

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

HCP No. 59/2023

Reserved on: 13.12.2023
Pronounced on: 27.12.2023

Jaleel Ahmad Shah ...Appellant/Petitioner(s)

Through: Mr. N. H. Shah, Sr. Advocate with
Ms. Suwaiba, Advocate

Vs.

UT of J&K and Ors. ...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 detention order bearing No. DIVCOM-"K"/114/2023 dated 27.07.2023, detained the detenu, namely, Jaleel Ahmad Shah, in exercise of powers vested in 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 mother Masarat Afza.
2. The case set up by detenu in this petition is that he was arrested on 30th April 2023, in connection with case FIR No.88/2023 under Section 8/21-29 NDPS Act by Police Station, Baramulla. In the said FIR, the detenu filed an application for grant of bail before the Court of Principal Sessions Judge, Baramulla, The Court of Principal Sessions Judge, Baramulla, vide order dated 27.05.2023, granted bail in favour of detenu. It is stated that this fact of grant of bail has neither been mentioned in the grounds of detention nor did they file the appeal against the said bail order. It is averred that detenu was

arrested and implicated in FIR no.88/2023 on 30th April 2023, and subsequently he was admitted to bail.

3. The impugned detention order has been assailed by the detenu on the grounds (i) that there has been non-application of mind on the part of the Detaining Authority as the detenu has already been admitted to bail by the Court of Principal Sessions Judge, in FIR No.88/2023, on 27.05.2023, but this fact has not been mentioned in the grounds of detention; (ii) that although a representation was made against the detention by the detenu, yet the same was not considered rendering the detention order unsustainable in law; (iii) that the material relied upon by Detaining Authority has not been provided to detenu to enable him to make an effective representation against his detention; (iv) that the allegations made in the grounds of detention are vague, non-existent and have been fabricated to justify his detention against which no effective representation could be made.
4. Mr. Sajad Ashraf, GA, has filed counter affidavit as well as produced detention record.
5. Learned counsel for respondents submitted that the detenu was apprehended in case FIR No. 88/2023, registered with Police Station, Baramulla, and at the time of his arrest, 15 grams of Charas was recovered from him. The activities of detenu in indulging in narcotic trade are highly prejudicial and will cause 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. He is supplying drugs to young immature youth. 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. In compliance to the provisions of Act, the State

Advisory Board after perusing the record confirmed the detention order DIVCOM-“K”/114/2023 dated 27.07.2023.

6. Heard learned counsel for the parties and perused the record.
7. The first ground taken by the detenu is that bail granted to him has not been mentioned in grounds of detention, the same has force. Detenu has been granted bail by the Court of Principal Sessions Judge, Baramulla, vide order dated 27.05.2023, in case FIR no.88/2023, registered with P/S Baramulla. This fact is not coming forth from perusal of grounds of detention. Non-mentioning of this important fact in the grounds of detention, exhibits non-application of mind on the part of Detaining Authority. This also reflects that Detaining Authority has not meticulously examined the material record available before him while passing the impugned order of detention which renders the same unsustainable in law, as held in **Anant Sakharam Raut v. State of Maharashtra and Anr. reported in AIR 1987 SC 137.**
8. The law on the subject is trite. If Detaining aAuthority is apprehensive that in case detenu is released on bail he may again carry on his criminal activities, then in such situation, the authority should oppose the bail application and, in the event, bail is granted, the authority should challenge such a bail order in the higher forum and that merely on the ground that an accused in detention is likely to get bail, an order of preventive detention should not ordinarily be passed. Para 24 of judgement in **Saima Aruna v. State of Telangana and another, AIR 2017 SC 2662**, reads 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 2002-2003. The detenu 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 detenu 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 undertrial prisoner was likely to get bail an order of detention under the Nation Security Act should not ordinarily be passed.”

9. The next ground projected by the petitioner is that the detenu submitted a representation against his detention through his mother, which has not been considered by the respondents.
10. As is apparent from perusal of file, a representation has been made by detenu through his mother. The learned counsel has specifically stated in his petition that detenu has made a representation before Detaining Authority through his mother, but same has not been considered by respondents. 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 225 (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 **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.”

11. The next contentions raised by the detenu is that he was not provided the material on which the Detaining Authority has passed the order of detention.
12. Perusal of the record does not reflect that any such document regarding supply of all the relevant material relied upon by the Detaining Authority while passing the order of detention has been

provided to the detenu. In fact, there is nothing placed on record including execution report and receipt of grounds of detention, which would show that the detenu has received all the material to make an effective representation. Non-furnishing of the material has vitiated the order of detention.

13. From the above legal position on the subject, it is clear that non-consideration or an unreasonably belated consideration of the representation tantamount to non-compliance of Article 22(5) of the Constitution, which in turn renders the detention unsustainable in law.
14. For the foregoing reasons, without advertng to other grounds raised in this petition, this petition is allowed. Impugned order of detention bearing No.DIVCOM-“K”/114/2023 dated 27.07.2023, 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. Detention record be returned to learned counsel for the respondents.

SRINAGAR
27.12.2023
Manzoor

(SINDHU SHARMA)
JUDGE

Whether order is reportable: Yes/No