S. No.01

HIGH COURT OF JAMMU AND KASHMIR & LADAKH
AT SRINAGAR

WP(Crl) No. 52/2022 (O&M)

Reserved on: 20.10.2022
Pronounced on: 23.11.2022

Iqbal Jaffer Dar ...Petitioner(s)

Through :- Mr. Umar Mir, Advocate

v/s

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

Through :- Mr. Sajad Ashraf, GA

Coram: HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

1. Challenge in this petition has been thrown to the detention Order No. DIVCOM-"K"/199/2022 dated 24.02.2022 passed by respondent No. 2 under Section (3) of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (for short, PITNDPS Act), vide which, the detenue has been directed to be detained and lodged in Central Jail, Kote Balwal, Jammu for a period to be specified by the Government/Advisory Board.

2. The detenue, through his father, Sh. Mohd. Abdullah Dar, the petitioner, has invoked writ jurisdiction of this Court for the issuance of appropriate writ in the nature of Habeas Corpus for his production in the Court as also issuance of a writ of Certiorari for the quashment of detention order, impugned in the present petition.

3. The petitioner has questioned the impugned detention order primarily on two grounds that detenue has been bailed out in both the FIRs viz. FIR No. 323

of 2020 under Sections 8/22 of The Narcotics Drug and Psychotropic Substances Act, 1985 (for short, NDPS Act) and FIR No. 388 of 2021 under Sections 8/21 of the NDPS Act, on the basis of which, impugned detention order has been passed against him and that the respondent-detaining authority has not reflected any compelling circumstance or immediate necessity or apprehension which prompted it to detain the detenue under the preventive detention law.

4. Besides, the petitioner has challenged the impugned order on the conventional grounds that unspecified period of detention renders the detention order illegal and violative of fundamental rights of the detenue; that since the communication was not made to detenue within five days or fifteen days as per mandate of Section (3) of the PITNDPS Act, therefore, respondent-detaining authority has failed to follow the procedure prescribed under law as also the constitutional requirement; that since the detaining authority has not referred the detention order to the Government/Advisory Board within a period of five weeks from the date of detention for confirmation, therefore, the impugned detention order is not sustainable in the eyes of law; that the grounds of detention are replica of dossier placed before the Divisional Commissioner by the Superintendent of Police, Kupwara except the replacement of word “Detenue with the subject” and therefore, impugned detention order has been passed with total non application of mind; that the allegations leveled against detenue are purely criminal in nature and detaining authority has failed to justify as to how ordinary law of the land is not sufficient to deal and deter the detenue from indulging in activities; that the relevant material including copies of FIR, dossier, statements of prosecution witnesses under Section 161 of Cr.P.C., FSL report and other material referred and considered by the detaining authority was not supplied to detenue, therefore, he was not able to make effective and purposeful

representation against his detention; and finally, that detenue has studied upto 9th standard and the grounds of detention were couched in a hyper technical language which was beyond his comprehension and the detaining authority was under legal obligation to furnish the grounds of detention to the detenue in his local language to enable him to make an effective and purposeful representation.

5. Countervailing the stand taken by the petitioner, the respondent-detaining authority in its counter affidavit is affront with the contention that the impugned detention order has been passed strictly in terms of Section 3 of the PITNDPS Act with a view to prevent the detenue from indulging in illegal trade of illicit traffic in Narcotic Drugs And Psychotropic Substances.

6. It has been urged that J&K Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 has been repealed in terms of J&K Re-organization Act, 2019, as such, impugned detention order has been passed under the corresponding Central Act i.e. Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 extended to Union Territory of J&K by virtue of J&K Re-organization (Removal of difficulties) Order, 2019 notified vide SO 3912(E) dated 31.10.2020 by Ministry of Home Affairs, Government of India. As per clause (5) of the said order, all the Central laws, ordinances and rules which are applicable to whole of India except the erstwhile State of J&K have been made applicable to Union Territory of J&K in addition to the Central Laws specified in table (1) of the 5th Schedule of J&K Re-organization Act, 2019. In terms of clause (14) of the said order, anything done or any action taken including any appointment of delegation made shall be deemed to have been done or taken under the corresponding provisions of the Central Act extended to the Union Territory of J&K in terms of J&K Re-organization Act, 2019.

