HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

LPA No. 276/2022

Reserved on: 27.02.2024

Pronounced on: 26.03.2024

Athar Mushtaq Khan (Aged 23 years)
S/o Mushtaq Ahmad Khan
R/o Tantraypora, Tehsil Litter Pulwama, Kashmir.
Through his Father, Mushtaq Ahmad Khan

….. Appellant(s)

Through: M/S N.A. Ronga and Tuba Manzoor, Advocate.

V/s

1. **Union Territory of J&K through Principal Secretary to Government, Home Department, Civil Secretariat, Srinagar/ Jammu.**

2. **District Magistrate Pulwama**

…..Respondent(s)

Through: Mr. Zahid Qais Noor, GA.

CORAM:

HON'BLE THE CHIEF JUSTICE.
HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE.

JUDGMENT

Per Wasim Sadiq Nargal: J

1. This Letters Patent Appeal has been filed on behalf of the detenu against the judgment dated **22.11.2022** passed in **WP (Crl.) No. 318/2022** titled, **"Athar Mushtaq Khan Vs. UT of J&K and Ors"**, whereby, the learned Writ Court has dismissed the writ petition seeking quashing of the detenu's detention order bearing No. 24/DMP/PSA/22 dated 12.04.2022, passed under the Jammu and Kashmir Public Safety Act, 1978.

2. The brief facts of the case giving rise to the passing of the detention order and filing of the present appeal are stated as follows:

3. The appellant-petitioner filed a writ petition before the learned writ Court which was registered as ***WP(Crl) No. 318/2022*** challenging the detention of his son, Athar Mushtaq Khan, ordered by the District Magistrate, Pulwama, in exercise of the powers under ***Section 8*** of the ***J&K Public Safety Act, 1978 (JK PSA),*** in terms of his Order no. 24/DMP/PSA/22 dated 12.04.2022. The said order is shown to have been passed by the detaining authority with a view to prevent the detenu from acting in any manner prejudicial to the security of the state.

4. The detention order so passed by the detaining authority was challenged in the Writ Petition by the appellant-detenu, broadly, on the following grounds*:*

(i) Firstly, it has been submitted that the grounds of detention are vague, non-existent frivolous, baseless and unfounded.

(ii) Secondly, it has been further submitted that the detaining authority has shown the wavering mind by labelling the detenu as OGW and also as a member of banned terrorist organization Hizbul Mujahideen (HM) when there is no evidence on the basis of which he had been so labelled.

(iii) Thirdly, the petitioner/ detenu was not provided copies of FIR, statement of witnesses, dossier and other connected documents on the basis of which detention order was passed, which deprived the detenu from making a meaningful and effective representation to the concerned authority.

(iv) Fourthly, it has been submitted that the detaining authority has failed to demonstrate compelling reasons for taking recourse to the preventive law instead of seeking cancellation of bail of the detenu.

(v) Fifthly, no subjective satisfaction has been recorded by the detaining authority while formulating grounds of detention.

5. The learned Writ Court, vide its judgment impugned in this appeal, dismissed the writ petition, the operative part of which is reproduced as under:

> ***"In the light of the aforesaid position of law settled by the Six-Judge Constitution Bench, way back in the year 1951, the scope of looking into the manner in which the subjective satisfaction is arrived at by the Detaining Authority, is limited. This Court, while examining the material, which is made basis of subjective satisfaction of the Detaining Authority, cannot act as a court of appeal and find fault with the satisfaction on the ground that on the basis of the material before Detaining Authority another view was possible. The reliance placed by learned counsel for petitioner on Abdul Latief Abdul Waheed v. B.K. Jha and another (1987) 2 SCC 22; and A.K. Roy v. Union of India, (1982) AIR SC 710, are extremely distinguishable from the facts of the present case and do not bolster the case set up by petitioner.***
>
> ***In the backdrop of foregoing discussion, the petition is without any merit, therefore, dismissed".***

6. The appellant by way of the present appeal has challenged the impugned judgment of the Writ Court on the following grounds that:

