

IN HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

HCP NO. 20/2024

Reserved on : 24.10.2024

Pronounced on: 03.12.2024

Abinash Sharma

...Appellant(s)/Petitioner(s)

Through his Mother Neelam Sharma

S/O Shamboo Dutt R/O Shakti Nagar, Udhampur

Through: Mr. Ankit Vaid, Advocate

Vs.

01. Union Territory of JK through
Commissioner Secretary Home Civil
Secretariat Jammu, J&K

...Respondent(s)

02. Divisional Commissioner, Jammu

03. Director General of Police, Police Head
Quarter, Jammu.

04. Senior Superintendent of Police,
Udhampur

05. SHO, Police Station Udhampur.

06. Investigating Officer
Police Station, Udhampur.

Through: Mrs. Monika Kohli, Sr. AAG, with Ms Chetna Manhas, Advocate.

CORAM:

HON'BLE MR. JUSTICE MOHD YOUSUF WANI, JUDGE.

JUDGMENT

01. Impugned in the instant petition filed under the provisions of Article 226 of the Constitution of India is the order of detention bearing No. PITNDPS 63 of 2023 dated 21st November, 2023, passed by the respondent no. 2 i.e., Divisional Commissioner, Jammu, [hereinafter referred to as “the Detaining Authority”] in exercise of its powers vested under Section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Act, 1988 [hereinafter referred to as “the Act”], whereunder the petitioner/detenué was directed to be detained and lodged in District Jail Udhampur for a period to be specified by the Government.

- 02.** The order impugned has been assailed on the grounds, *inter alia*, that the petitioner is a citizen of India and, as such, within his rights to approach this Court for enforcement of his legal and fundamental rights; that the order impugned is illegal, unfair and suffers from patent perversity; that petitioner was falsely and frivolously implicated in three cases bearing FIR Nos’ 30/2021, 533/2022 and 431/2023 all under Section 8/21/22 NDPS Act and all registered with Police Station, Udhampur, during a period of two years which have been made the basis for his detention under the Act despite having already been enlarged on bail in all the said cases; that the police concerned on account of its hostile approach towards the petitioner/detenué and his family left nothing untried to harass him and his family; that on 17th November, 2023, the concerned Authorities of Police Station, Udhampur, mercilessly bet the petitioner and made him to sign and affix his finger and thumb impressions on various documents; that the unwarranted and illegal behavior of the police concerned with the petitioner forced him to leave the Union Territory, who, on 18th November, 2023, booked a rail ticket to AyodhyaJi (Uttar Pradesh) from Jammu Tawi and came back only on 3rd December, 2023; that apprehending threat to their life, the petitioner/detenué as well as his mother filed a writ petition before this Court bearing WP(Crl) No. 112/2023 on 4th December, 2023 seeking protection of their liberty which came to be disposed of by this Court on 6th December, 2023 with a direction to the respondents that they shall not summon the petitioners

without adopting due course of law; that on 7th December, 2023, the petitioner along with his mother was called by the respondent no. 5 purportedly for investigation, where they furnished to him a copy of Order dated 6th December, 2023, passed by this Court in WP(Crl) No. 112/2023, but the SHO concerned, instead in defiance of the Order of this Court, took the petitioner into custody without assigning any reason; that the family members of the petitioner under a bonafide belief again approached a criminal court at Udhampur to seek the bail in favour of the petitioner, but after few days it was learned by them that petitioner has been detained illegally by invoking the provisions of the Act; that the grandfather of the petitioner also died as a result of harassment caused by the police concerned to the petitioner and his family ; that it was on 12th December, 2023 when the mother of the petitioner visited District Jail, Udhampur to meet the petitioner, she was furnished with the copies of impugned detention order along with grounds of detention and dossier; that the petitioner made a representation against his preventive detention on baseless grounds which was not considered by the respondents; that the impugned detention order was passed by the respondents through respondent no. 2 only to nullify the force of the bail orders that had already been passed against the petitioner in three criminal cases; that the allegation of the respondents to the effect that petitioner/detenué is a habitual drug peddler is not substantiated by any evidence as no commercial quantity of any narcotic drug or psychotropic substance as alleged to has been seized from his possession; that the Detaining Authority has failed to satisfy itself as to how the normal criminal law is inadequate to deal with the petitioner/accused in respect of the alleged

