

Sr. No.2

Suppl. List.

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

LPA No.124/2023 in
WP (CrI) No.157/2022

Reserved on:29.03.2024
Pronounced on:01.04.2024

...Appellant(s)/Petitioner(s)

JAHANGIR AHMAD WANI

Through: Mr. G.N. Shaheen, Advocate with Mr. Asif Nabi, Advocate

Vs.

UNION TERRITORY OF J AND K AND
ANR. (HOME DEPARTMENT)

...Respondent(s)

Through: Mr. Zahid Ahmad Noor, GA

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE MOHAMMAD YOUSUF WANI, JUDGE

JUDGMENT

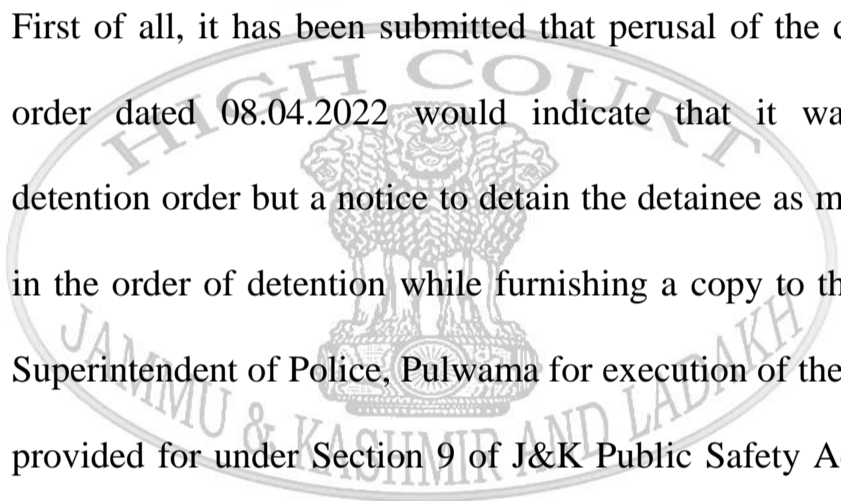
N.KOTISWAR SINGH, CJ

01. Heard Mr. G.N. Shaheen, learned counsel assisted by Mr. Asif Nabi, appearing on behalf of appellant as also Mr. Zahid Ahmad Noor, learned GA, appearing on behalf of respondents.

02. The present appeal has been filed questioning the correctness of the judgment dated 12.06.2023 passed by the learned Single Judge in WP (CrI) No.157/2022 titled *Jahangir Ahmad Wani versus UT of J&K*, by which the challenge made by the detenu of his detention order no.15/DMP/PSA/22 dated 08.04.2022 was rejected.

03.Mr. G.N. Shaheen, learned counsel appearing for the appellant has submitted before us that learned Single Judge, unfortunately, did not consider and deal with various grounds of challenge to the said detention order raised in the writ petition and the same was dismissed without proper application of mind by the learned Single Judge.

04.Be that as it may, he has submitted that otherwise also, the detention order cannot sustain judicial scrutiny for the following reasons: -

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- (i) First of all, it has been submitted that perusal of the detention order dated 08.04.2022 would indicate that it was not a detention order but a notice to detain the detainee as mentioned in the order of detention while furnishing a copy to the Senior Superintendent of Police, Pulwama for execution of the order as provided for under Section 9 of J&K Public Safety Act, 1978, in which it has been mentioned that notice of the order be given to the detainee Jahangir Ahmad Wani.
- (ii) It has been further submitted that when so called detention order was issued, it did not accompany the other relevant materials on the basis of which the detention order was issued, which had prevented the petitioner from making effective representation which is a fundamental right guaranteed under Article 22 (5) of Constitution of India.
- (iii) The third limb of the argument of Mr. G.N. Shaheen, learned counsel for the appellant, is that the detenu is merely a class 12th passed student, not well versed in English language and the order of detention as well as grounds of detention are only in

English that too couched in complicated legal language which he did not understand fully, which has also prevented him from making effective representation to the detaining authority/Government.