> ***a. That the Hon'ble Single Bench has not considered the grounds of challenge pleaded in the petition by the appellant. Not even single ground has been considered while passing the judgment.***
>
> ***b. That the law produced by the petitioner/appellant herein in support of grounds of challenge has totally been ignored by the Hon'ble Single Bench while delivering the impugned judgment***
>
> ***c. That the Hon'ble Single Judge has not returned the finding with respect of the breach of constitutional and legal safe guards, available to the detenu, by the detaining authority/ respondents while passing the detention order against the appellant (detenu).***
>
> ***d. The aspect that detenu has been deprived of his constitutional and legal right of filing a representation against his detention before the competent authority as he has not been provided the material in the shape of FIR, statement of witnesses, dossier and other material***

which has been referred and relied upon by the detaining authority while passing the order of detention, has also been ignored by the Hon'ble Single Bench.

e. ***That the respondents have nowhere properly or effectively refuted or replied the grounds of challenge pleaded in the writ petition by the appellant before the writ Court, yet the Hon'ble Single Bench did not consider the grounds challenging the validity, legality and constitutionality of the order of detention which is apparent and quite visible in the impugned judgment.***

7. At the hearing of this Letters Patent Appeal, Mr. N. A Ronga, learned counsel, appearing for the appellant, submitted that detenu was not provided the relevant material viz. copy of FIR, Statement of witnesses recorded by the Investigating Agency, dossier and other material perused by the detaining authority and on the basis of which, the detaining authority had attained its subjective satisfaction with respect to detention of the detenu under the provisions of the Public Safety Act with a view to prevent the detenu from acting in any manner prejudicial to the security of state.

8. He further submits that the action of the respondents in not providing the entire material has prevented the detenu from making an effective representation to the detaining authority and the Government against his detention, and was, thus, deprived of his most precious right of making the representation, guaranteed to him by the Constitution. The learned counsel submitted that because of such a failure, the detention of the detenu is rendered illegal; therefore, the detention order is liable to be quashed.

9. It was next argued by the learned Counsel appearing on behalf of the detenu, that the detaining authority has shown wavering mind by labelling detenu as Over-Ground Worker as also a member of banned Terrorist Organization (Hizbul Mujahideen), when the detenu is neither an Over-Ground Worker nor a member of the said banned organization and when there is no evidence available to the detaining authority to substantiate such allegation. He further submits that the detaining authority has failed to show compelling reasons for such detention and not taking recourse to cancellation of bail. Moreover, no subjective satisfaction has been recorded by the

detaining authority in the grounds of detention before issuance of the impugned order.

10. To support his submission, the Learned counsel for the appellant in support of his submissions, relied upon the following decisions: -

a. ***Anant Sakharam Raut Vs State of Maharashtra and Anr. AIR 1987 SC 137;***

b. ***Abdul Rehman Vs State of Karnataka AIR 1979 SC 1924;***

c. ***Thahira Haris v Govt. of Karnataka, AIR 2009 SC 2184;***

d. ***Sophia Ghulam Mohd Bham Vs State of Maharashtra and Anr. AIR 1997 SC 305;***

e. ***Farooq Ahmad Shaikh vs State and Ors. SLJ 2017 (II) 681; and***

f. ***Bilal Ahmad Dar Vs State of J&K and Another SLJ (II) 650***

11. ***Per contra***, Mr. Zahid Qais Noor, the learned Government Advocate appearing on behalf of respondents, resisted the appeal and submitted that the activities of the detenu were found prejudicial to the security of the state and it was on this count that the police recommended the preventive detention of the detenu. He further submits that the contents of the warrant and the grounds of detention were read over and explained to the detenu in the language understood by him and in lieu thereof the detenu had put his signature on the execution report. Additionally, the detenu was informed about his right to submit representation against his detention if the detenu so desires.