accusation against him; that the impugned detention order appears to be the product of copy paste having been issued to nullify the effect of the order dated 6th December, 2023, which had already passed by this Court; that the impugned detention order dated 21st November, 2023, was not executed till 7th day of December, 2023 and the respondents have failed to explain as to why the same came to be executed after a delay of 16 days; that the copies of the detention record were neither furnished to the petitioner/detenu at the time of his arrest nor were contents of the same explained to him in the language understandable by him i.e., Hindi or Dogri; and that the procedural safeguards mandated under Article 22 (5) of the Constitution of India were observed in breach by the respondents.

03. The Detaining Authority has resisted the petition through its counter affidavit on the grounds that same deserves to be outrightly rejected for want of any cause of action as none of the legal or statutory rights of the petitioner has been violated by the respondents. That the petitioner has raised disputed questions of facts which cannot be adjudicated upon through the medium of a writ petition and the detention order was passed after a careful examination of the dossier and the material annexed to the same because the detention of the petitioner was felt imperative under the relevant provisions of the Act who after being proceeded under the NDPS Act for repeated and continuous offences got again involved in the illicit trafficking of narcotic drugs, thus, posing a serious threat to the public order as well as to the health and welfare of the people. That the ordinary law has failed to deter the petitioner as is evident from the conduct of the detenu transpiring from the dossier submitted by the SSP, Udhampur. That at the time of the

execution of the impugned detention order, the Executing Officer has provided the complete set of dossier along with detention order, grounds of detention who also explained the contents of the same to the detenu/petitioner in his own language i.e. Hindi and Dogri with further information to him to make a representation before the Government (Home Department) as well as before the detaining authority against the detention order, if he feels aggrieved. That the petitioner has admitted the registration of three case FIR(s) against him. That the aspect of the writ petitioner being on bail in the criminal cases has been specifically mentioned in the grounds of detention and, as such, there is no suppression of information and non-application of mind as alleged. That the repeated and continuous involvement of the petitioner/detenu in illicit trafficking led to the issuance of the detention order. That the detention order under challenge issued by the answering respondent No.2 stands backed by the judgment dated 16.08.2023 passed by this Court in LPA No. 55/2023 titled “Anil Sharma Vs. UT of J&K and Ors.” wherein this Court was pleased to uphold the detention order and the relevant portion of the said judgment is reproduced as under :-

“...In view of the foregoing discussion, it is clearly disclosed that it is not the number of acts that are to be determined for detention of an individual but it is impact of the act which is material and determinative. In the instant case the act of detenue relates to drug trafficking, which has posed serious threat, apart from health and welfare of the people, to youth, most particularly unemployed youth, to indulge in such acts, ramifications thereof would be irreversible and unimaginable. Appellant/writ petitioner has not been able to convincingly point out violation of any statutory or constitutional provisions...”

04. That the Hon'ble Apex Court has also issued guidelines for preventive detention in case titled "Naresh Kumar Goyal Vs. Union of India (2005) 8 SCC 276" and "Haradhan Saha Vs. State of W.B (1975) 3 SCC". The relevant portions of the authoritative judgments are reproduced hereunder respectively:-

"It is trite law that an order of detention is not a curative or reformatory or punitive action, but a preventive action, avowed object of which being to prevent the anti-social and subversive elements from imperilling the welfare of the country or the security of the nation or from disturbing the public tranquillity or from indulging in 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."

"32. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention, may be made before during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution."

33. Article 14 is inapplicable because preventive detention and prosecution are not synonymous. The purposes are different. The authorities are different. The nature of proceedings is different. In a prosecution an

accused is sought to be punished for a past act. I preventive detention, the past act is merely the material for inference about the future course of probable conduct on the part of the detenu.”

