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

WP(Crl) No. 228/2021

Reserved on 19.05.2022.
Pronounced on 25.05 .2022

Riyaz Ahmad Mir.

…Petitioner/Appellant(s)

Through: Mr. Shah Ashiq Hussain, Advocate

Vs

Union Territory of J&K & Ors.

…Respondent(s)

Through: Mr. Sajad Ashraf, GA.

CORAM: HON'BLE MR. JUSTICE M. A. CHOWDHARY, JUDGE

ORDER

25 .05. 2022

1. Detention Order No. DIVCOM-"K"/170/2021 dated 25th September 2021, (for short "*detention order)* issued by Divisional Commissioner, Kashmir – respondent no.2 (for brevity "*detaining authority*"), placing *Riyaz Ahmad Mir son of Abdul Rehman Mir, resident of Khellan Litter, District Pulwama* (for short hereinafter called as "*detenu*) under preventive detention, with a view to prevent him from committing any of the acts within the meaning of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, has been challenged by the detenue in this petition.

2. It is stated that the detenue was arrested without any reason and justification in the year 2019 and was falsely implicated in FIR No. 64/2019 in which he was admitted to interim bail vide order dated 26th March, 2020, which was subsequently bail was made absolute. Thereafter the detenue was

summoned to Police Station Litter in the month of September, 2021, detained illegally and shifted to Central Jail Jammu, under the provisions of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act in terms of the impugned order.

3. The impugned order is assailed *inter-alia* on the grounds that the detention order is vague, non-existent and no prudent man can make a representation against such allegation and passing of detention order on such ground is unjustified and unreasonable; that the detaining authority has mentioned two FIRs, i.e, 62 and 64 of the year 2019 of Police Station Litter, Pulwama in the grounds of detention and the activities alleged therein are bad in law and the impugned order passed by the respondent No.2 deserves to be quashed; that the detenue was already granted bail in case FIR No. 64/2019 at the time detention order was passed and the detaining authority despite having knowledge about the detenue having already been admitted to bail has not mentioned this important fact in the grounds of detention which shows non-application of mind on the part of detaining authority. The detention was recommended on 11.08.2021 but order was passed on 25.09.2021, i.e, after a delay of more than a month. It is stated that the detenue has been admitted to bail in the FIRs mentioned in the grounds of detention and he was at large, however, this important fact has not been reflected in the grounds of detention. It is further urged that the delay is unreasonable, illegal and as

such the impugned order deserves to be quashed on this ground also.

4. It is further urged that the detenue had not been provided copies of the relevant material like copy of dossier, copy of FIRs, statements recorded under Section 161/164-A Cr PC referred to, in the grounds of detention, thus depriving him to make an effective representation against his detention before the detaining authority/Government. The said failure is stated to have infringed the constitutional right of the detenue guaranteed under Article 22 (5) of the Constitution of India.

5. It is also stated that the detaining authority has not prepared the grounds of detention by itself which is pre-requisite but relied upon the police dossier and has not perused any supporting material relating to the case. It appears that the detaining authority has worked on the dictates of police authorities and has not enquired about the existence of the facts by perusing the supporting material, as such grounds of detention seems to be replica of the police dossier. Thus non-application of mind by the detaining authority has rendered the detention order bad in law and as such deserves to be quashed.

6. Respondents have filed counter affidavit which *inter-alia* reveals that all statutory requirements and constitutional guarantees had been fulfilled and complied with while detaining the detenue, that the detention order has been passed strictly in terms of Section 3 of Prevention of Illicit

Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 with a view to prevent the detenue from indulging in illegal trade or Illicit Traffic in Narcotic Drugs and Psychotropic Substances, as such the challenge thrown to the detention order is totally misconceived and misdirected both on facts as also in law, that the detenue had been selling poppy straw to the youth and thereby indulging them to drug addiction. That the consignment of poppy straw seized from the possession of the detenue clearly shows that he is fully involved in illegal trade with conscious mind and in an organized manner. The activities of the detenue have deleterious effect on national and state economy as well.

7. Heard learned counsel for the parties and also perused the detention record.

8. Learned counsel for the petitioner has highlighted various grounds while seeking quashment of impugned order but the main grounds on which stress has been laid during the course of arguments are that there has been total non-application of mind while passing the impugned detention order, inasmuch as at the time of passing the detention order, the detenue was already implicated in case FIR No.62 and 64 of 2019, for offences under Sections 8/15,8/20 of NDPS Act of P/S Litter and that there were no compelling reasons for the detaining authority to make the impugned detention order and the detaining authority has not spelt out the compelling reasons for detaining the detenue under

preventive detention laws; that the material on the basis of which impugned detention order has been passed has not been supplied to the detenue, thereby disabling him from making an effective representation against his detention.

9. The circumstance which goes on to suggest that there was total non-application on the part of the detaining authority while passing the order of preventive detention against the detenue, is that the detenue in connection with FIR No.62 and 64 of 2019 registered by P/S Litter Pulwama for commission of offence under Section 8/15, 8/20 of NDPS Act was taken into custody, and subsequently, admitted to bail by the Court of learned Additional Sessions Judge, Pulwama, however, in the grounds of detention, it is nowhere mentioned that the detenue has been admitted to bail in the aforesaid criminal cases.