12. Learned counsel appearing for the Respondents further submits that all the statutory requirements and constitutional guarantees have been fulfilled and complied by the detaining authority, indisputably keeping in mind the very object of law of preventive detention being not punitive, but only preventive. Additionally, he submits that the grounds of detention are precise, proximate, pertinent and relevant and that there is no vagueness or staleness in the grounds of detention coupled with definite indications. The

grounds of the detention shows the complete picture of the activities of the detenu, which on the face of it are highly prejudicial to the security of the State.

13. In support of his submissions, the learned counsel appearing for the respondents has relied upon following decisions:-

a) ***Union of India Vs Dimple Happy Dhakad AIR 2019 SC 3428;***

b) ***Hardhan Saha Vs State of West Bengal (1975) 3 SCC 198;***

c) ***Secretary to Government, public (Law and order) and Anr. Vs Nabila and Anr. (2015) 12 SCC 127; and***

d) ***Debu Mahato Vs State (1974) AIR SC 816***

14. Heard learned counsel for the parties at length and we have also gone through the detention record produced before us by the learned Counsel for the respondents.

15. The record reveals that the detenu vide Order No. ***24/DMP/PSA/22*** dated ***12.04.2022*** was detained by the Respondent No 2- District Magistrate Pulwama, after drawing his satisfaction which was based on the dossier placed before him by the Senior Superintendent of Police (SSP)- Pulwama dated ***11.04.2022***, that there were sufficient grounds to prevent the detenu from acting in any manner which is prejudicial to the security of the state and that it was necessary to detain him under the provisions of Public Safety Act, 1978. While passing the impugned order of detention, the detaining authority formulated the grounds of detention showing the detenu as a person of 23 years old being an active member of banned terrorist organization (Hizbul Mujahideen) providing every help to the terrorists of the said organization in carrying out subversive activities in and around Pulwama town.

16. The grounds of detention further reveal that the detenu had been harbouring terrorists of the banned terrorist organization ((Hizbul Mujahideen) at unknown locations and had been indulging in motivating and instigating the youth of the district Pulwama and its adjoining areas to follow

each and every instruction of terrorists/separatists thereby not only jeopardizing the peace and tranquillity but also weakening the law enforcing agencies in the UT of J&K. In addition to this the grounds of detention also reveal that the detenu had been apprehended in relation to case ***FIR No 41/2020*** of Police Station Litter Pulwama Under Section 13/18 & 39 Unlawful Activities Prevention Act. Further, as per the grounds of detention, the detenu had been providing logistic support to the terrorists as an ***Over Ground Worker*** (OGW) of a banned terrorist organization Hizbul Mujahideen like providing food, shelter, information about the movement of security forces, thus, creating obstacles to security forces in bringing the normalcy in the area.

17. Learned Counsel for the Appellant has vehemently argued that the Writ Court has not considered the grounds of challenge in the Writ Petition and the law relied upon by him while adjudicating the case and not even a single ground has been considered or dealt with while passing the judgment which is impugned in the present appeal. He further submits that all the grounds of challenge to the detention order pleaded by the detenu before the Writ Court have not been considered at all by the learned single Bench.

18. On a perusal of the impugned Judgment, the contentions raised by the learned Counsel for the Appellant appears to be correct as there is no whisper with regard to the grounds of challenge in the judgment impugned. The Writ Court, while deciding the case, has observed that the bare perusal of the impugned detention Order would reveal that the Respondents have complied with all the statutory and constitutional requirements and guarantees in letter and spirit and that the detaining authority has seemingly applied its mind to the facts and circumstances of the case to draw subjective satisfaction while detaining the detenu, taking into account his activities, being prejudicial to the security of the State.

19. As far as the grounds of detention are concerned, we are of the view that there is no specific allegation against the detenu as to how his activities could be attributed to be prejudicial to the security of the State. The grounds of detention nowhere suggest/ reveal that the detenu had, at any point of time being an active member of banned terrorist organization (Hizbul

Mujahideen). Further, there is no specific instance in any of the allegations levelled against him to show that he had been working as an ***Over Ground Worker***, so as to be prejudicial to the security of the State. Therefore, it seems apparent that the grounds of the detention are baseless and vague, without any material being put forth to prove the genuineness of the same.