05. I have heard learned counsel for the parties.

06. Learned counsel for the petitioner/detenu in reiteration of the grounds taken in the writ petition submitted that the petitioner was detained in pursuance to the impugned order passed by the Detaining Authority without application of mind and recording its subjective satisfaction. He further contended that all the three FIRs’ registered with Police Station Udhampur were made basis for the preventive detention of the detenu regardless of the fact that he had been enlarged in all the said FIRs and there was no proximate or live link between the last alleged incident of 16th August, 2023, resulting into the registration of case FIR no. 431/2023 and the impugned order dated 21st November, 2023. The learned counsel further contended that more than three months had elapsed till the passing of the impugned detention order which was further executed with a delay of 16 days. He further contended that the respondents 3 to 5 got annoyed with the petitioner and his mother approaching this Court with a writ petition which led to the passing of the order dated 6th December, 2023. He contended that there was no justification under law for the Detaining Authority to invoke provisions of Section 3 of the Act for the detention of the petitioner as there was no record available with him that he had violated the terms and conditions of the bail order granted by the competent courts in the pending criminal cases against him and while doing so was repeatedly indulging in the drug peddling.

- 07.** Learned counsel for the petitioner submitted that the procedural safeguards laid down under Article 22 (5) of the Constitution, which are meant to be obeyed, have been observed in breach in the case of the petitioner because the respondents 4 to 5 had developed a personal animosity and hostility towards the petitioner. He submitted that the impugned order is unsustainable in law because the same suffers from non-application of mind and the subjective satisfaction of the Detaining Authority. The learned counsel, in support of his arguments placed reliance on Authoritative Judgments of Hon'ble Supreme Court as well this Court passed in cases titled ***Rajinder Arora vs. Union of India and Ors. reported in 2006 (4) SCC 796, Rashid Kapadia vs. Medha Gadgil and Ors. reported in (2012) 11 SC 745, Iqbal Jaffar Dar vs. UT of J&K and Ors.***
- 08.** *Per contra*, Mrs. Monika Kohli, learned Sr. AAG, submitted that the detention order impugned in the instant writ petition does not suffer from any illegality or incorrectness because the same came to be passed by the Detaining Authority after proper application of mind. She submitted that petitioner is a habitual drug peddler who is as a threat for the health and welfare of the people and the detention of the petitioner by invoking the provisions of the Act was imperative with the view to prevent him from acting in any manner prejudicial to the interests of the society by repeating the acts punishable under the NDPS Act. She further submitted that all the three FIRs came to be repeatedly registered against the petitioner in the years 2021, 2022 and 2023. The learned Sr. AAG, further contended that the Detaining Authority has complied with all the procedural requirements mandated under Article 22 (5) of the Constitution of India as well as under

the provisions of the Act by furnishing him the copies of the detention order at the time of his apprehension in execution of the detention order and by explaining to him the contents of the said documents in his own language with further information that he is at liberty to make a representation to the Government or the Detaining Authority which he did as himself admitted by him in the petition. She in support of her arguments placed reliance on the Judgments of this Court passed in LPA No. 107/2024 arising out of HCP No. 2/2024 titled *Gourav Khajuria vs UT of JK and Ors*, LPA No. 77/2024 arising out of HCP No. 51/2023, WP(Crl) No. 269/2021, WP(Crl) No. 271/2021 case titled *Rouf Ahmad Mir vs. UT of JK and Ors*, HCP No. 52/2024 titled *Rashid Ali Th. Rahim Ali vs. UT of J&K and Ors*.

09. I have perused the record of the instant petition including the counter affidavit filed by the Detaining Authority. The detention record furnished by the learned Sr. AAG, was also gone through. Keeping in view the aforementioned perusal and the consideration of the rival arguments advanced by both the sides in the light of law on the subject, this Court is of the opinion that the impugned order suffers from illegality and perversity and as such cannot sustain.

10. The impugned detention order has been mainly based on the registration of three case FIRs against the petitioner for the commission of offences alleged to have been committed by him under the NDPS Act as is apparent from the grounds of detention forming an integral part of the impugned order. The said FIRs bearing Nos. 30/2021, 533/2022 and 431/2023 have all been registered against the petitioner in Police Station Udampur alleging the commission of offences punishable under Sections 8/21/22 NDPS Act. It is

the case of the petitioner that he was granted bail by the competent courts in all the three FIRs which are pending trial. The respondents have not disputed this fact in the counter affidavit. The last incident of commission of offences under the NDPS Act, which led to the registration of case FIR No. 431/2023 with Police Station Udhampur is reported to have taken place on 16th August, 2023. A period of more than three months has elapsed between the date of said incident and the passing of the impugned detention order dated 21st November, 2023. With the delay of about 95 days occurring in passing the impugned order from the last incident of 16th August, 2023, the proximate and live link between the two appears to be missing. Secondly after the passing of the impugned detention order, the same came to be executed on 7th December, 2023 after a delay of 16 days.

