

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

HCP No. 61/2024

1. Poonam

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

Aged 35 years W/O Satvir R/O
Rajiv Nagar Narwal, Jammu
Th. Her Husband Satvir Aged 49
years S/O Niku Ram R/O Rajiv
Nagar Narwal, Jammu

Through: Mr. Tanveer Ahmed Khan, Advocate.

vs

1. Union Territory of Jammu and

..... Respondent(s)

Kashmir Th. Principal/Commissioner
Secretary Govt. of J&K Home
Department, Civil Secretariat, Jammu.

2. The Divisional Commissioner, Jammu

**3. The Superintendent District Jail,
Kathua.**

Through: Ms. Monika Kohli, Sr. AAG.

Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

ORDER
26.12.2024

ORAL

1. In the instant petition filed under Article 226 of the Constitution, the petitioner herein has challenged order No. PITNDPS 17 of 2024 dated 12.02.2024 (for short 'the Impugned Order') passed by the respondent 2 (for short 'the Detaining Authority') whereby the petitioner has been detained under and in terms of the provisions of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (for short the Act of 1988).
2. The petitioner has challenged the impugned order on the following grounds:

- a) *That the detention of the petitioner is illegal and arbitrary. The same appears to be based on the ideas. The Hon'ble Court may kindly appreciate that the respondents have exhibited complete non application of mind while detaining the petitioner as he was not provided with the copies of FIRs, seizure memos, copies of statements and other documents which were relied upon by the detaining authority while detaining the petitioner. The detention of the petitioner in such a mechanical manner is foreign to the spirit of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988, constitutional mandate and the law laid down by the Hon'ble Apex Court in its various authoritative pronouncements. The non-supply of the detention order and the requisite material on which the detention order has been passed has vitiated the petitioner's detention and further it has infringed the petitioner's right to make an effective representation to the competent authority against his illegal detention.*
- b) *That the petitioner herein in all the cases has already been admitted on bail by the court of law. The petitioner is neither involved in any case whatsoever nor has any connection with commission of offence, but has been falsely implicated in the FIRs on the basis of which the petitioner has been put under detention by the respondent no. 2. Hence the order impugned is bad in the eyes of law and liable to be quashed.*
- c) *That the petitioner was not informed about the grounds of detention and nothing was explained to her as to why she has been detained under Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988. It is humbly submitted that the said detention order is merely an outcome of non- application of mind of detaining authority, as the petitioner has been detained from her house, thereby curtailing the liberty of the petitioner. Hence the order impugned is bad in the eyes of law and liable to be quashed.*
- d) *That the petitioner has been detained in an illegal manner thereby violating her right to life enshrined under Article 21 of the Constitution. The petitioner has not been informed about the grounds of detention and no detention order was given to her at the time of her arrest. It was only when the petitioner approached the authority of Jail she was given the said detention order which is in English Language and the petitioner who is not well conversant with the English language. Besides this the petitioner has also not been provided with the grounds of detention, nor the copies of any FIRs. This act, on the part of the*

respondents, vitiates the entire proceedings against the petitioner hence the order is liable to be quashed.

- e) That it is settled law that the detaining authority is under an obligation to inform the detenue that she may approach Home Department, J&K Government, Jammu, if she would like to be heard in person by Advisory Board and make a representation to the Government against order of detention. It is further submitted that the detaining authority has to inform that she has a right to make a representation to the Government as well as detaining authority in terms of Subsection (4) of Section 8 of the Act has also power to revoke detention order. This power is clearly relatable to Section 21 of the General Clauses Act, Samvat, 1977, which has been saved by virtue of Section 19 of the Act of 1978. Till the Government's approval to detention order is granted, since detaining authority had power to revoke detention order, a representation could have been made to detaining authority for revoking detention order. It was incumbent upon detaining authority to have informed detenue that he could also make a representation to detaining authority, if she so desired. Since detaining authority did not communicate to detenue that such a representation could be made to detaining authority, this per-se amounted to infraction of provisions of Section 13 of the Act of 1978 read with Article 22(5) of the Constitution of India.*
- f) That if the detenue is released on bail and was out of jail when the order of her detention was passed, then such order of bail must be placed before the Detaining Authority to enable it to arrive at proper subjective satisfaction. The satisfaction is to be derived by the Detaining Authority for placing an individual under preventive detention is subjective and the sufficiency of material considered by it cannot be made subject matter of judicial review. However, if the relevant material is not placed before the Detaining Authority, the subjective satisfaction derived by the Detaining Authority would be vitiated, in that, nobody can guess as to whether in the presence of availability of all requisite material the Detaining Authority may not have passed the detention order. With a view to enable the Detaining Authority to arrive at its subjective satisfaction, it is necessary for the authorities demanding the detention to produce all relevant material before the Detaining Authority. On this ground alone, the order impugned of detention is vitiated and cannot sustain in law and liable to be dismissed against the petitioner by setting the petitioner at liberty.*