20. With a view to corroborate the allegations levelled against the detenu, we have examined the record produced before this Court, a perusal whereof leads to an irresistible conclusion that the same is not substantiated from the record.

21. Therefore, we are of the view that the grounds of the detention are baseless, ambiguous and vague, without any material being put forth to prove the genuineness of the same. . Detention in preventive custody on the basis of such vague and ambiguous grounds cannot be justified. There is no doubt that preventive detention is largely precautionary and is based on suspicion and the courts are not equipped to investigate into circumstances of suspicion on which such detention order is based. However, the matters to be considered by the detaining authority are whether the person concerned, having regard to his past conduct judged in the light of surrounding circumstances and other relevant material, is likely to act in a manner subversive to law and order. In the present case no such apprehension is forthcoming from the material on record which would warrant preventive detention of the detenu.

22. This Court is fortified by the observation made in ***Mohammad Yousuf Rather vs The State Of Jammu & Kashmir And Ors*** reported as ***AIR 1979 SC 1925,*** wherein the Court has held as under:

> ***"It is well settled that a ground is said to be irrelevant when it has no connection with the satisfaction of the authority making the order of detention under the appropriate law. It nevertheless appears that the aforesaid irrelevant grounds were taken into consideration for making the impugned order, and that is quite sufficient to vitiate it. Reference in this connection may be made to the decisions in Keshav Talpade v. The King Emperor,***

Tarapada De and others v. State of West Bengal (supra), Shibban Lal Saxena v. State of Uttar Pradesh and others (supra), Pushkar Mukherjee and others v. State of West Bengal (supra), Satya Brata Ghose v. Mr. Arif Ali, District Magistrate, Sibasagar, Jorhat and others and to K. Yadava Reddy and others v. The Commissioner of Police, Andhra Pradesh, Hyderabad, and another. It has been held there that even if one of the grounds of detention is irrelevant, that is sufficient to vitate the order. The reason is that it is not possible to assess in what manner and to what extent that irrelevant ground operated on the mind of the appropriate authority and contributed to provide the satisfaction that it was necessary to detain the petitioner with a view to preventing him from acting in any manner prejudicial to the maintenance of the public order.

23. Further this court is supported by the observation made in ***Vijay Narain Singh vs State Of Bihar & Ors*** reported as ***(1984) 3 SCC 14***, wherein Hon'ble Supreme Court has observed as under:

> ***32. ...It is well settled that the law of preventive detention is a hard law and therefore it should be strictly construed. Care should be taken that the liberty of a person is not jeopardised unless his case falls squarely within the four corners of the relevant law. The law of preventive detention should not be used merely to clip the wings of an Accused who is involved in a criminal prosecution. It is not intended for the purpose of keeping a man under detention when under ordinary criminal law it may not be possible to resist the issue of orders of bail, unless the material available is such as would satisfy the requirements of the legal provisions authorising such detention.***

24. The respondent no. 2-District Magistrate, Pulwama has nowhere referred as to, on what factual basis and inputs shared by the Senior Superintendent of Police (SSP), Pulwama, the petitioner was so projected as Over Ground Worker as also a member of the banned terrorist Organization (Hizbul Mujahideen). If this goes unquestioned, then the security agencies would be at liberty to implicate any innocent citizen of this country, without their actual involvement into any criminal

activity which in itself would be an unfair target on any citizen by the law enforcement agency simply because they are labeled as criminals.

25. Hon'ble Apex Court in case titled ***Pramod Singla Vs Union of India and Ors.*** reported as ***2023 Livelaw (SC) 293*** has observed as follows:

> ***"44. As has been mentioned above, preventive detention laws in India are a colonial legacy, and as such, are extremely powerful laws that have the ability to confer arbitrary power to the state. In such a circumstance, where there is a possibility of an unfettered discretion of power by the Government, this Court must analyze cases arising from such laws with extreme caution and excruciating detail, to ensure that there are checks and balances on the power of the Government. Every procedural rigidity, must be followed in entirety by the Government in cases of preventive detention, and every lapse in procedure must give rise to a benefit to the case of the detenu. The Courts, in circumstances of preventive detention, are conferred with the duty that has been given the utmost importance by the Constitution, which is the protection of individual and civil liberties. This act of protecting civil liberties, is not just the saving of rights of individuals in person and the society at large, but is also an act of preserving our Constitutional ethos, which is a product of a series of struggles against the arbitrary power of the British state."***

