

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

HCP 72/2023

Abdul Qayoom Ganaie, aged 35 years
S/o Lt. Ghulam Rasool Ganaie
R/o Trikanjan Boniyar, Baramulla Kashmir through
his wife Mst. Zareena Begum aged 30 years
Wo Abdul Qayoom Ganie
R/o Trikanjan Boniyar, Baramulla, Kashmir.

... Petitioner

Through: Mr. M. Usman Gani, Advocate

V/s

1. UT of Jammu and Kashmir through Commissioner Secretary to Govt. Home Department, Civil Secretariat Kashmir, Srinagar.
2. Divisional Commissioner, Kashmir, Srinagar.
3. Superintendent Central Jail, Kot Bhalwal, Jammu.

... Respondent(s)

Through: Mr. Sajad Ashraf, GA

CORAM: HON'BLE MR. JUSTICE RAHUL BHARTI, JUDGE

J U D G M E N T

19.03.2024

1. Heard learned counsel for the parties, perused the pleadings and examined the detention record produced in photostat form before this court.
2. The petitioner has come to be detained under preventive detention custody by virtue of an Order No. DIVCOM-“K”/90/ 2023 dated 04.07.2023 issued under section (3) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances (in short PITNDPS) Act, 1988 by the respondent No. 2 - Divisional Commissioner, Kashmir.
3. Pursuant to this detention order, the petitioner came to be detained by ASI Manzoor Ahmad PID No. APR-901260 on

13.07.2023 and kept under detention in the Central Jail Kot Bhalwal, Jammu.

4. At the time of execution of the detention order, the petitioner was handed over the detention record comprising of 11 leaves that being the detention order, grounds of detention, dossier, copies of FIR, statement of witnesses and other related documents.
5. The respondent No. 2 - Divisional Commissioner, Kashmir, in passing the detention order above referred, acted upon a dossier No. LGL/PIT-NDPS/2023/1286-89 dated 20.05.2023 submitted by the Senior Superintendent of Police (SSP) Baramulla meaning thereby that the respondent No. 2 – Divisional Commissioner, Kashmir passed the detention order after a gap of one month and thirteen days after the submission of the dossier by the SSP, Baramulla.
6. In the dossier, the SSP Baramulla referred the petitioner as a member of an organized drug-trafficking gang involved in procuring, transporting and sale of psychotropic substances. The petitioner's alleged activities in the illicit trade of narcotic drugs and psychotropic substances were said to be posing threat to the welfare and health of the Trikanjan area. In the dossier, the petitioner's apprehension by the Police Station Boniyar on 06.05.2023 being allegedly in possession of 45 grams of Heroin resulting in the registration of an FIR No. 35/2023 under section 8/21 of the Narcotic Drugs and

Psychotropic Substances Act (NDPS), 1985 has been referred and the case was said to be in the state of investigation at the time of framing of the dossier and the petitioner was in the state of judicial custody in reference to the said FIR.

7. The reason prompting the framing the dossier against the petitioner was apprehension of the police that the petitioner may apply for and get the bail with respect to said FIR so as to resume his drug peddling activities.
8. Contrary to the statement in the dossier about the implication of the petitioner in FIR No. 35/2023 under section 8/21 of the NDPS Act, 1985 with the Police Station Boniyar, the FIR accompanying the dossier was FIR No. 33/2023 dated 06.05.2023 for alleged commission of offence under section 8/21 of the NDPS Act, 1985 registered by the Police Station Boniyar.
9. After submitting the dossier above referred, the SSP Baramulla came forward with a communication No. Legal/PIT-NDPS/2023/1543 dated 12.06.2023 addressed to respondent No. 2 - Divisional Commissioner, Kashmir thereby forwarding FSL Report dated 12.05.2023 from the Forensic Laboratory, Srinagar in reference to FIR No. 33/2023 of Police Station Boniyar about the nature of the purported contraband allegedly recovered from the petitioner and which was reported to be "Diacetyl Morphine (Heroin)".

10. The respondent 2 - Divisional Commissioner, Kashmir came to formulate the grounds of detention feeding his subjective satisfaction that a case was made out for effecting the preventive detention of the petitioner under the PITNDPS Act 1988. In the grounds of detention, the petitioner's alleged involvement in illegal activities censured under the PITNDPS Act, 1988 was read from his implication in FIR No. 35/2023 under section 8/21 of the Narcotic Drugs and Psychotropic Substances Act (NDPS), 1985 of the Police Station Boniyar for possessing 45 grams of Heroin.
11. Intervening the submission of the dossier and the passing of the detention order, the petitioner had applied for bail on 11.05.2023 before the Court of Ist Additional Sessions Judge, Baramulla in which vide an order dated 13.06.2023 the court of Ist Additional Sessions Judge, Baramulla was convinced to find sufficient grounds for admission of the petitioner to bail subject to terms and conditions as set out in the order dated 13.06.2023.
12. Against his detention so ordered and effected, the petitioner came to submit a representation dated 21.08.2023 to the respondent No. 2 - Divisional Commissioner, Kashmir which was duly received against a receipt No. 2841684 dated 21.08.2023 by the office of the respondent No. 2 - Divisional Commissioner, Kashmir. This representation was submitted by the petitioner acting through his wife.