- (iv) It has been submitted that the executing officer who had allegedly explained the documents to the detenu in Kashmiri and Urdu has not filed any affidavit, as is required under law.
- (v) Fourthly, it has been also submitted that detention order does not indicate as to who is the competent authority who passed the detention order.
- (vi) Fifthly, it has been submitted that the grounds of detention are vague as they are very general in nature without specifics which can be made against any person, and in view of vagueness of the grounds it was not possible to give a proper and effective representation.
- (vii) It has been further submitted that at the time of the passing of the detention order, the detenu was already in judicial custody in connection with FIR No.47/2020 registered under Sections 7/25 I.A. Act and 23, Section 39 UAP Act registered at Police Station Rajpora, and since he did not apply for bail, there was no question of his being released on bail in which event, the question of detaining him by invoking the preventive detention law on the ground that the detenu is likely to be released does not arise, as has been held by a number of decisions of the Hon'ble Supreme Court. Accordingly, it has been submitted

that apprehension of the detaining authority that he is likely to be released on bail is based on no material and it clearly shows non-application of mind on the part of detaining authority and hence, on this ground alone the detention order cannot be sustained and is liable to be quashed.

(viii) It has also been submitted that perusal of the grounds of detention will reveal that it is a cyclostyled copy of the dossier prepared by the police and as such by engaging in a cut and paste method indicates non-application of mind while passing the detention order by detaining authority and as such, it would vitiate the detention order.

(ix) Mr. Shaheen, learned counsel for the petitioner submits that preventive detention law is basically a detention without trial in order to prevent any person from committing a crime, who, according to authorities believe, engaged in certain prejudicial acts, but cannot be used as a substitute for trial. It has been submitted that the petitioner has been merely accused of committing certain illegal acts of which the trial is yet to commence and as such, before the charges against the detenu has been proved the authorities could not have invoked the preventive detention law on the same ground he was arrested in the aforesaid FIR case.

05. In support of his submissions learned counsel for the petitioner has relied upon the following decisions of the Hon'ble Supreme Court:-

- (i) **Shri LallubhaiJogibhai Patel versus Union of India and others**, AIR 1981 SC 728, in which it has been held that non-supply of relevant materials to the detenue would vitiate the order of detention as it would prevent the detenue from making an effective representation. The same principle was reiterated in **Abdul Razak Nanekhan Pathan Versus Police Commissioner Ahmadabad**, AIR 1989 SC 2265.
- (ii) **Banka Sneha Sheela v. State of Telangana and Ors.**, AIR 2021 AIR SC 3656, in which it was held that preventive detention is not substitute for trial and cannot be invoked indiscriminately.
- (iii) Relying on the decision in **Abdul Razak Nanekhan Pathan Versus Police Commissioner Ahmadabad**, AIR 1989 SC 2265, it has been contended that if no application has been moved for bail, there was no likelihood of detenue being released from jail and as such, mere false statement that he would be released on bail does not amount to proper application of mind by the authorities and as such, the detention order would be vitiated. To the same effect the Ld. Counsel for the petitioner has relied on the decision in **Dharmendra SuganchandChelawat and another v. Union of India and others** AIR 1990 SC 1196 wherein it was held that there must be cogent material to arrive at a satisfaction that he is likely to be released on bail, which is missing in the present case and accordingly, it has been submitted that detention of the detenue is liable to be set aside on the aforesaid grounds.

(iv) Learned counsel for the petitioner has also relied upon the decision rendered by this Court in case titled *Athar Mushtaq Khan versus UT of J&K and others*, decided on 26.03.2024, wherein it has been held that the detaining authority before passing the order of detention has not applied its mind to draw subjective satisfaction to order preventive detention of the detenue and on this ground alone the same is not sustainable.

06. Heard also Mr. Zahid Noor, learned counsel appearing for the State, who has vociferously defended the impugned judgment as well as the detention order.

07. It has been submitted by Mr. Zahid that as regards the submission that grounds of detention were furnished in English and not in the language understood by the detenue and as such, he was prevented from making an effective representation, the execution order would clearly show that the detenue was explained the detention order and the documents in Kashmiri and Urdu language by the Executing Officer to which he appended his signature thereby acknowledging that he understood the contents of grounds of detention and as such, it does not lie in the mouth of the detenue at this stage to make the submission that he did not understand the grounds of detention and the contents of the documents. Since, he did not raise any objection at that stage but knowingly put his signature it will be deemed that he understood the contents and hence this plea is hit by acquiescence.

