

Serial No.

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on 01.05.2024
Pronounced on 16.05.2024

HCP No. 50/2023

Owais Naseer Sheikh @ Owais
S/o Lt. Naseer Ahmad Sheikh
R/o Sangrama Sopore Baramulla through his
Brother Shafqat Nisar

.....Petitioner (s)

Through: Ms. Palvi, Advocate
V/s

1. Union Territory of Jammu and Kashmir through
Principal Secretary to Government Home Department,
Civil Secretariat, Srinagar/Jammu
2. Divisional Commissioner, Kashmir, Srinagar
3. Superintendent, Central Jail Kotebalwal Jammu
4. Station House Officer, Baramulla

..... Respondent(s)

Through: Ms. Maha Majeed, Assistant Counsel
vice Mr. Mohsin ul Showkat Qadiri, Sr. AAG

Coram:

Hon'ble Mr. Justice Puneet Gupta, Judge.

JUDGMENT

1. The Divisional Commissioner, Kashmir by Order No. DIVCOM
"K"/62/2023 dated 19.05.2023 has placed Owais Naseer Sheikh @
Owais S/o Lt. Naseer Ahmad Sheikh R/o Sangrama Sopore District
Baramulla, J&K under the preventive detention under Section 3 of
Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic

Substance Act, 1988 and has lodged in Central Jail Kotbalwal, Jammu. It is this order, the brother of the petitioner is aggrieved of and seeks quashment of the same on the following grounds:

- i) That the detainee has already been admitted to bail in the FIR No. 97/2018 under Section 8/22-29 of NDPS P/s Baramulla and FIR No. 60/2023 U/s 8/21 P/s Baramulla. The detaining authority has not mentioned this fact in the detention order nor any compelling reason has been given by the detaining authority to pass the detention order as the detainee was already in bail.
 - ii) That the grounds of detention are verbatim reproduction of the police dossier.
 - iii) The grounds of detention are vague, irrelevant and based on extraneous consideration and passing of detention on such grounds is unjustified and unreasonable.
 - iv) That the representation has been filed before the detaining authority but the same has not been decided as yet.
2. Counter affidavit has been filed by the respondents. In the counter affidavit, the respondents have admitted that the petitioner was apprehended in the FIRs in question. All statutory requirements stands fulfilled in the matter including handing over of the requisite material and making the petitioner aware of his right to make representation to the authorities concerned. The petitioner being involved in Narcotics and

the detention order being valid, the petition is required to be dismissed. Law is well settled that the detention is not punitive in nature but to prevent the activities of the detinue on the basis of his past conduct. The subjective satisfaction of the detaining authority cannot be normally interfered by the constitutional court unless the court is otherwise satisfied that the same is apparently visible from the detention order. The rights guaranteed under the Constitution of India to the detinue cannot be compromised by the detaining authority while passing the detention order. In compliance to detention order, the warrant was accordingly executed by Executing Officer namely , ASI Rajinder Singh No.1127/B EXK-982214 of P/s Baramulla and was handed over to Superintendent Central Jail Kot Bhalwal Jammu for lodgment.

3. Photocopy of the record is provided by learned counsel for the respondents.
4. Learned counsel has raised argument that the petitioner has been bailed out by the Principal Sessions Judge, Baramulla and 1st Additional Sessions Judge, Baramulla under NDPS Act in FIR No. 97/2018 and in FIR No. 60/2023 on 30.06.2018 and 19.04.2023 . However, there is no mention of those bail orders in the grounds of detention which clearly shows non application of mind on the part of the detaining authority while passing the order of detention. She further submits that the representation filed by the petitioner has not been decided as yet.

5. Per contra, learned counsel for the respondents submits that the petitioner is a member of an organized drug trafficking gang which is involved in procuring, transporting and sale of Psychotropic Substance and the petitioner is exploiting the immature minds of the younger generation by making them dependant on drugs and to make them habitual addicts. There is no flaw in the impugned detention order.
6. Heard learned counsel for the parties and perused the record.
7. It is evident that the detaining authority has not applied its mind properly while passing the impugned order. While detaining a person under Public Safety Act, detaining authority is under a legal obligation to analyze all the circumstances and material and then to gather conclusion about the requirement of depriving a person of his personal liberty. Non-mention about the grant of bail in the detention is serious lapse which in turn gives rise to the inference that there is non-application of mind. The petitioner was granted bail in FIR No. 60/2023 just few days before the detention order came to be passed. Had it been brought to the notice of the detaining authority of the bail granted in favour of the petitioner, the detaining authority may or may not have passed the detention order. What prompted the detaining authority to pass the detention order after the petitioner was granted bail in the aforesaid FIR within the short period is not revealed from the detention order. On the aforesaid score, the instant petition deserves to be allowed. Similar situation has been dealt with by the Apex Court. It is quite relevant to quote following

portion from para 8 of the judgment rendered by the Hon'ble Apex Court in the case of "*Anant Sakharam Raut v. State of Maharashtra and another*" reported in AIR 1987 SC 137:-

"We hold that there was clear non-application of mind on the part of detaining authority about the fact that the petitioner was granted bail when the order of detention was passed. In the result we set aside the judgement of the Bombay High Court under appeal, quash the order of detention and direct that the petitioner be released forthwith....."

8. The representation filed by the petitioner has been duly received by the authorities concerned and the same is evident from the record produced by the respondents. It appears from the record that the representation of the petitioner has just been forwarded by one authority to another but no decision has been taken on the same. Learned counsel for the respondent could not also convince this Court as to why no decision was taken on the representation. The right of detenu to prefer representation on his detention is a fundamental right enshrined under Article 22(5) of the Constitution of India. There is no escape by the authorities not to consider the representation and pass orders on the same accepting or rejecting the representation. Non-consideration of the representation goes to core of the case. Undoubtedly the proceedings stands vitiated, the court is left with no other option but to quash the detention order.

9. In view of the above, this Court is of the considered view that the order of detention bearing Order No. DIVCOM “K”/62/2023 dated 19.05.2023 is not sustainable in the eyes of law. Accordingly the same is quashed. The petitioner is directed to be released from the custody provided he is not required in any other case.

10. Disposed of as above.

SRINAGAR

16.05.2024

Aasif



(Puneet Gupta)
Judge