10. It means either the detaining authority has not applied its mind or the full material relatable to the detenue had not been placed before it. So the non-application of mind is explicit which renders the order of detention illegal. In my view I am fortified by the judgment rendered in the case captioned *Anant Sakharam Raut Vs. State of Maharashtra and others* reported in **AIR 1987 SC 137**.

11. Making of an effective representation by a detenue is a very vital constitutional safeguard against the preventive detention. In the absence of the material on the basis of which grounds of detention have been formulated, the

detenue has been rendered handicapped and hampered in making an effective representation against the order of detention. The violation of this vital safeguard by the respondents renders the impugned order of detention unsustainable in law. I am supported in my aforesaid view by the judgment of the Hon'ble Supreme Court in *Ibrahim Ahmad Bhatti alias Mohd. Akhtar Hussain alias Kandar Ahmad Wagher alias Iqbal alias Gulam Vs. State of Gujarat and others",* **(1982) 3 SCC 440.**

12. Another ground that has been urged by learned counsel for the petitioner during the course of argument is that there were no compelling reasons for the detaining authority to pass the order of detention against the petitioner because he was already implicated in connection with case FIRs No. 62 and 64 of P/S Litter, Pulwama. In this regard it may be noted that preventive detention orders can be passed even when a person is in police custody or involved in a criminal case but for doing so, there must be compelling reasons for the detaining authority to do so. The detaining authority is bound to record the compelling reasons as to why the detenue could not be deterred from indulging in subversive activities by resorting to normal law and in the absence of these reasons, the order of detention becomes unsustainable in law. I am supported in my aforesaid view by the judgment of the Supreme Court in case *Surya Prakash Sharma v. State of U. P. and others,* **1994 SCC (Cri) 1691.**

13. The following observations of the of Hon'ble Supreme Court in *T. P. Moideen Koya vs. Government of Kerala and ors."* reported in **2004 (8) SCC 106**, are also relevant to the context and the same are reproduced as under:

> *"……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"*

14. Further the Supreme Court in ***Sama Aruna*** *v.* ***State of Telangana & Anr,*** **[AIR 2017 SC 2662],** while considering the question whether an order of detention could be passed in the face of the fact that the detenue was already in custody in a substantive offence, observed as under:

"24. There is another reason why the detention order is unjustified. It was passed when the accused was in jail in Crime No.221 of 2016. His custody in jail for the said offence was converted into custody under the impugned detention order. The incident involved in this offence is sometime in the year 2002-03. The detenue could not have been detained preventively by taking this stale incident into account, more so when he was in jail. In Ramesh Yadav v. District Magistrate, Etah and ors, this Court observed as follows:

> *"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenue was*

released on bail he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under-trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed."

15. From the discussion of the aforesaid law on the subject, it is clear that though a person who is already booked in a criminal case can be taken into preventive custody yet for doing so, there must be compelling reasons.

16. Coming to the case on hand, it is apparent from the record;

a. *That the detenue had been arrested for the commission of a substantive offence punishable under section 15 of the NDPS Act in a case registered vide FIRs No. 62 and 64 of 2019, at Police Station Litter, Pulwama;*

b. *That he was released on having been admitted to bail by the court of learned Additional Sessions Judge, Pulwama;*

c. *Senior Superintendent of Police District Pulwama prepared a dossier in respect of detenue based on his involvement in the commission of aforementioned offence and recommending for his preventive detention under the provisions of the Prevention of Illicit Traffic in Narcotic Drugs and* Psychotropic Substances Act, 1988.

d. *Detaining Authority in the grounds of detention stated that it has become imperative to deal with the detenue*

under Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988

e. *Detaining Authority vide impugned order in the month of September, 2021, ordered preventive detention of the detenue in terms of Prevention of Illicit Traffic in* Narcotic Drugs and Psychotropic Substances Act *1988, for a period to be specified by the Government/Advisory Board.*

17. Detention record shows that the detenue was arrested in case FIRs No.62 and 64 of 2019 for offence under Section 8/15, 8/20 NDPS Act of P/S Litter, Pulwama. So far as the grounds of detention are concerned, the same are based upon the incidents which are the subject matter of aforesaid FIRs. There was no material on record except the allegations made in the afore-noted FIRs before the detaining authority which would have compelled it to pass the impugned detention order against the petitioner who was already booked for commission of a substantive offence.

18. Impugned detention order has been passed by the detaining authority by showing the detenue as an active member of some drug mafia involved in the illicit traffic of narcotics. There is, however, no such record/proof in support of such claim, except the alleged involvement in the aforesaid cases. Such an eventuality can be taken care of by the substantive laws on the subject instead of resorting to preventative law.

19. Having regard to the discussion made hereinabove, and the legal and factual circumstances of the case, the impugned order is held to be not sustainable and liable to be quashed.

Resultantly, the petition is allowed and the order of detention bearing No. DIVCOM-"K"/170/2021 dated 25.09.2021, issued by the Divisional Commissioner, Kashmir, is quashed. Detenue is directed to be released from the preventive custody provided he is not required in connection with any other case(s).

20. Petition is ***disposed of*** as granted.

(M. A. CHOWDHARY)
JUDGE

SRINAGAR
25.05.2022
"Ab. Rashid"

Whether the order is speaking: Yes/No.
Whether the order is reportable: Yes/No.