08. Coming to the challenge to the detention order on the ground of vagueness, it has been submitted that perusal of the grounds of detention

would clearly reveal that the detenué was in-fact an over ground worker(OGW) of the banned terrorist organization Jaish-e-Mohammad (JeM) and specific instances have been mentioned in the grounds of detention how he was in contact with certain members of the militants and the names of such militants have been mentioned in the grounds of detention.

09. It has been mentioned in the grounds of detention that he was in touch with active militants namely Yasir R/o Qasbayar, Manzoor Ahmad Kar R/o Sirnoo and Furkan Bhai and that these militants had visited his house and remained there for 24 hours and that the detenué had also arranged fishes for them as an Eid meal from Budgam by using his personal vehicle WagonR bearing Registration No.JK13-8758 and in this criminal act he has also been aided by his brother namely, Adil Nabi Wani S/o Ghulam Nabi Wani. Thus, it cannot be said that the grounds of detention are vague as the grounds mention specifically the acts committed by the detenué being in touch with the militants and helping them. Further, it was specifically mentioned that on 11.06.2020, Police Station Rajporawhile carrying out frisking duty, the detenué was found travelling along-with his brother in the aforesaid WagonR vehicle and the police personnel recovered one hand grenade from the possession of Adil Ahmad Wani, his brother, and 15 AK-47 live rounds were recovered from his possession in connection with which afore-mentioned the FIR no.47/2020 under Sections 7/25 I.A. Act and 23, 39 UAP Act was registered at Police Station Rajpora, and investigations were taken up and as such, it cannot be said that the grounds of detention are vague.

10. It has been further submitted that as far as the subjective satisfaction of detaining the detinue is concerned, the same cannot be subjected to judicial review as has been held by the Hon'ble Supreme Court in a catena of decisions. It has been accordingly submitted that these materials were sufficient for the detaining authority to arrive at the subjective satisfaction that the detinue would be required to be detained under preventive detention law.

11. As regards the contention raised by the learned counsel for the petitioner that since the detinue was already in judicial custody and that he had not applied for bail and detaining authority could not have arrived at the satisfaction that he may be released on bail, the respondents have relied upon the decision of the Hon'ble Supreme Court in **Union of India and another vs. Dimple Happy Dhakad**, AIR 2019 SC 3428, wherein the Hon'ble Supreme Court held that even the observation by the detaining authority that the detinue who is already in custody is likely to be released from custody is a matter of subjective satisfaction which will be beyond judicial review and in the aforesaid case of **Dimple Happy Dhakad** (supra), it was observed by the Hon'ble Supreme Court that the High Court had erred in quashing the detention order merely on the ground that the detaining authority has not expressly recorded the finding that there was a real possibility that the detinue is to be released on bail which was in violation of the principle laid down in **Kamarunnissa vs. Union of India and Anr.**, AIR 1991 SC 1640 and the other judgments and guidelines issued in that regard, and accordingly, set aside the quashment of the detention order by the High Court.

12. It has also been submitted that it was observed by the Apex Court in the aforesaid case of **Dimple Happy Dhakad** (supra) while the personal liberty is of immense importance and the Courts have been rigorously upholding the personal liberty of individual, yet liberty of an individual must be subordinate to reasonable bounds for the good of the people and the order of detention is clearly a preventive measure devised to provide protection to the society and when the preventive detention is aimed to protect the society and security of nation, balance has to be maintained between liberty of an individual and needs of the society.
13. In the present case, it is clearly evident from the grounds of detention that the detenu has been actively associated with the militants of Jaish-E-Mohammad (JeM) which has been declared a banned terrorist organization under the UPA Act and also he has been apprehended with 15 AK 47 live rounds along-with his brother who was found possessing a hand grenade.
14. Under such circumstances, a person who has been found involved in anti-national activities, the detention of the said person cannot be said to be illegal.
15. Heard the learned counsel for the parties and perused the materials on record as well the records relating to the detention produced before us.
16. The right to submit representation against a detention order is a facet of the Fundamental Right guaranteed under Article 22 of the Constitution of India. Article 22 (5) reads as follows:

“22. Protection against arrest and detention in certain cases:

- (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be

denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2)

(3)

(4)

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6)

(7)"

Thus, the right to submit representation against the detention order is a Fundamental Right, if breached, can be fatal for the continued detention of the detenu.

17. But the question herein is, did the detenu submit any representation to the competent authority which according to the detenu, was not effective?