26. This Court is deeply concerned by the manner in which the alleged grounds of detention were presented, as they appear to be exaggerated descriptions of the detenu provided by the SSP Pulwama and accepted by the District Magistrate Pulwama.

27. From a bare perusal of the record supplied by the respondents, which has been examined by us, we are of the view that the grounds of detention formulated

by the detaining authority are devoid of any cogent legal basis as the same are contradictory in view of the statements of the witnesses recorded under ***Section 161 Code of Criminal Procedure,1973*** and other relevant material on record.

28. There is no doubt that the Courts cannot, on a review of the grounds, substitute its own opinion for that of the detaining authority, and cannot act as a court of appeal, it is solely the domain of the detaining authority to reach to a subjective satisfaction. However, this does not mean that the subjective satisfaction of the detaining authority is wholly immune from judicial reviewability. The courts have by judicial decisions carved out an area, limited though it be, within which the validity of the subjective satisfaction can yet be subjected to judicial scrutiny. The basic postulate on which the courts have proceeded, is that the subjective satisfaction being a condition precedent for the exercise of the power conferred on the Executive, the Court can always examine whether the requisite satisfaction is arrived at by the authority: if it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad. There are several grounds evolved by judicial decisions for saying that no subjective satisfaction is arrived at by the authority as required under the statute. The simplest case is whether the authority has not applied its mind at all; in such a case the authority could not possibly be satisfied as regards the fact in respect of which it is required to be satisfied.

29. We also draw support from the law laid down by the Hon'ble Supreme Court in case titled ***Ameena Begum Vs. The State Of Telangana & Others*** reported as ***(2023) 9 SCC 587,*** the operative part of which is reproduced as under:

> ***"10. It is common knowledge that recourse to preventive detention can be taken by the executive merely on suspicion***

and as a precaution to prevent activities by the person, sought to be detained, prejudicial to certain specified objects traceable in a validly enacted law. Since an order of preventive detention has the effect of invading one's personal liberty merely on suspicion and is not viewed as punitive, and the facts on which the subjective satisfaction of the detaining authority is based for ordering preventive detention is not justiciable, meaning thereby that it is not open to the Constitutional Courts to enquire whether the detaining authority has erroneously or correctly reached a satisfaction on every question of fact and/or has passed an order of detention which is not justified on facts, resulting in narrowing down of the jurisdiction to grant relief, it is only just and proper that such drastic power is not only invoked in appropriate cases but is also exercised responsibly, rationally and reasonably. Having regard to the circumstance of loss of liberty by reason of an order of preventive detention being enforced without the detenu being extended any opportunity to place his case, the Constitutional Courts being the protectors of Fundamental Rights have, however, never hesitated to interdict orders of detention 8 suffering from any of the vices on the existence whereof such limited jurisdiction of judicial reviewability is available to be exercised.

30. Preventive detention laws in India are extraordinary statutes, granting significant power to the State. Such laws can easily lead to arbitrary exercise of authority by the Government. Therefore, it is imperative for the Courts to meticulously scrutinize cases involving these laws, ensuring strict adherence to procedural norms and safeguarding against governmental overreach. Any deviation from procedural requirements should favour the detenu. Courts have a constitutional duty to protect individual and civil liberties, which is paramount.

This duty not only upholds the rights of individuals and society but also preserves the foundational principles of our Constitution.

31. Furthermore, the Learned Counsel appearing on behalf of the detenu has argued that the detaining authority had failed to show compelling reasons for taking recourse to preventive law when the detaining authority could have gone for seeking cancellation of bail.

