

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

WP(Crl) No. 136/2023

Reserved on: **11.08.2023**

Pronounced on: **24.08.2023**

Tawqeer Bashir Magray

...Petitioner(s)

Through: Mr. M.Ashraf Wani, Advocate.

Vs.

Union Territory of J&K & Anr.

...Respondent(s)

Through: Mr. Sajad Ashraf, GA vice
Mr.Mohsin Qadri, Sr.AAG.

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

JUDGMENT

1. By virtue of Order No. DIVCOM-“K”/21/2023 dated 04.03.2023 (for short ‘impugned order’) passed by Divisional Commissioner Kashmir - respondent No.2, the detenu namely Tawqeer Bashir Magray S/O Late Bashir Ahmad Magray R/O Nowshara Boniyar Baramulla, has been ordered to be detained under Section -3 of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act 1988 (for short ‘the Act’). Aggrieved of the said detention order, detenu, through his wife, has filed the present petition seeking quashment of the same on the grounds taken in the petition in hand.
2. Case set up by the petitioner is that the detaining authority has not followed the constitutional and statutory procedural safeguards while passing the detention order of the detenu; that that order of detention

has been passed in breach of the mandate of law as declared by the Supreme Court of India as also the other High Courts of the country; that the detention order passed by Divisional Commissioner, in terms of the Central Act, is not competent to detain a person whereas the competent officer is Secretary to Government or the officer of the rank of Joint Secretary especially empowered in this behalf; that the grounds of detention are vague and mere assertions of the detaining authority and no prudent man can make an effective and meaningful representation against these allegations; that the detenu was arrested in connection with FIR No. 04/2023 under Section 8/21 NDPS Act on 30.01.2023 but owing to the non-involvement of the detenu in the said FIR, he was admitted to bail by the court of Sessions Judge Baramulla on 25.02.2023; that while facing trial in connection with FIR No. 04/2023, the detenu was ordered to be detained under the provisions of NDPS Act vide order impugned. The grounds of detention as formulated by Divisional Commissioner have also been incorporated in the dossier which, ipso facto, demonstrates complete non-application of mind on the part of the detaining authority and vitiates the detention of the detenu.

3. Reply affidavit has been filed by respondents, vehemently resisting the petition. It is contended that the impugned order of detention does not suffer from any malice or legal infirmity, inasmuch as safeguards provided under the Constitution as also the rights of the detenu have been followed while ordering his detention, as such, challenge thrown to the impugned order of detention is not sustainable, hence on this score the instant petition merits dismissal. It is further contended that the detenu has been detained with a view to prevent him from

indulging in illegal trade and illicit traffic in Narcotic Drugs and Psychotropic Substances after satisfying that the detinue is a great threat for sustaining the conservative values of the society. The detinue has remained a notorious trafficker of contraband substance like 'cannabis' and is involved in the distribution of the same among the youth of the area. In the instant case there is enough material against the detinue which is highly suggestive of the fact that the normal law of the land is not sufficient to prevent him from continuing with his anti-social activities and, it is evident that the detinue is highly motivated and is not likely to desist from anti-social and unlawful activities.

4. Heard learned counsel for the parties and perused the detention record produced by learned counsel for the respondents.
5. Detention record, as was directed to be made available, is produced by learned counsel for the respondents, which, on perusal, would indicate that FIR No. 04/2023 under Section 8/21 NDPS Act was registered at Police station Sheeri against the detinue. The contraband seized from the detinue, prima facie, indicates that he is fully involved in the illegal trade in an organized manner which is a great threat for sustaining the conservative values of the society. It has been observed that the activities of the detinue have posed a serious threat to the health and welfare of the people of the area. The reports received from the field agencies are suggestive of the fact that the detinue is dealing with illegal business of Narcotics and in order to carry out this illegal trade, the detinue is exploiting the immature minds of the younger generation by making them habitual addicts. The detinue, as per the reports of field agencies, was supplying drugs against hefty amounts to the immature youth, which in turn has exposed them to different kinds of immoral

and illegal criminal tendencies like, thefts and other illegal activities in order to purchase drugs from the detenu. The drug mafia, of which the detenu is an active member, is hell bent to spoil the life and career of younger generation by selling drugs to them against hefty amounts. Therefore, it was found imperative to detain the detenu under the provisions of the Act.