In the present case, it is seen from the records that the detenu never submitted any representation to any of the authorities. If he has not submitted any representation, how can it be said that he could not submit any representation which was effective. If he choose not to file the representation, can it be said now that he could not file any effective representation?

18. In our opinion, this issue has to be examined in the context of the representation he might have submitted.

In **R. Keshava v. M.B. Prakash**, (2001) 2 SCC 145 it was as follows:

“17. We are satisfied that the detenu in this case was apprised of his right to make representation to the appropriate Government/authorities against his order of detention as mandated in Article 22(5) of the Constitution. Despite knowledge, the detenu did not avail of the opportunity. Instead of making a representation to the appropriate Government or the confirming authority, the detenu chose to address a representation to the Advisory Board alone even without a request to send its copy to the authorities concerned under the

Act. In the absence of representation or the knowledge of the representation having been made by the detenu, the appropriate Government was justified in confirming the order of detention on perusal of record and documents excluding the representation made by the detenu to the Advisory Board. For this alleged failure of the appropriate Government, the order of detention of the appropriate Government is neither rendered unconstitutional nor illegal. (emphasis added)

Further, in **Veeramani v. State of T.N.**, (1994) 2 SCC 337 it was held that,

“17. However, there may be scope to contend that even within 12 days, the detaining authority has the power to revoke and therefore in view of the safeguards provided under Article 22(5) the detenu if told, can make a representation within that period to the detaining authority in which case it would be under an obligation to consider the same. It may be noted that Article 22(5) casts an obligation on the detaining authority to communicate to the detenu the grounds and to afford to the detenu the earliest opportunity of making the representation. The article does not say to whom such representation is to be made but the right to make a representation against the detention order undoubtedly flows from the constitutional guarantee enshrined therein. The next question as to whom such representation should be made, depends on the provisions of the Act and naturally such a representation must be made to the authority who has power to approve, rescind or revoke the decision.Therefore, the representation to be made by the detenu, after the earliest opportunity was afforded to him, can be only to the Government which has the power to approve or to revoke. That being the position the question of detenu being informed specifically in the grounds that he had also a right to make a representation to the detaining authority itself besides the State Government does not arise.”

19. Reading of the two decisions would clearly demonstrate that while it is incumbent upon the authority to inform the detenu that he has right to submit a presentation, and the authorities are to consider the same at the earliest. However, if the representation is submitted to an authority which has no power to revoke the detention order he cannot have a grievance.

There is no obligation on the part of the authority to redirect such wrongly addressed representation to the competent authority.

The inference from the above two decisions is inescapable. If the detinue does not submit any representation to the competent authority, no fault could be found with the authorities as there is no obligation of the authorities to remind him to file any representation. At the time of the execution of the detention order, it was clearly mentioned that the detinue was requested to submit a representation.

20. Yet, it may still be contended that the detinue could not make an effective representation since he was not furnished with the relevant documents.

As regards this, one may refer to the decision in **State of Bombay vs. Atma Ram Shridhar Vaidya**, AIR 1951 SC 157 where it was held that,

“30. While cl. (5) does not allow the authority, after making the order of detention and communicating the grounds of such order, to put forward fresh grounds in justification of that order, I can find nothing in that clause to preclude the authority furnishing particulars or details relating to the grounds originally communicated, or the person under detention availing himself of such particulars and making a better or a further representation. Nor is there anything to prevent such person from asking for, or the authority from providing, further and better particulars of those grounds where it is in a position to do so.....”

Thus, if the detinue was furnished with inadequate materials as he claims because of which he could not submit an effective representation, nothing prevented him from asking the authorities for the same. But he chose to remain silent and did not ask for the same. In such event, how the authorities could come to know that documents being supplied are not

sufficient for him to make an effective representation? The detenué does not make any request for better particular and does not even submit any representation alleging deficiency of materials.

21. Be that as it may, we have also perused the documents produced before us including copies of the documents which were furnished to the detenué. What we have noted is that he was furnished with copies of the FIR, copies of statements made by the witnesses including his own statement made under section 161 CrPC during the investigation. The dossier prepared by the Police which was the basis for the grounds of detention was also furnished, which contains all the particulars of his activities as mentioned above.

In view of the above legal and factual position obtaining, we reject the plea of the petitioner detenué that his right to submit effective representation due to non-furnishing of relevant documents as devoid of merit.