7. It is contention of the respondents that the impugned order of detention does not suffer from any malice or legal infirmity and safeguards provided under the Constitution have been duly followed. While referring to the aforementioned FIRs of 2020 and 2021 under Sections 8/22 and 8/21 of the NDPS whereby the detenue was allegedly found to be in possession of 20 grams of Heroin and 20 grams of Brown Sugar respectively, it is contended that the report received from the field agencies are suggestive of the fact that detenue had clandestinely started dealing in illegal business of narcotics to carry out illegal trade and involved the innocent youth of the area. The detenue was exploiting the immature minds of the younger generation by making them dependant on drugs and to make them habitual addicts. Detenue was supplying drugs against hefty amounts to the immature youth, which, in turn, exposed them to different kinds of immoral and illegal tendencies and resorted them to thefts and other illegal activities in order to purchase drugs from detenue. According to respondents, detenue was an active member of a drug mafia, hell bent to spoil the life and career of younger generation by selling drugs to them. Detenue's designs and conduct is to lure the teenaged youth and students into the menace of drug.

8. According to respondents, the seizure of consignment obtained from detenue would show that he was involved in illegal trade consciously and in an organized manner, which is a threat for sustaining moral values of the society. It poses a serious threat to the health, wealth and welfare of the people especially the younger generation in the Union Territory in general and the youth of District Kupwara in particular. It is submission of the respondents that activities of the detenue have deleterious effect on the National and State Economy, as the afore-narrated circumstances would give a clear picture of detenue's involvement in illegal trafficking of narcotic substances.

9. Respondents have denied having passed the impugned detention order with non-application of mind and submitted that competent authority has passed the impugned order with complete independent application of mind strictly in terms of Section 3 of the PITNDPS Act. It is contended by the respondents that detenue is aged about 34 years and is educated upto 12th standard from Government Higher Secondary School, Halmatpura, Kupwara and that after dropping from the school, he indulged into felonious activities like drug peddling and other crimes and notwithstanding the counseling measures adopted by the Police, detenue became a hardcore drug trafficker/peddler.

10. According to respondents, the impugned detention order against the detenue has been passed by the detaining authority only after attaining satisfaction of the facts and circumstances of the case, after perusal of the dossier furnished by the concerned Police Station duly supported by the record/material strictly in accordance with the law/rules in vogue and detaining authority derived satisfaction that preventive detention of detenue was necessary.

11. Having heard rival contentions of the parties, I have given my thoughtful consideration to the facts attending the present case as also the law governing the field.

12. While learned counsels on the rival sides have reiterated their respective grounds of pleadings, learned counsel for the petitioner, to buttress his arguments, has relied upon the judgments passed by this Court in **Tawheed Ahmad Zargar v. UT of J&K and others [WP(Crl) No. 97 of 2022 dated 18.10.2022], Farooq Ahmed Bhat @ Tawheedi v. Union Territory of J&K and ors.** reported as **2021 (3) JKJ 319 [HC], Muhmmad Lateef Dar v. UT of J&K and Anr. [WP(Crl) No. 134 of 2021 dated 01.02.2022]** and judgments rendered by Hon'ble Supreme Court in **Anant**

Sakharam Raut: Leena Anand Raut v. State of Maharastra reported as **AIR 1987 SC 137** and **Ibrahim Ahmad Batti v. State of Gujrat and others** reported as **AIR 1982 SC 1500**.

13. In support of his contention, learned counsel for the respondents has also referred to judgments passed by this Court in **Jahangir Ahmad Bhat v. UT of Jammu and Kashmir and others [WP(Crl) No. 175 of 2021 dated 25.04.2022], Gowher Ahmad Najar v. UT of J&K and Anr. [WP(Crl) No. 95 of 2022 dated 25.07.2022**] and **Haradhan Saha v. The State of West Bengal and others** reported as **(1975) 3 SCC 198**.

