

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

WP(Crl) No. 53/2023

Reserved on: 22.12..2023  
Pronounced on: 28.12.2023

Imtiyaz Ahmad Dar ...Appellant/Petitioner(s)

Through: Mr. Usman Gani, Advocate

**Vs.**

UT of J&K and Anr. ...Respondent(s)

Through: Mr. Sajad Ashraf, GA

**CORAM:**

**HON'BLE MS JUSTICE SINDHU SHARMA, JUDGE**

**JUDGEMENT**

1. Divisional Commissioner, Kashmir- respondent no.2, vide impugned order bearing No. DIVCOM-“K”/339/2022 dated 30.12.2022, detained the detenu, namely, Imtiyaz Ahmad Dar, in exercise of powers vested by him under Section (3) of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988. The impugned detention order is being questioned by the detenu through his wife Shareefa Bano.
2. The detenu was detained in terms of detention order dated 30.12.2022, on the ground that he is dealing in illegal business of Narcotics and supplying drugs to immature youths, who has exposed them to different kind of immoral and illegal & criminal tendencies, resulting in thefts and other illegal activities.
3. The detenu has assailed the detention order on number of grounds, but has laid thrust on :-
  - (i) that the detenu was apprehended in FIR No. 196/2007 under Section 20 of NDPS Act and in FIR No. 280/2016 under Section 8/15 of NDPS Act, registered with Police Station Bijbehara. In these FIRs contraband was seized from the detenu and as per the report, he is clandestinely dealing in illegal business of Narcotics. The contention of the detenu is that there is total non-application of mind

by the Detaining Authority as the detenu was acquitted vide judgement dated 11.08.2020 in FIR 280/2016 and on 11.11.2014 in FIR No. 196/2007. This fact has not been noticed by the Detaining Authority while passing the detention order, as such, has vitiated the detention;

- (ii) that the detenu has moved representation to the respondents against his detention, but same has not been considered till date;
  - (iii) that the material on which the Detaining Authority has derived its satisfaction has also not been supplied to the detenu.
4. Mr. Sajad Ashraf, GA, has filed counter affidavit as well as produced detention record.
  5. It is submitted by learned counsel for the respondents that the activities of detenu, indulging in narcotic trade is highly prejudicial and causes adverse affect of drug abuse in the society and his remaining at large involves a great risk to the health and welfare of the people of the area. It is further submitted that as per the reports of the field agencies, the detenu is clandestinely dealing in illegal business of Narcotics and is exploiting the immature minds of the younger generation by making them dependent on drugs. It is also submitted that all the statutory requirements and constitutional guarantees have been fulfilled and complied with by the Detaining Authority. The grounds of detention, order of detention as well as all the material relied upon by the Detaining Authority have been provided to the detenu within the statutory period. The detenu was also informed to make a representation either to the Detaining Authority or to the Government.
  6. Heard learned counsel for the parties and perused the record.
  7. Firstly, learned counsel for the petitioner contended that the detenu has been admitted to bail in FIR Nos. 196/2007 & 280/2016. This vital fact has not been noticed by the Detaining Authority while passing the detention order. It is well settled law that if there are reasonable grounds for believing that the accused is not guilty of an offence or not likely to commit any offence, the facts are to be brought to the notice of Detaining Authority. The fact that the detenu

was acquitted in both the FIRs registered under Sections 20, 8/15 of NDPC Act, was a vital fact, which was to be brought to the notice of Detaining Authority as it would have influenced the mind of the Detaining Authority as to whether or not to make an order of detention. In paragraph 24, 25 & 26, the Apex Court in ***Sushanta Kumar Banik v. The State of Tripura***, has held as under:-

*“24. In Asha Devi v. Additional Chief Secretary to the Government of Gujarat and Anr., reported in 1979 CrL LJ 203, the Apex Court pointed out that:*

*“... if material or vital facts which would influence the minds of the detaining authority one way or the other on the question whether or not to make the detention order, are not placed before or are not considered by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal.”*

*25. In Sk. Nizamuddin (supra) this Court observed as under:*

*"We should have thought that the fact that a criminal case is pending against the person who is sought to be proceeded against by way of preventive detention is a very material circumstance which ought to be placed before the District Magistrate. The circumstance might quite possibly have an impact on his decision whether or not to make an order of detention. It is not altogether unlikely that the District Magistrate may in a given case take the view that since a criminal case is pending against the person sought to be detained, no order of detention should be made for the present, but the criminal case should be allowed to run its full course and only if it fails to result in conviction, then preventive detention should be resorted to. It would be most unfair to the person sought to be detained not to disclose the pendency of a criminal case against him to the District Magistrate."*

*26. From the above decisions, it emerges that the requisite subjective satisfaction, the formation of which is a condition precedent to passing of a detention order will get vitiated if material or vital facts which would have bearing on the issue and weighed the satisfaction of the detaining authority one way or the other and influence his mind are either withheld or suppressed by the sponsoring authority or ignored and not considered by the detaining authority before issuing the detention order."*

This vital fact was not brought to the notice of Detaining Authority, which renders the detention unsustainable.