In our view the proper course of action for the respondents would have been to move an application for cancellation of bail, if any further untoward incident prejudicial to the security of the State were apprehended to take place in their opinion. Since, no such application for cancellation of bail had been moved by the respondents, therefore, the non-compliance of the statutory provision of the criminal law vitiates the order of detention.

32. We are supported by the view taken in ***Banka Sneha Sheela V/s The State of Telangana & Ors.*** reported as ***2021 SCC Online SC 530,*** wherein, the Hon'ble Supreme Court has observed as follows:

> ***"14. A close reading of the Detention Order would make it clear that the reason for the said Order is not any apprehension of widespread public harm, danger or alarm but is only because the Detenu was successful in obtaining anticipatory bail/bail from the Courts in each of the five FIRs. If a person is granted anticipatory bail/bail wrongly, there are well-known remedies in the ordinary law to take care of the situation. The State can always appeal against the bail order granted and/or apply for cancellation of bail. The mere successful obtaining of anticipatory bail/bail orders being the real ground for detaining the Detenu, there can be no doubt that the harm, danger or alarm or feeling of security among***

the general public spoken of in Section 2(a) of the Telangana Prevention of Dangerous Activities Act is make believe and totally absent in the facts of the present case.

33. Further this Court is fortified by the view taken in ***Vijay Narain Singh (Supra)*** wherein it was observed that:

"32. The law of preventive detention should not be used merely to clip the wings of an Accused who is involved in a criminal prosecution. It is not intended for the purpose of keeping a man under detention when under ordinary criminal law it may not be possible to resist the issue of orders of bail, unless the material available is such as would satisfy the requirements of the legal provisions authorising such detention. When a person is enlarged on bail by a competent criminal court, great caution should be exercised in scrutinising the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal court."

34. The Hon'ble Supreme Court in case titled ***Ameena Begum (Supra)*** has observed as follows:

"51. …It is pertinent to note that in the three criminal proceedings where the Detenu had been released on bail, no applications for cancellation of bail had been moved by the State. In the light of the same, the provisions of the Act, which is an extraordinary statute, should not have been resorted to when ordinary criminal law provided sufficient means to address the apprehensions leading to the impugned Detention Order. There may have existed sufficient grounds to appeal against the bail orders, but the circumstances did not warrant the circumvention of ordinary criminal procedure to resort to an extraordinary measure of the law of preventive detention."

35. From the above discussion coupled with the law laid down by the Hon'ble Apex Court, this court is of the view that the grounds of detention formulated by the detaining authority, as such, are general allegations against the detenu, with no

specific instance/ incident as the record supplied by the respondents does not support their version . The detention order based on such vague grounds is not sustainable, for the reason that the detaining authority, before passing the order, has not applied its mind to draw subjective satisfaction to order prevention detention of the detenu by curtailing his liberty which is a valuable and cherishable right guaranteed under *Article 21 of the Constitution of India*.

36. For the foregoing reasons and observations made hereinabove, this appeal is *allowed* and the impugned judgment dated ***22.11.2022*** passed by the learned Single Bench is set aside. Resultantly, the Writ Petition filed by the Appellant, being ***WP (Crl) No.318/2022***, is ***allowed*** and the impugned Order of detention bearing No. ***24/DMP/PSA/22*** dated ***12.04.2022*** passed by the Respondent-District Magistrate, Pulwama is hereby **quashed**. The Respondents are directed to release the detenu, namely, ***Athar Mushtaq Khan S/o Mushtaq Ahmad khan R/o Tantraypoa Tehsil Litter Pulwama***, forthwith from the preventive custody, provided he is not required in any other case.

37. Letters Patent Appeal is *disposed of* along with the connected CM(s) in the manner as indicated above.

38. Registry is directed to return the detention record to the learned Counsel for the respondents against proper receipt.

(Wasim Sadiq Nargal)
Judge

(N. Kotiswar Singh)
Chief Justice

SRINAGAR:
.03.2024
"Hamid"

i. Whether the Judgment is Reportable? Yes/No
ii. Whether the Judgment is Speaking? Yes/No