corruption Bureau, Jammu shall file the compliance report within period of one month from the date of receipt of this order. Registry to send a copy of this order to the Director, Anti-Corruption Bureau Jammu against proper receipt.

17. List for filing compliance report on 16.08.2022.

(RAJNESH OSWAL)
JUDGE

Jammu
12.07.2022
Rakesh

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