11. It is settled legal position that there should be proximity of time between the alleged incident and the object of passing of the detention order, to sustain the later.

12. This Court in its opinion is fortified with the authoritative judgments of Hon'ble Apex Court cited as "P.U. Iqbal Vs. Union of India & Ors." reported as (1992) 1 SCC 434, the operative paras of which decision are reproduced hereunder for ready reference:-

"14. Now, there can be no doubt-and the law on this point must be regarded as well settled by these two decisions-that if there is unreasonable delay between the date of the order of detention and the date of arrest of the detenue, such delay, unless satisfactorily explained, would throw considerable doubt on the genuineness of the subjective satisfaction of the District Magistrate and it would be a legitimate inference to draw that the District Magistrate was not really and genuinely

satisfied as regards the necessity for detaining the petitioner.

15. Chinnappa Reddy, J. speaking for the Bench in Bhawarlal Ganeshmalji v. State of Tamil Nadu has explained as follow:

It is further true that there must be a 'live and proximate link' between the grounds of detention alleged by the detaining authority and the avowed purpose of detention namely the prevention of smuggling activities. We may in appropriate cases assume that the link is 'snapped' if there is a long and unexplained delay between the date of the order of detention and the arrest of the detenu. In such a case, we may strike down an order of detention unless the grounds indicate a fresh application of the mind of the detaining authority to the new situation and the changed circumstances. But where the delay is not only adequately explained but is found to be the result of the recalcitrant or refractory conduct of the detenu in evading arrest, there is warrant to consider the 'link' not snapped but strengthened.

It is manifestly clear from a conspectus of the above decisions of this Court, that the law promulgated on this aspect is that if there is unreasonable delay between the date of the order of detention and the date of arrest of the detenue, such delay unless satisfactorily explained throws a considerable doubt on the genuineness of the requisite subjective satisfaction of the detaining authority in passing the detention order and consequently render the detention order bad and invalid because the 'live and proximate link' between the grounds of the detention and the purpose of detention is snapped in arresting the detenue. A question whether the delay is unreasonable and stands unexplained depends on the facts and circumstances of each case.”

13. In the opinion of this Court, there appears to be no proximity or the live link between the past conduct of the detenu and the need for passing of the detention order. The same leads to an inference of non-application of mind on the part of the detaining authority. The Detaining Authority has explained

the delay caused in passing of the impugned order as well in executing the same.

14. This Court feels supplemented in its opinion with the authoritative judgment of the Hon^{ble} Supreme Court of India reported in “Rajinder Arora Vs. Union of India and others” AIR 2006 (4) SCC 796, decided on 10.03.2006.

The relevant paras of the judgment are reproduced as hereunder:-

“The conspectus of the above decisions can be summarized thus: The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the livelink between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinize whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the causal connection has been broken in the circumstances of each case.

Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for

detaining the detenu with a view to preventing him from acting in a prejudicial manner.”

15. This Court in its opinion is also fortified with the authoritative judgment of the Hon^{ble} Apex Court passed in case titled “Rameshwar Shaw Vs. District Magistrate, Burdwan and another”, AIR 1964 SC, 334, the relevant portion whereof is reproduced as hereunder:

“In deciding the question as to whether it is necessary to detain a person, the authority has to be satisfied that the said person if not detained may act in a prejudicial manner and this conclusion can be reasonably reached by the authority generally in light of evidence about past prejudicial activities of the said person. When evidence is placed, the Detaining Authority has to examine the said evidence and decide whether it is necessary to detain the said person in order to prevent him from acting in a prejudicial manner. Thus, it was held that the past conduct or antecedent history of a person can be taken into account in making the detention order and it is largely from prior events showing tendencies or inclinations of a man that an inference could be drawn whether he is likely even in the future to act in a manner prejudicial to the maintenance of public order. Further the past conduct or history of the person on which the authority purports to act should ordinarily be proximate in point of time and should have the rational connection with the conclusion that the detention of the person is necessary, that it would be irrational to take into account the conduct of a person which took the place years before the date of detention”.