14. In so far as conventional grounds of challenge are concerned, the detention record would show that the detention order was passed on 21.02.2022 and the same was executed upon the detenue on 01.02.2022 i.e. within five days from the date of the passing of the detention order and notice of the detention has been given to the detenue and contents of detention warrant as also grounds of detention have been read over to the detenue in English but explained in Urdu/Kashmiri language which he fully understood and signatures of the detenue have been obtained, as an acknowledgement of this fact at mark A. Similarly, detention order of one leaf, notice of detention of one leaf, grounds of detention containing two leaves, dossier of detention comprising of four leaves and copies of FIR, statement of witnesses and related relevant documents comprised of sixty (60) leaves i.e. total sixty eight (68) leaves were duly handed over to the detenue at Central Jail, Kotbalwal, Jammu on the date of execution of the detention order on 01.03.2022 against proper receipt of the detenue.

15. Further, a perusal of the impugned detention order dated 24.02.2002 would show that detaining authority after passing of the detention order has referred the detention order to the Government/Advisory Board for approval in the month of

February itself (date not mentioned) for a period to be specified by the Advisory Board. Therefore, it is evident from the detention record that detaining authority has passed the impugned detention order in the present petition after following the due procedure prescribed under law. As such, since the safeguards provided under the Constitution have been duly observed, the impugned order is not found to be afflicted with any legal malady.

16. However, as already discussed, the petitioner has assailed the impugned order of detention primarily on the ground that in both the FIRs under the NDPS Act, which prompted the detaining authority to pass the impugned order, detenue has been enlarged on bail by the competent authority. The grounds of detention and the order of detention which led to the placement of the detenue under preventive detention vide impugned order of detention, bears testimony to the fact that detenue in FIR No. 323 of 2020 for offence under Sections 8/22 of the NDPS Act was enlarged on bail and similarly, he was also enlarged on bail in FIR No. 388 of 2021 for offences 8/21 of the NDPS Act by learned Additional District and Sessions Judge (Fast Track), Kupwara on 07.02.2022 which came to be extended till 26.02.2022.

17. In the aforesaid backdrop, the pristine question which arises for consideration is whether the ordinary law of land was insufficient to deal with the activities attributed to the detenue and deter him from indulging in similar activities and whether the said activities would constitute a law and order problem or may be construed to be prejudicial to the maintenance of public order.

18. This question came up for discussion before Hon’ble Supreme Court in **Rekha V. State of T.N.** reported as **(2011) 5 SCC 244** and Hon’ble Supreme Court

with reference to the law existing in the USA and England with respect to the detenue, had an occasion to draw distinction between the law and order and public order and held as below:

> **"29. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.**
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> **30. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is: was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal. In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in question was illegal.**
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> **12. This case is fully covered by the Banka Sneha Sheela (supra). The allegations in the FIR registered against the detenue may be a problem of law and order but would not certainly come within the purview of the term "public order". There is nothing mentioned in the grounds of detention to demonstrate that the activities of the detenue, on the basis of which the FIR for cheating and fraud came to be registered against him, had an impact of disturbing even the tempo of life of the community or had the effect of affecting the public at large. The offences with which the detenue has been charged in the FIR are substantive offences and the ordinary law of the land is sufficient to deal with the detenue, if he is ultimately found guilty of the allegations leveled against him in the FIR. The apprehension of the detaining authority that the detenue was likely to get bail and in that event, his remaining at large would be detrimental to the maintenance of peace and public order, cannot be basis of putting the detenue under preventive detention. The detaining authority as also the State machinery is well within its rights to oppose the bail and, if granted, take remedial measures by way of approaching the higher forum. The simplicitor case of cheating and fraud, without having wider ramifications, cannot be made the basis of issuing the detention order in the name of maintaining the public order."**

19. In the present case, two FIRs, on the basis of which, the detenue has been placed under detention pertain to the years 2020 and 2021, whereas the impugned order of detention came to be passed on 24.02.2022. It is an admitted position of fact on record that there is nothing in the dossier placed by the Superintendent of