13. The preventive detention of the petitioner in fact self-rendered itself invalid from the very inception by the fact that in the dossier as well as in the grounds of detention a reference is made to FIR No. 35/2023 of the Police Station, Boniyar which by no stretch of reference is an FIR against the petitioner. Instead, the FIR referable to the petitioner is 33/2023 of the Police Station Boniyar. The mere fact that an FIR which is in no manner related to the petitioner is being ascribed against him in the dossier by the SSP, Baramulla and also by the respondent No. 2 – Divisional Commissioner, Kashmir in the grounds of detention, is a pointer to the fact that the dossier making as well as the grounds of detention formulation exercise at the end of the two officials was done with a mechanical mindset without even examining the papers in front, otherwise if the documents would have been read and referred with actual application of mind by the SSP Baramulla as well as the respondent No. 2 – Divisional Commissioner, Kashmir, then the fact would have come self-revealing to them that it is the FIR No. 33/2023 in which the petitioner's alleged involvement has been shown and not the FIR No. 35/2023.
14. This omission with respect to wrong mentioning of the FIR cannot be taken to be a case of typographical error in the sense that the preventive detention order execution officer ASI Manzoor Ahmad PID No. APR-901260 of the Police Station

Boniyar is said to have read over the grounds of detention as it is to the petitioner along with detention order as it is, meaning thereby that he read to the petitioner the reference of FIR No. 35/2023 of P/S Boniyar. There is no mention in the execution report tendered by the ASI Manzoor Ahmad PID No. APR-901260 that he also read over the documents accompanying the detention order for the petitioner to understand that the FIR accompanying the detention order was having reference to FIR No. 33/2023 notwithstanding mention of FIR No. 35/2023 meaning thereby the petitioner was left at his own to understand and figure out the puzzle set in the dossier and the grounds of detention by the SSP Baramulla and the Divisional Commissioner, Kashmir respectively with respect to mention of FIR 35/2023 of the Police Station Boniyar as if expecting the petitioner to go and fetch a certified copy of the FIR No. 33/2023 and then make wise the SSP, Baramulla and the respondent No. 2 - Divisional Commissioner, Kashmir of the typographical mistake attending their dossier and the grounds of detention respectively.

15. The Government came to submit the case for Advisory Board's opinion which came forward with a purported opinion dated 26.07.2023 identifying itself to be the Advisory Board under the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988.

16. The very fact that the preventive detention of the petitioner has been effected under the PITNDPS Act of 1988 is a fact which cancels the very purported opinion dated 26.07.2023 of the Advisory Board constituted and acting under the repealed J&K Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988. This renders the purported opinion of the Advisory Board as non-est in the eyes of law and vitiates the entire detention of the petitioner.
17. In addition, the petitioner's written representation against his preventive detention remained under consideration without any conclusion and communication to the petitioner which is borne out from the detention record produced from the respondents' end which reveals that while the petitioner's detention came to be confirmed by the Home Department, Government of J&K vide Government Order No. Home/PB-V/1762 of 2023 dated 31.07.2023, the Revenue Attorney with the Divisional Commissioner, Kashmir vide letter No. Div.Com/RA-PSA/2023/90(A) dated 29.08.2023 forwarded the representation of the petitioner to the Additional Chief Secretary/Financial Commissioner, Home Department J&K, wherefrom the petitioner's representation came to be referred onwards for the comments from the concerned police agency in terms of communication No. Home/PB-V/363/2023 (7231315) dated 04.09.2023 but what was the outcome of the said representation is not obtaining on the file of the detention

record with respect to the petitioner produced from the respondents' end and that renders the petitioner's detention illegal on account of non-communication of the fate of his representation by the Government.

18. In addition, in passing the detention order No. DIVCOM-“K”/90/ 2023 dated 04.07.2023, the Divisional Commissioner, Kashmir has not spelled out the reasons on the detention file of the case for the delay in responding to the dossier No. LGL/PIT-NDPS/2023/1286-89 dated 20.05.2023 of the SSP, Baramulla intervening which period the petitioner had even come to procure bail from the court of Ist Additional Sessions Judge, Baramulla, which fact was least known to the SSP, Baramulla or made aware to the Divisional Commissioner, Kashmir. Therefore, the delay caused in passing the detention order is a weakening factor against the detention of the petitioner rendering his detention illegal.

19. A cumulative effect of the aforesaid facts and circumstances renders the petitioner's detention liable to be quashed.

20. Therefore, this court in exercise of its power under article 226 of the Constitution of India for the purpose of issuing a writ of habeas corpus sets aside the detention order No. DIVCOM-“K”/90/2023 dated 04.07.2023 read with consequent confirmation orders(s). This court directs the release of the petitioner from the preventive detention custody forthwith.

The respondent No. 2 - Divisional Commissioner, Kashmir as

well as the Superintendent of Central Jail, Kot Bhalwal to comply with the writ so issued for the release of the petitioner.

21. Disposed of.

(RAHUL BHARTI)
JUDGE

Srinagar
19.03.2024
N Ahmad

Whether the order is speaking: Yes

Whether the order is reportable: Yes