16. In the attending facts and circumstances of the case, this Court has reason to believe that the procedural safeguards mandated under Article 22 (5) of the Constitution of India have been observed in breach.

This Court in its opinion is also fortified with the authoritative judgment of the Hon'ble Apex Court cited as *Shalini Soni Vs. Union of India* (1980) 4 SCC 544: 1981 SCC (Ori) 38, the relevant portion of which is reproduced as under:-

The Article 22 (5) has two facets : (1) communication of the grounds on which the order of detention has been made; (2) opportunity of making a representation against the order of detention. Communication of the grounds pre-supposes the formulation of the grounds and formulation of the grounds requires and ensures the application of the mind of the detaining authority to the facts and materials before it, that is to say to pertinent and proximate matters in regard to each individual case and excludes the elements of arbitrariness and automatism (if one may be permitted to use the word to describe a mechanical reaction without a conscious application of the mind). It is an unwritten rule of the law, constitutional and administrative, that whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only eschewing the irrelevant and the remote. Where there is further an express statutory obligation to communicate not merely the decision but the grounds on which the decision is founded. It is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went in to make up the mind of the statutory functionary and not merely the inferential conclusions. Now, the decision to detain a person depends on the subjective satisfaction of the detaining authority. The Constitution and the statute cast a duty on the detaining authority to communicate the grounds of detention to the detenu. From what we have said above, it follows that the grounds communicated to the detenu must reveal the whole of the factual material considered by the detaining authority and not merely the inferences of fact arrived at by the detaining authority. The matter may

also be looked at from the point of view of the second facet of Article 22(5). An opportunity to make a representation against the order of detention necessarily implies that the detenu is informed of all that has been taken into account against him in arriving at the decision to detain him. It means that the detenu is to be informed not merely, as we said, of the inferences of fact but of all the factual material which have led to the inferences of fact. If the detenu is not to be so informed the opportunity so solemnly guaranteed by the Constitution becomes reduced to an exercise in futility. Whatever angle from which the question is looked at, it is dear that "grounds" in Article 22(5) do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences. The 'grounds' must be self-sufficient and self-explanatory. In our view copies of documents to which reference is made in the 'grounds' must be supplied to the detenu as part of the 'grounds'."

17. Neither the Detaining Authority in its grounds of detention nor the Sponsoring Agency in its dossier has assigned any reason as to how the normal criminal law had failed to tackle with the petitioner/detentue. The petitioner has been granted bail in all the three case FIRs and the criminal cases are repeated to be presently pending trial before the competent courts. It is not the case of the respondents that they filed petitions for cancellation of bail which were not allowed , the terms and conditions of the bail orders. On this count also, the impugned order seems to be unjustified under law.
18. The preventive detentions need to be passed with great care and caution keeping in mind that a citizen's most valuable and inherent human right is being curtailed. The arrests in general and the preventive detentions in particular are an exception to the most cherished fundamental right guaranteed under Article 21 of the Constitution of India. The preventive

detentions are made on the basis of subjective satisfaction of the detaining authority in relation to an apprehended conduct of the detenu by considering his past activities without being backed by an immediate complaint as in the case of the registration of the FIR and, as such, is a valuable trust in the hands of the trustees. The provisions of Clauses (1) and (2) of Article 22 of our Constitution are not applicable in the case of preventive detentions. So, the provisions of Clause (5) of the Article 22 of our Constitution, with just exception as mentioned in Clause (6), requiring for application of mind, subjective satisfaction, inevitability of the detention order, proper and prompt communication of the grounds of detention and the information of liberty to make a representation against the detention order, are the imperative and detention order.

19.For the foregoing discussion, the instant petition is allowed and the impugned detention order bearing No. PITNDPS 63 of 2023 dated 21st November, 2023 passed by respondent no.2 (Divisional Commissioner), Jammu, is quashed with the direction to the respondents to release the petitioner/detenu forthwith from his preventive custody in the instant case. The detention record is directed to be returned to the office of the learned Sr. AAG, against acknowledgment.

20. Disposed of.

(Mohd. Yousuf Wani)
Judge

SRINAGAR:
03.12.2024
“*Shamim Dar*”

Whether the Judgment is reportable? No
Whether the Judgment is Speaking No