22. The other contention of the petitioner that the grounds are vague and these could not be the basis for his preventive detention is also without any merit. The dossier and grounds of detention specifically refer to various activities of the detenué, by way being in personal and physical touch with the militants of a banned terrorist organization and the detenué himself was alleged to have caught with incriminating materials in the form of live ammunitions along with his brother who was also apprehended with a grenade. The grounds as mentioned in the grounds of detention furnished to him cannot by any stretch of imagination be

considered vague. These grounds in our view were sufficient for the detinue to make a representation, if he so desired.

Hence, we also reject his plea of the grounds being vague.

23. As regards the plea of the detinue that he was not well versed with English and he was not furnished the documents in Kashmiri language which he understood, cannot be also accepted now at this stage, as he never made any protestation at the time of furnishing the documents. He neither submitted any representation to the authorities for supplying of materials in the language he understands. In the records it is seen that he put his signature in English. Even if the executing officer did not file any affidavit before this Court to support that the documents were explained in the language the detinue understood, it would not be fatal, as he never raised any objection at the time of furnishing the documents nor submitted any application for furnishing documents in Kashmiri language soon thereafter. Therefore, the contention of the Respondents that this plea has been taken at a belated stage and hit by acquiescence cannot be brushed aside.

24. It has been also submitted that the grounds of detention is the carbon copy of the dossier prepared by the police shows non application of mind by the detaining authority is also devoid of merit as mere reproduction does not necessarily prove non application of mind by the detaining authority.

25. As regards the plea of the petitioner that the impugned detention order does not disclose who was detaining authority on whose subjective satisfaction the detention order was issued, the same is also devoid of

merit as it has been clearly mentioned in the detention order that it was the District Magistrate of Pulwama who issued the order.

26. Thus, we reject the pleas of the petitioner that the grounds of detention were vague, that he was not furnished with better particulars and that he was not served with documents which he understood which prevented him from making an effective representation, as devoid of merit for the reasons discussed above.

27. However, we find force with the plea of the petitioner that since he was already in judicial custody, and as he did not apply for bail and hence, there was no possibility of being released, there was no material basis for arriving at the satisfaction that there is every apprehension that he may succeed in obtaining bail from the court and may again indulge in similar activities.

28. As regards this plea we have minutely examined the decision rendered by the Apex Court in **Dimple Happy Dhakad** (supra), on which the counsel for the respondent has heavily relied on by contending that this opinion/subjective satisfaction of the authority that there is every apprehension that he may succeed in obtaining bail from the court and may again indulge in similar activities, is not subject to judicial review and hence, this subjective satisfaction does not warrant interference.

29. As we examine this decision cited, it may be noted that, it was mentioned in the grounds of detention about this apprehension in the following words,

“You are presently in judicial custody at Central Jail Srinagar and there is every apprehension that you may obtain bail from the

Hon'ble Court of Law and may again indulge in similar activities."

The aforesaid sentence consists of three components.

A. Firstly, that the petitioner is in judicial custody. As far as this component is concerned, it is a factual statement which is not denied by anyone. Hence, there is no controversy about this aspect.

B. Secondly, there are two apprehensions/expressions in the said sentence. Apprehension is not an objective state of mind, but subjective state of mind or belief or inferences one may draw based on certain facts or materials.

The first apprehension is that he may obtain bail from the court.

The second apprehension is that he may again indulge in similar activities.

30. Both these apprehensions to sustain must be based on certain facts/materials, sufficiency of which however, will certainly be beyond judicial review, as also correctly submitted by the Ld. Counsel for the respondent.

As far as the second apprehension is concerned, in our opinion there are materials to suggest and to make the authorities feel that he may indulge in similar activities if released on bail from the materials disclosed in the ground of detention. He was found to be in collaboration with wanted militants, providing logistic support, and he himself also was engaged in acts prejudicial to the security of the State. These are not isolated incidents. There is a pattern visible from the acts as disclosed in the grounds of detention.

Therefore, if the detaining authorities feel and apprehend that he may indulge in similar activities on being released on bail, such an apprehension cannot be said to be unwarranted. Moreover, this subjective satisfaction of the authorities cannot be subjected to judicial review.