6. So far as the contention of learned counsel for the petitioner that the Divisional Commissioner Kashmir was not authorized under laws, as detaining authority with the enactment of the J&K Re-organization Act, 2019, as the Divisional Commissioner has been designated as detaining authority vide SRO 247 of 1988 dated 27.07.1988 issued by the Government of J&K through Home Department, as such, that SRO does not hold the field after repealing of the Acts in terms of the J&K Re-organization Act, 2019, is concerned, the Union Government issued the order called J&K Re-organization (Removal of Difficulties Orders) 2019 and Clause-14 of this Order is relevant, which is extracted as under:-

"Anything done or any action taken including any appointment or delegation made, notification, instruction or direction issued, form, by-law or Scheme framed, certificate obtained, permit or license granted or registration effected or agreement executed under any law shall be deemed to have been done or taken under the corresponding provisions of the Central laws now extended and applicable to the Union Territory of Jammu & Kashmir and the Union Territory of Ladakh and shall continue to be in force accordingly, unless and until superseded by anything done or any action taken under the Central laws now extended."

7. Therefore, the argument advanced at bar by the learned counsel for the petitioner that the Divisional Commissioner was not competent to pass order of detention under the Act, is misplaced and is over ruled.
8. It would be apt to say that right of personal liberty is most precious right, guaranteed under the Constitution. A person is not to be deprived of his personal liberty, except in accordance with procedures established under law and the procedure as laid down by the Apex Court, in the case '**Maneka Gandhi vs. Union of India, (AIR 1978 SC 597)**', is to be just and fair. The personal liberty may be curtailed where a person faces a criminal charge or is convicted of an offence and sentenced to imprisonment. Where a person is facing trial on a criminal charge and is temporarily deprived of his personal liberty owing to criminal charge framed against him, he has an opportunity to defend himself and to be acquitted of the charge in case prosecution fails to bring home his guilt. Where such person is convicted of offence, he still has satisfaction of having been given adequate opportunity to contest the charge and also adduce evidence in his defense.
9. However, framers of the Constitution have, by incorporating **Article 22(5)** in the Constitution, left room for detention of a person without a formal charge and trial and without such person held guilty of an offence and sentenced to imprisonment by a competent court. Its aim and object are to save society from activities that are likely to deprive a large number of people of their right to life and personal liberty. In such a case it would be dangerous, for the people at large, to wait and watch as by the time ordinary law is set into motion, the person, having dangerous designs, would execute his plans, exposing general public to risk and causing colossal damage to life and property. It is, for that

reason, necessary to take preventive measures and prevent a person bent upon to perpetrate mischief from translating his ideas into action. **Article 22(5)** of the Constitution of India, therefore, leaves scope for enactment of preventive detention law.

10. Having glance of the grounds of detention, it is clear that the detenu was involved in illicit drug activities. The detenu did not shun the path of his nefarious and anti-social activities and continues to spoil the life and career of young generation making them the addicts of these drugs. The detenu was found actively involved in illegal business of drugs and the detaining authority after keeping in view the activities of the detenu, detained him under preventive custody, in terms of the impugned order, which is under challenge in the present petition.

11. The menace of illicit drug activities is a social problem that harms youth and their families, and the money it generates is diverted for disruptive activities that have bearings on national security. The abuse of alcohol and drugs has resulted in significant morbidity and mortality among adolescents worldwide. Many of these youth lose their lives to drugs and narcotics and a significant numbers are likely to grow up to become drug addicts. No part of the world is free from the curse of drug addiction. Drug abuse has emerged as a serious concern globally, adversely affecting the physical and socio-economic well-being of the country. It has severe repercussions on public health across various sections of the society. The epidemic of drug abuse in younger generation has assumed alarming dimensions in the country. Prevention of drug abuse among adolescents requires awareness about its destructive results. To overcome the menace of drug abuse, concerned agencies hand-in-hand with the community heads are required to come

forward and deal with this menace with iron hand to save the society more particularly the young generation and families.