Police, Kupwara before the detaining authority to indicate that the detenue was involved in any other illegal activity after 2021. It is pertinent to mention that the investigating agencies in the aforesaid FIRs recovered intermediate quantities of 20 gms of heroine and 20 gms of Brown Sugar respectively. The allegation against the detenue is that he had clandestinely started dealing in illegal business of Narcotics and was supplying drugs against hefty amounts to the immature youth. It is further allegation of the detaining authority that the detenue was an active member of a drug mafia. In these circumstances, the police agency would have recovered a huge cache of Narcotic Drugs and Psychotropic Substances from the possession of the detenue, particularly of commercial quantity to substantiate the allegations leveled in the dossier prepared by the Superintendent of Police. However, on the contrary, there is nothing in the detention record to suggest that the detenue, at any point of time, after the aforesaid two FIRs was found in possession of the Narcotic drugs to establish that the detenue indulged into continuous felonious activities like drug peddling etc.

20. Hon'ble Supreme Court in **Rajinder Arora v. Union of India & other** reported as **(2006) 4 SCC 796** has clearly ruled that a detention order after ten months of alleged illegal act without any explanation for delay cannot be sustained in the eyes of law. In other words, only a couple of criminal activities attributed to the detenue, which took place in the past, cannot be made basis for passing a detention order unless it is established from the detention record that the detenue was continuously indulged in felonious activities of similar nature.

21. A similar view has been expressed by the Apex Court in **Golam Hussain v. Commissioner of Police Calcutta and others** reported as **AIR 1974 SC 1336** that no authority, acting rationally, can be satisfied, subjectively or otherwise, of future mischief merely because long ago the detenue had done something evil. Hon'ble

Supreme Court in the said case had clearly observed that length of the gap from the past act to the recording of the satisfaction by the detaining authority that the detenue is likely to repeat the similar act is material and relevant and if the chain is snapped and there is unexplained long interval, the detention order cannot be sustained in law.

22. An identical view has been expressed by Hon'ble Supreme Court in **Sahib Singh Dugal v. The Union of India** reported as **AIR 1966 SC 340, Abhayraj Gupta v. Superintendent, Central Jail, Bareilly** reported as **2021 SCC Online ALL 900** and **Khaja Bilal Ahmed v. State of Telangana and other** reported as **(2020) 13 SCC 632.**

23. There is no dispute to the settled position of law that detention order can be passed before or during the prosecution and even without prosecution and in anticipation or after discharge or even acquittal of a detenue in a criminal case as held by Hon'ble Supreme Court in **Haradhan Saha's case (supra)** that power of preventive detention is qualitatively different from punitive detention. However, it is also settled position of law that there must be compelling reasons for the detaining authority to do so and the detaining authority is duty bound to record satisfaction as to why the detenue could not be deterred from indulging in similar type of activities under the ordinary criminal law of the land.

24. I am fortified in my opinion by **Surya Prakash Sharma v. State of U.P. and others** reported as **1994 SCC (Cri) 1691** and **T.P. Moideen Koya v. Government of Kerala and ors.** reported as **2004 (8) SCC 106,** the relevant extract whereof is reproduced below:

> **"……in law there is no bar in passing a detention order even against a person who is already in custody in respect of a criminal offence if the detaining authority is subjectively satisfied that detention order should be passed and that there must be cogent material before the authority passing the detention order for inferring that the detenue was likely to be released on bail"**

25. The same principal has been followed by Hon'ble Supreme Court in **Sama Aruna v. State Telangana and anr.,** reported as **AIR 2017 SC 2662**.

26. Adverting to the present case, as already underlined there is nothing in the record to suggest that but for the two FIRs mentioned above, there was any material before the detaining authority which prompted it to pass the impugned order of detention against the detenue. There is nothing to indicate the compelling reasons for the detaining authority to pass the impugned detention order against the detenue and that too, after unexplained delay. Be that as it may, the detenue is already behind the bars for about 09 months and nothing adverse has been reported against him.

27. Having regard to what has been observed and discussed hereinabove, the present petition is allowed and impugned detention order is quashed. Consequently, the detenue is directed to be released from the preventive detention provided he is not involved in any other case.

28. The detention record be returned.

29. With the aforesaid direction, the present petition stands disposed of.

(RAJESH SEKHRI)
JUDGE

Srinagar
23.11.2022
(Paramjeet)

Whether the order is reportable? Yes/No