HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

…

WP (Crl) no.45/2021

Reserved on: 14.02.2022

Pronounced on: 25.02.2022

Farhat Mir

……. Petitioner(s)

Through: Mr N.H.Shah, Senior Advocate with Mr Fahim Nisar Shah, Advocate

Versus

Union Territory of J&K and another

.…Respondent(s)

Through: Mr Ilyas Nazir, Laway, GA

***CORAM*:**

HON'BLE MR. JUSTICE TASHI RABSTAN, JUDGE

JUDGEMENT

1. Through the medium of this writ petition, the petitioner is seeking to quash the Order No.113/DMB/PSA(F)/2021 dated 26.03.2021, having been passed by the District Magistrate, Baramulla, whereby the detenu, namely, Farhat Mir S/o Nazir Mir R/o Mundgi, Tehsil Dangerpora, District Baramulla, has been placed under preventive detention to prevent the detenu from smuggling timber and has been directed to be lodged in Central Jail, Kotebhulwal, Jammu.
2. It is contended in this writ petition that the detenu was arrested without any justification and cause and was detained in terms of impugned order or detention.
3. The respondents have filed the Reply Affidavit in opposition to the petition, wherein it is insisted that the detenu is involved in the timber smuggling by chopping down of the trees, encroaching the forest land, setting the forest fires and cultivating the profitable crop on the forest land.

4. The learned senior counsel appearing for the petitioner has submitted that the allegations/grounds of detention are vague and mere assertions of the detaining authority and no prudent man can make an effective representation against these allegations and can only be defended in a court of law. The learned senior counsel has also averred that the grounds of detention have no nexus with the detenu and have been fabricated by the police in order to justify its illegal action of detaining the detenu. He has also contended that the authorities with preconceived mind sought the detention order to be passed by the respondent no.2 without applying his mind and without any due procedure and that impugned detention order has been seemingly passed upon the dictates of police authorities. It is also stated that the detaining authority has not prepared the grounds of detention itself, which is a prerequisite for him before passing the detention order. It is also the assertion of the learned senior counsel for the petitioner that the detenu was not informed that within what timeframe he can make a representation against the detention order to the detaining authority to respondent no.1, which is in total violation of the rights of the detenu as guaranteed under Article 22 of the Constitution. The detenu is stated to have not been produced before the Advisory Board and no opportunity of being heard has been ever provided to detenu by the said Advisory Board nor opined about his continuous detention. It is also submitted that the grounds of detention were never explained to the detenu in vernacular.
5. Heard and considered.
6. Before paying heed to the present case, it would be appropriate to say that the right of personal liberty is most precious right, guaranteed under the Constitution. It has been held to be transcendental, inalienable and available to a person independent of the Constitution. A person is not to be deprived of his personal liberty, except in accordance with the procedures established under law, and the procedure, as laid down in ***Maneka Gandhi v. Union of India, 1978 AIR SC 597***, is to be just and fair. The personal liberty may be curtailed, where a person faces a criminal charge or is convicted of an offence and sentenced to imprisonment. Where a person is facing the trial on a criminal charge and is temporarily deprived of his personal liberty

because of the criminal charge framed against him, he has an opportunity to defend himself and to be acquitted of the charge in case the prosecution fails to bring home his guilt. Where such a person is convicted of offence, he still has satisfaction of having been given the adequate opportunity to contest the charge and also adduce the evidence in his defence.

7. It is to be seen that framers of the Constitution of India have incorporated Article 22 in the Constitution of India, so as to leave room for placing a person under the preventive detention without a formal charge and trial, and without such a person held guilty of an offence and sentenced to imprisonment by a competent court. Its aim and object are to save the society from the activities that are likely to deprive a large number of people of their right to the life and personal liberty. In such a case it would be dangerous for the people at large, to wait and watch as by the time the ordinary law is set into motion, the person, having the dangerous designs, would execute his plans, exposing the general public to risk and causing the colossal damage to the life and property. It is, for that reason, necessary to take the preventive measures and prevent a person bent upon to perpetrate the mischief from translating his ideas into action. Article 22 of the Constitution of India, therefore, leaves scope for enactment of the preventive detention laws.

8. The essential concept of the preventive detention is that the detention of a person is not to punish him for something he has done, but to prevent him from doing it. The basis of the detention is satisfaction of the Executive of a reasonable probability of likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. It is pertinent to mention here that the preventive detention means the detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure conviction of the detenu by legal proof, but may still be sufficient to justify his detention. [***Sasthi Chowdhary v. State of W.B. (1972) 3 SCC 826***].