31. However, as regards the other apprehension that he may obtain bail from the court, on examination of the records, we did not find any material to support such an inference and apprehension. It is not denied by the respondent that the detenu had not filed any application for bail. If no such application for bail had been filed, how one can draw the inference that he may succeed in obtaining bail from the court. Even if one does not file any application for bail, there may instances where similarly situated persons have been released on bail, which may trigger an apprehension that he may also succeed in obtaining bail, and considering his antecedents, the authorities may be warranted to issue the preventive detention order inspite of being in judicial custody.

As also held by the Apex Court, there is no inflexible law that a person in judicial custody cannot be subjected to preventive detention. Such a person can still be subjected to preventive detention order under certain circumstances. The related law had been succinctly put in **Rekha v. State of T.N.**, (2011) 5 SCC 244 by a three Judges Bench wherein it was held as follows:

“27. In our opinion, there is a real possibility of release of a person on bail who is already in custody *provided he has moved a bail application which is pending*. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case

stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed.” (emphasis added).

32. The aforesaid decision was also followed in **HuidromKonungjao Singh**

v. State of Manipur, (2012) 7 SCC 181, wherein it was held as follows:

“9. In view of the above, it can be held that there is no prohibition in law to pass the detention order in respect of a person who is already in custody in respect of criminal case. However, if the detention order is challenged the detaining authority has to satisfy the Court the following facts:

(1) The authority was fully aware of the fact that the detenu was actually in custody.

(2) There was reliable material before the said authority on the basis of which it could have reasons to believe that there was real possibility of his release on bail and further on being released he would probably indulge in activities which are prejudicial to public order.

(3) In view of the above, the authority felt it necessary to prevent him from indulging in such activities and therefore, detention order was necessary.”

33. The Hon’ble Supreme Court in **Dimple Happy Dhakad** (supra) also endorsed the aforesaid view as reflected in the following paragraph of the aforesaid decision.

“36. Whether a person in jail can be detained under the detention law has been the subject-matter for consideration before this Court time and again. In *HuidromKonungjao Singh v. State of Manipur* (2012) 7 SCC 18, the Supreme Court referred to earlier decisions including *Dharmendra Suganchand Chelawat v. Union of India* (1990) 1 SCC 746 and reiterated that if the detaining authority is satisfied that taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.”

34. However, the Hon'ble Supreme Court in the aforesaid case of **Dimple Happy Dhakad** (supra) found certain materials because of which the Apex court declined to interfere with the detention order of the detenu who was already in detention based on the subjective satisfaction which was based on certain materials before the Hon'ble Supreme Court, as evident from the following paragraph no.40.

“40. The satisfaction of the detaining authority that the detenu may be released on bail cannot be ipse dixit of the detaining authority. On the facts and circumstances of the present case, the subjective satisfaction of the detaining authority that the detenu is likely to be released on bail is based on the materials.....”
(emphasis added)

35. In the present case, while shuffling through the pages of the records, nothing has come to our notice that there was any such instance of others who were similarly situated, were granted bail which would make the authorities apprehend that the petitioner may succeed in obtaining bail, even though he had not yet filed any bail application.

Thus, unfortunately, as discussed above, we do not find any such material on records as in the case of **Dimple Happy Dhakad** (supra) which led the detaining authority to apprehension that the detenu may be released on bail

36. Under the circumstances, we are of the opinion that the subjective satisfaction or the apprehension of the authorities that he may be released on bail does not appear to be based on any cogent material which would render the aforesaid apprehension a mere figment of imagination and, hence not substantiated, thus, not sustainable in law.

37. For the reasons discussed above, the appellant detenue succeeds solely on this ground, and appeal is accordingly allowed and the impugned detention order No.15/DMP/PSA/22 dated 08.04.2022 passed by District Magistrate Pulwama is set aside.

Resultantly, the impugned judgment and order dated 12.06.2023 passed by the Ld. Single Judge in WP (Crl). 157 of 2022 is also set aside.

Consequently, the detenue **Jahangir Ahmad Wani, S/o Gh. Nabi Wani, R/o Rahmoo, Tehsil Rajpora, District Pulwama** shall be set free unless detained/required to be detained in connection with any other case.

(MOHAMMAD YOUSUF WANI)
JUDGE

(N. KOTISWAR SINGH)
CHIEF JUSTICE

SRINAGAR
01.04.2024
Shameem H.

Reportable:

Yes.