8. Similar issue has been dealt by the Apex Court in case of “**Anant Sakharam Raut v. State of Maharashtra and another**” reported in **AIR 1987 SC 137**, and has held in paragraph 8 as under:-

*“We hold that there was clear non-application of mind on the part of detaining authority about the fact that the petitioner was granted bail when the order of detention was passed. In the result we set aside the judgement of the Bombay High Court under appeal, quash the order of detention and direct that the petitioner be released forthwith.....”*

9. It is next submitted that the representation was moved by the detenu through his father to the Detaining Authority, but the same has not been considered by the respondents till date. This non-consideration of the representation of detention has resulted infraction of the constitutional rights as well as procedural safeguards provided to the detenu under Public Safety Act. The failure on the part of the respondents to place the representation submitted by the detenu before the Advisory Board and its consequent non-consideration indisputably amounts to violation of the provisions of Article 22 (5) of the Constitution. This issue has been considered and decided by the Apex Court in the case of **Sarabjeet Singh Mokha vs. The District Magistrate, Jabalpur and others.**, reported as **2021 SCC Online SC 1019**, and has held as under:-

*“.....Article 22(5) reflects a keen awareness of the framers of the Constitution that preventive detention leads to the detention of a person without trial and hence, it incorporates procedural safeguards which mandate an immediacy in terms of time. The significance of Article 22 is that the representation which has been submitted by the detenu must be disposed of at an early date. The communication of the grounds of detention, as soon as may be, and the affording of the earliest opportunity to submit a representation against the order of detention will have no constitutional significance unless the detaining authority deals with the representation and communicates its decision with expedition.”*

10. It is statutory requirement under the provisions of Public Safety Act, that copies of all the material relied upon and considered by the Detaining Authority while forming his opinion be furnished to the detenu in order to enable him to make an effective and meaningful representation against the order of detention to the Detaining Authority as well as Government.
11. Perusal of the record reveals that all material has not been provided to the detenu. The receipt of the grounds of detention, which is in the detention record produced by the learned counsel for the respondents reveals as under:-

*“Received copies of detention order (01) leaf), Notice of detention (01 leaf), grounds of detention (02 leaves), Dossier of detention (Nil), Copies of FIR, Statements of Witnesses and other related documents (01 leaf) (Total 05 Leaves) through executing officer ASI Nazir Ahmad No. 3760/S PID No. 911643 of P/P Wachi, by reading over in English language and explained to me in Kashmiri/Urdu language which I understood fully. I have been also be informed that I can make representation to the government as well as detaining authority against this detention order if I so desire.”*

12. It is evident from the receipt of grounds of detention that the petitioner has been provided only detention order, notice of detention, grounds of detention, Copies of FIR, Statement of Witnesses and other related documents (01 leaf) (Total 05 leaves). All other material on the basis of which the detention order has been passed including copy of FIR, dossier and other connected material, has not been provided to the detenu, thus, precludes him for making an effective representation. Reliance in this regard is placed in ***Sophia Gulam Mohd Bham v. State of Maharashtra and Others***, reported in ***AIR 1999 SC 3051***, the Supreme Court has held as under:-

*“The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the grounds are based flows from the right given to the detenu to make a representation against the order of detention. A representation can be made and the order of detention can be assailed only when all the grounds on which the order is based are communicated the detenu and the material on which those grounds are based are also disclosed and copies thereof are supplied to the person detained, in his own language.”*

13. The detenu has also made a representation to the respondents through his father, which is on record, but the respondents have not considered the same within the statutory time period.
14. For the stated reasons and the law laid down by the Hon'ble Apex Court, this petition is allowed and impugned detention order bearing No. DIVCOM"K"/339/2022 dated 30.12.2022, passed by the Divisional Commissioner, Kashmir, respondent no.2, is quashed. The respondents are directed to release the detenu forthwith provided he is not required in any other case.
15. The detention record, as produced, be returned to learned counsel for the respondents.

**(SINDHU SHARMA)**  
**JUDGE**

**SRINAGAR**

28.12.2023

Manzoor

Whether order is reportable: Yes/No