9. While the object to the punitive detention is to punish a person for what he has done, the object of the preventive detention is not to punish an individual for any wrong done by him, but curtailing his liberty with a view to preventing him from committing certain injurious activities in future.

Whereas the punitive incarceration is after the trial on the allegations made against a person, the preventive detention is without trial into the allegations made against him. [***Haradhan Saha v. State of W.B. (1975) 3 SCC 198***].

10. The preventive justice requires an action to be taken to prevent the apprehended objectionable activities. The compulsions of the primordial need to maintain order in society, without which enjoyment of all the rights, including the right of the personal liberty would lose all their meaning, are the true justifications for the laws of the preventive detention. This justification has been described as a "jurisdiction of suspicion" and the compulsions to preserve the values of freedom of a democratic society and social order, sometimes merit the curtailment of the individual liberty. [***State of Maharashtra v. Bhaurao Punjabrao Gawande (2008) 3 SCC 613***].

11. To lose our Country by a scrupulous adherence to the written law, said *Thomas Jefferson*, would be to lose the law, absurdly sacrificing the end to the means. [***Union of India v. Yumnam Anand M., (2007) 10 SCC 190; R. v. Holliday, 1917 AC 260; Ayya v. State of U.P. (1989) 1 SCC 374***].

12. In the present case, main assertion of learned senior counsel for petitioner is that the material, relied upon by detaining authority for issuance of impugned order of detention, has not been furnished to detenu. His further submission is that grounds of detention are vague and sketchy. At the time of passing of impugned order of detention detenu was already in police custody and detention order or grounds of detention nowhere make even a whisper about compelling reasons for passing of impugned order of detention. The learned senior counsel, to buttress his arguments, has placed reliance on ***Jitendra v. Dist. Magistrate, Barabanki, 2004 Cri. L.J. 2967;*** and ***Yasmeen Raja v. State of J&K & others, 2011 (II) SLJ 663***.

13. Perusal of the detention record, produced by the counsel for the respondents reveals that the impugned order of detention has been approved by the Government within the time. The detenu has also been informed to make a representation before the Government as well as the detaining authority. Perusal of the detention record also reveals that all the material relied upon by the detaining authority while passing the impugned order of detention, has been provided to detenu. Thus, there is

no force in the submission of petitioner that petitioner has not been provided the material relied upon by the detaining authority.

14. While examining the question whether the ordinary laws of the land would have sufficed, and whether the recourse to the preventive detention was unnecessary, it must be borne in mind that the compulsions of the primordial need to maintain order in society without which the enjoyment of all rights, including the right to the personal liberty of the citizens, would lose their meaning, provide the justification for the laws of the preventive detention. These laws provide that an individual's conduct, prejudicial to maintenance of public order, security of State, preservation of forest wealth, provides grounds for satisfaction for a reasonable assessment of possible future manifestations of similar propensities on the part of the offender. The object of the law of preventive detention is not punitive, but is only preventive. In preventive detention no offence is to be proved nor is any charge formulated. The justification of such detention is suspicion and reasonability.

15. The essential concept of preventive detention is that detention of a person is not to punish him for something he has done, but to prevent him from doing it. Its basis is the satisfaction of the Executive of a reasonable probability of detenu acting in a manner similar to his past acts, and preventing him by detention from so doing. Preventive detention, an anticipatory measure, is resorted to when the executive is convinced that such detention is necessary to prevent a person detained from acting in a manner prejudicial to certain objects which are specified by the law. In the preventive detention no offence is proved, and the justification of such a detention is suspicion or reasonable probability. The order of detention is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances. The power of preventive detention is exercised in reasonable anticipation. It may or may not relate to an offence. It does not overlap with the prosecution even if it relies on certain facts for which the prosecution may be, or may have been, launched. An order of the preventive detention may be made before or during the prosecution. It may be made with or without the prosecution and in anticipation or after

the discharge or even the acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.