12. It would be apt to refer to the observations made by the Constitution Bench of the Supreme Court in the case of '**The State of Bombay v. Atma Ram Shridhar Vaidya AIR 1951 SC 157**'. Para- 5 of the said judgment lays law on the point, which is profitable to be reproduced hereunder:

"5. It has to be borne in mind that the legislation in question is not an emergency legislation. The powers of preventive detention under this Act of 1950 are in addition to those contained in the Criminal Procedure Code, where preventive detention is followed by an inquiry or trial. By its very nature, preventive detention is aimed at preventing the commission of an offence or preventing the detained person from achieving a certain end. The authority making the order therefore cannot always be in possession of full detailed information when it passes the order and the information in its possession may fall far short of legal proof of any specific offence, although it may be indicative of a strong probability of the impending commission of a prejudicial act. Section 3 of the Preventive Detention Act therefore requires that the Central Government or the State Government must be satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to (1) the defence of India, the relations of India with foreign powers, or the security of India, or (2) the security of the State or the maintenance of public order, or (3) the maintenance of supplies and services essential to the community it is necessary So to do, make an order directing that such person be detained. According to the wording of section 3, therefore, before the Government can pass an order of preventive detention it must be satisfied with respect to the individual person that his activities are directed against one or other of the three objects mentioned in the section, and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. The wording of the section thus clearly shows that it is the satisfaction of the Central Government or the State Government on the point which alone is necessary to be established. It is significant that while the objects intended to be defeated are mentioned, the different methods, acts or omissions by which that can be done are not mentioned, as it is not humanly possible to give such an exhaustive list. The satisfaction of the Government however must be based

on some grounds. There can be no satisfaction if there are no grounds for the same. There may be a divergence of opinion as to whether certain grounds are sufficient to bring about the satisfaction required by the section. One person may think one way, another the other way. If, therefore, the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of mala fides cannot be challenged in a court. Whether in a particular case the grounds are sufficient or not, according to the opinion of any person or body other than the Central Government or the State Government, is ruled out by the wording of the section. It is not for the court to sit in the place of the Central Government or the State Government and try to determine if it would have come to the same conclusion as the Central or the State Government. As has been generally observed, this is a matter for the subjective decision of the Government and that cannot be substituted by an objective test in a court of law. Such detention orders are passed on information and materials which may not be strictly admissible as evidence under the Evidence Act in a court, but which the law, taking into consideration the needs and exigencies of administration, has allowed to be considered sufficient for the subjective decision of the Government.”

13. In light of the aforesaid legal position 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, would not 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.
14. The courts do not even go into the questions as to whether the facts mentioned in the grounds of detention are correct or false. The reason for the rule is that to decide this, evidence may have to be taken by the courts and that it is not the policy of the law of preventive detention.

15. Preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it and to prevent him from doing. Justification for such detention is suspicion or reasonable probability and not criminal conviction, which can only be warranted by legal evidence. Thus, any preventive measures, even if they involve some restraint or hardship upon individuals, as said by the Supreme Court in the case '**Ashok Kumar v. Delhi Administration & Ors., AIR 1982 SC 1143**', do not contribute in any way of the nature of punishment.

16. Observing that the object of preventive detention is not to punish a man for having done something but to intercept and to prevent him from doing so, the Supreme Court in the case '**Naresh Kumar Goyal v. Union of India & Ors., 2005 (8) SCC 276**', and reiterated in the judgment dated **18th July 2019**, rendered by the Supreme Court in **Criminal Appeal No.1064 of 2019** arising out of **SLP (Crl.) No.5459 of 2019** titled '**Union of India and another v. Dimple Happy Dhakad**', has held that an order of detention is not a curative or reformatory or punitive, but a preventive action, acknowledged object of which being to prevent anti-social and subversive elements from endangering the welfare of the country or security of the nation or from disturbing public tranquility or from indulging in anti-national activities or smuggling activities or from engaging in illicit traffic in narcotic drugs and psychotropic substances, etc., preventive detention is devised to afford protection to society. The authorities on the subject have consistently taken the view that preventive detention is devised to afford protection to society. The object is not to punish a man for having done

something but to intercept before he does it and to prevent him from doing so.

17. The petitioner, who has been described as a Graduate and was running a shop at Boniyar, the narcotic substance had been recovered from his possession and the intelligence inputs received by the administration also indicated that the petitioner was engaged in the illicit trafficking of narcotic drugs, therefore, the apprehension of the detaining authority, which has been recorded in the detention order, cannot be reviewed by this Court on merits.

18. In the backdrop of foregoing discussion, the petition found to be devoid of any merit is, accordingly, dismissed.

19. Detention record, as produced, be returned to learned counsel for respondents.

(M. A. CHOWDHARY)
JUDGE

Srinagar
24.08.2023
Muzammil. Q

Whether the order is reportable: Yes / No