16. A six Judge Constitution Bench of the Supreme Court way back in the year 1951, in the case of ***The State of Bombay v. Atma Ram Shridhar Vaidya, AIR 1951 SC 157***, while looking into the scope subjective satisfaction arrived at by the detaining authority has held that the same is extremely limited and that the Court, while examining the material, which is made basis of subjective satisfaction of detaining authority, would not act as a court of appeal and find fault with satisfaction on the ground that on the basis of the material before detaining authority, another view was possible. Such being the scope of enquiry in this field, and the contention of counsel for petitioner, therefore, cannot be accepted. While going through the grounds of detention and dossier, I do not find that grounds of detention are ditto copy of dossier supplied by sponsoring authority. As is evident from the detention record, the material has been supplied to detenu. and all this material was before detaining authority when it arrived at subjective satisfaction that the activities of the detenu are such, which would entail the preventive detention under J&K Public Safety Act, 1978.

17. One more submission was made during course of advancing the arguments that criminal prosecution could not be evaded or short-circuited by ready resort to preventive detention and power of detention could not be used to subvert, supplant or substitute punitive law of land. It has also been urged that no material has been disclosed by detaining authority in grounds of detention to establish existence of any exceptional reasons justifying recourse to preventive detention inasmuch as implication of the detenu in criminal offence(s) would suggest that these offences could be dealt with under the provisions of criminal law and if at all detenu would be found involved in the offence(s) after a full-dress trial before criminal court, the law would take its own course, and in the absence of such reasons before detaining authority, it was not competent to detaining authority to make order of detention sidestepping criminal prosecution. This argument completely overlooks the fact that the object

of making an order of detention is preventive while object of a criminal prosecution is punitive. Even if a criminal prosecution fails and an order of detention is then made, it would not invalidate the order of detention, because, as pointed out by the Supreme Court in ***Subharta v. State of West Bengal, [1973] 3 S.C.C. 250***, "*the purpose of preventive detention being different from conviction and punishment and subjective satisfaction being necessary in the former while proof beyond reasonable doubt being necessary in the latter*", the order of detention would not be bad merely because criminal prosecution has failed. It was pointed out by the Supreme Court in that case that "*the Act creates in the authority concerned a new jurisdiction to make orders for preventive detention on their subjective satisfaction on grounds of suspicion of commission in future of acts prejudicial to the community in general. This Jurisdiction is different from that of judicial trial in courts for offences and of judicial orders for prevention of offences. Even unsuccessful judicial trial or proceeding would therefore not operate as a bar to a detention order or render it mala fide*". If the failure of criminal prosecution can be no bar to the making of an order of detention, *a fortiori* the mere fact that a criminal prosecution can be instituted cannot operate as a bar against the making of an order of detention. If an order of detention is made only in order to bypass a criminal prosecution which may be irksome because of inconvenience of proving guilt in a court of law, it would certainly be an abuse of power of preventive detention and detention order would be bad. But if object of making the order of detention is to prevent commission in future of activities, injurious to the community, it would be a perfectly legitimate exercise of power to make the order of detention. The Court would have to consider all the facts and circumstances of the case in order to determine on which side of the line the order of detention falls. The order of detention was plainly and indubitably with a view to preventing detenu from continuing the activities which are prejudicial to the security of the State.

18. In the above backdrop, it would be apt to refer to the observations made by the Constitution Bench of the Supreme Court in the case of ***Atma Ram***

Shridhar Vaidya (supra). The paragraph 5 of the judgement lays law on the point, which is advantageous to be reproduced infra:

> "5. It has to be borne in mind that the legislation in question is not an emergency legislation. The powers of preventive detention under this Act of 1950 are in addition to those contained in the Criminal Procedure Code, where preventive detention is followed by an inquiry or trial. By its very nature, preventive detention is aimed at preventing the commission of an offence or preventing the detained person from achieving a certain end. The authority making the order therefore cannot always be in possession of full detailed information when it passes the order and the information in its possession may fall far short of legal proof of any specific offence, although it may be indicative of a strong probability of the impending commission of a prejudicial act. Section a of the Preventive Detention Act therefore requires that the Central Government or the State Government must be satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to (1) the defence of India, the relations of India with foreign powers, or the security of India, or (2) the security of the State or the maintenance of public order, or (8) the maintenance of supplies and services essential to the community ..... it is necessary So to do, make an order directing that such person be detained. According to the wording of section 3, therefore, before the Government can pass an order of preventive detention it must be satisfied with respect to the individual person that his activities are directed against one or other of the three objects mentioned in the section, and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. The wording of the section thus clearly shows that it is the satisfaction of the Central Government or the State Government on the point which alone is necessary to be established. It is significant that while the objects intended to be defeated are mentioned, the different methods, acts or omissions by which that can be done are not mentioned, as it is not humanly possible to give such an exhaustive list. The satisfaction of the Government however must be based on some grounds. There can be no satisfaction if there are no grounds for the same. There may be a divergence of opinion as to whether certain grounds are sufficient to bring about the satisfaction required by the section. One person may think one way, another the other way. If, therefore, the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of mala fides cannot be challenged in a court. Whether in a particular case the grounds are sufficient or not, according to the opinion of any person or body other than the Central Government or the State Government, is ruled out by the wording of the section. It is not for the court to sit in the place of the Central Government or the State Government and try to determine if it would have come to the same conclusion as the Central or the State Government. As has been generally observed, this is a matter for the subjective decision of the Government and that cannot be substituted by an objective test in a court of law. Such detention orders are passed on information and materials which may not be strictly admissible as evidence under the Evidence Act in a court, but which the law, taking into consideration the needs and exigencies of administration, has allowed to be considered sufficient for the subjective decision of the Government."

19. What emerges from the above is that preventive detention is aimed at preventing prejudicial activities or preventing the detained person from achieving a certain end. The authority making the order, therefore, cannot always be in possession of full detailed information when it passes the order of detention and the information in its possession, may fall far short of legal proof of any specific offence, although it may be indicative of a strong probability of the impending commission of a prejudicial act. Preventive Detention Act, therefore, requires that the Government must be satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or maintenance of public order or the maintenance of supplies and services essential to the community, it is necessary so to do make an order directing that such person be detained. The Act, therefore, implies that the Government can pass an order of preventive detention it must be satisfied with respect to the individual person that his activities are directed against objects mentioned in the Act and that detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. Thus, it clearly shows that it is the satisfaction of Government on the point which alone is necessary to be established. It is significant that while the objects intended to be defeated are mentioned, the different methods, acts or omissions by which that can be done are not mentioned as it is not humanly possible to give such an exhaustive list. The satisfaction of the Government, however, must be based on some grounds. There can be no satisfaction if there are no grounds for the same. There may be a divergence of opinion as to whether certain grounds are sufficient to bring about the satisfaction required by the Act. It also emerges from above quoted judgement that one person may think one way, another the other way. If, therefore, the grounds on which it is stated that the Government was satisfied, are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of *mala fides* cannot be challenged in a court. Whether in a particular case, the grounds are sufficient or not, according to the opinion of any person or body other than the Government, is ruled out by the

language of the Act. It is not for the Court to sit in the place of the Government and try to determine if it would have come to the same conclusion as Government. As has been generally observed, this is a matter for the subjective decision of the Government and that cannot be substituted by an objective test in a court of law. Such detention orders, the Supreme Court has said, are passed on information and materials which may not be strictly admissible as evidence under the Evidence Act in a court, but which the law, taking into consideration the needs and exigencies of administration, has allowed to be considered sufficient for the subjective decision of the Government.

20. In the light of aforesaid position of law settled by the Six-Judge Constitution Bench, way back in the year 1951, the scope of looking into the manner in which subjective satisfaction is arrived at by detaining authority, is limited. This Court, while examining the material, which is made basis of subjective satisfaction of detaining authority, would not act as a '*court of appeal*' and find fault with the satisfaction on the ground that on the basis of material before detaining authority, another view was possible.

21. Personal liberty is one of the most cherished freedoms, perhaps more important than the other freedoms guaranteed under the Constitution. It was for this reason that the Founding Fathers enacted the safeguards in Article 22 in the Constitution so as to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by humanising the harsh authority over individual liberty. In a democracy governed by the rule of law, the drastic power to detain a person without trial for security of the State and/or maintenance of public order, must be strictly construed. However, where individual liberty comes into conflict with an interest of the security of the State or maintenance of public order, then the liberty of the individual must give way to the larger interest of the nation. These observations have been made by the Supreme Court in the case of ***Sunil Fulchand Shah v. Union of India and others (2000) 3 SCC 409*** and followed in ***Nabila and another*** (supra).

22. Liberty of an individual has to be subordinated, within reasonable bounds, to the good of the people. The framers of the Constitution were conscious of the practical need of preventive detention with a view to striking a just and delicate balance between need and necessity to preserve individual liberty and personal freedom on the one hand, and security and safety of the country and interest of the society on the other hand. Security of State, maintenance of public order and services essential to the community, prevention of smuggling and black-marketing activities, etcetera demand effective safeguards in the larger interests of sustenance of a peaceful democratic way of life.

23. In considering and interpreting preventive detention laws, the Courts ought to show greatest concern and solitude in upholding and safeguarding the fundamental right of liberty of the citizen, however, without forgetting the historical background in which the necessity—an unhappy necessity—was felt by the makers of the Constitution in incorporating provisions of preventive detention in the Constitution itself. While no doubt it is the duty of the Court to safeguard against any encroachment on the life and liberty of individuals, at the same time the authorities who have the responsibility to discharge the functions vested in them under the law of the country should not be impeded or interfered with without justification. [See: ***State of W.B. v. Ashok Dey, (1972) 1 SCC 199; Bhut Nath Mete v. State of W.B., (1974) 1 SCC 645; ADM v. Shivakant Shukla (1976) 2 SCC 521; A. K. Roy v. Union of India, (1982) 1 SCC 271; Dharmendra Suganchand Chelawat v. Union of India, (1990) 1 SCC 746; Kamarunnisa v. Union of India and another, (1991) 1 SCC 128; Veeramani v. State of T.N. (1994) 2 SCC 337; Union of India v. Paul Manickam and another, (2003) 8 SCC 342;*** and ***Huidrom Konungjao Singh v. State of Manipur and others, (2012) 7 SCC 181***].

24. Observing that the object of preventive detention is not to punish a man for having done something but to intercept and to prevent him from doing so, the Supreme Court in the case of ***Naresh Kumra Goyal v. Union of India and others, (2005) 8 SCC 276***, and ingeminated by the Supreme Court in ***Union of India and another v. Dimple Happy Dhakad, AIR***

2019 SC 3428, has held that an order of detention is not a curative or reformative or punitive action, but a preventive action, avowed object of which being to prevent antisocial and subversive elements from imperilling welfare of the country or security of the nation or from disturbing public tranquillity or from indulging in smuggling activities or from engaging in illicit traffic in narcotic drugs and psychotropic substances, etc. Preventive detention is devised to afford protection to society. The authorities on the subject have consistently taken the view that preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it, and to prevent him from doing so. Resultantly, the judgements cited by the learned senior counsel for the petitioner would not offer any aid and assistance to the case set up by the petitioner as being distinguishable in the facts to the present case.

25. To sum up, a law of preventive detention is not invalid because it prescribes no objective standard for ordering preventive detention, and leaves the matter to subjective satisfaction of the Executive. The reason for this view is that preventive detention is not punitive but preventive and is resorted to with a view to prevent a person from committing activities regarded as prejudicial to certain objects that the law of preventive detention seeks to prescribe. Preventive detention is, thus, based on suspicion or anticipation and not on proof. The responsibility for security of State, or maintenance of public order, or essential services and supplies, rests on the Executive and it must, therefore, have necessary powers to order preventive detention. Having said that, subjective satisfaction of a detaining authority to detain a person or not, is not open to objective assessment by a Court. A Court is not a proper forum to scrutinise the merits of administrative decision to detain a person. The Court cannot substitute its own satisfaction for that of the authority concerned and decide whether its satisfaction was reasonable or proper, or whether in the circumstances of the matter, the person concerned should have been detained or not. It is often said and held that the Courts do not even go into the question whether the facts mentioned in grounds of detention are correct or false. The reason for the rule is that to decide

this, evidence may have to be taken by the courts and that is not the policy of law of preventive detention. This matter lies within the competence of Advisory Board. While saying so, this Court does not sit in appeal over decision of detaining authority and cannot substitute its own opinion over that of detaining authority when grounds of detention are precise, pertinent, proximate and relevant.

26. It is apposite to mention that our Constitution undoubtedly guarantees various freedoms and personal liberty to all persons in our Republic. However, it should be kept in mind by one and all that the constitutional guarantee of such freedoms and liberty is not meant to be abused and misused so as to endanger and threaten the very foundation of the pattern of our free society in which the guaranteed democratic freedom and personal liberty is designed to grow and flourish. The larger interests of our multi-religious nation as a whole and the cause of preserving and securing to every person the guaranteed freedom peremptorily demand reasonable restrictions on the prejudicial activities of individuals which undoubtedly jeopardise the rightful freedoms of the rest of the society. Main object of Preventive Detention is the security of a State, maintenance of public order and of supplies and services essential to the community demand, effective safeguards in the larger interest of sustenance of peaceful democratic way of life.

27. For the foregoing reasons and discussion, the petition *sans* any merit and is, accordingly, **dismissed**.

(Tashi Rabstan)
Judge

Srinagar
25.02.2022
Shamim Dar

Whether the order is reportable: Yes