- g) *That the impugned detention order suffers from non-application of mind as the period for which the petitioner has been detained under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988 has not been mentioned by the detaining authority. On this ground also the detention order is required to be quashed.*
- h) *That the detention is based upon irrelevant and non-existent ground and also the detention is based upon ulterior motives and the same is therefore required to be quashed.*
- i) *That the petitioner has a right to life under Article 21 of the Constitution of India and this right includes life with dignity and there are only allegations against the petitioner and there was no scope for booking him under Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988 and as such the detention order be recalled by accepting the instant representation. Further it is a settled proposition of law that every accused is innocent unless proved guilty and merely by registration of FIR, it cannot be said that he has committed any offence, which is against the basic cannon of criminal jurisprudence. Hence the order impugned is liable to be quashed.*

3. **Counter affidavit** to the petition has been filed by the respondents, wherein the petition is being opposed by the respondents, contents whereof are extracted and reproduced hereunder:-

- A. *That it is submitted that none of the constitutional, legal or statutory rights of petitioner has been infringed or violated by the answering respondent which is sine qua non for invoking the writ jurisdiction of the Hon'ble Court. More so, no cause of action has accrued to the petitioner to file the present writ petition and on this analogy also, the writ petition deserves to be dismissed.*
- B. *That the writ petition is grossly misconceived and without any legal foundation as such, merits outright dismissal particularly when no constitutional, legal or statutory right of the petitioner is infringed by any action of the respondent/deponent.*
- C. *That the petitioner has raised disputed question of facts which cannot be adjudicated upon through the medium of this writ petition as such, the writ petition merits outright dismissal.*

At the outset, it is humbly submitted that the averments made in the petition unless specifically admitted may be treated as having been denied.

Parawise Reply:

- 1) That the contents of Para No. (1), it is submitted that the issuance of the impugned order is the matter of record and anything contrary to the records is vehemently denied. However, it is submitted that the impugned order is legal and in consonance with law. The order does not suffer from any legal infirmity, so as to warrant the interference of this Hon'ble Court in terms of its extraordinary jurisdiction under Article 226 of the Constitution of India.*
- 2) That the contents of Para No. (2) are false hence denied it is submitted that the petitioner/detenué has been detained under J& PITNDPS Act, 1988 it is submitted that dossier in respect of petitioner/detenué No. CRB/Dossier/2024/26/DPOJ dated 07.02.2024 was submitted to the answering respondent and after carefully examining the dossier and the relevant records attached with it, it was found imperative to detain the detenué under the relevant provisions of PITNDPS Act as after being tried under NDPS Act for repeated and continuous offence.*
- 3) That the contents of Para No. (3) are factual matrix of the case and sub para (a) to (f) are false hence denied. It is submitted that the petitioner/detenué after getting bail was again involved in the illicit trafficking of narcotic drugs and was posing serious threat to public order as well as to the health and welfare of the people. The ordinary law has failed to deter as is evident from the conduct of the detenué transpiring from the dossier submitted by the SSP Jammu. It is further submitted that at the time of execution of detention order, the Executing Officer has provided the relevant documents along with detention order, grounds of detention (Total 116 leaves) and explained the detenué/ petitioner in the language i.e. English/Hindi/Urdu and Dogri which he understands and accordingly informed the petitioner /detenué about his rights to make representation before the Government (Home Department) as well as before the detaining authority against the detention order and anything contrary to record is vehemently denied. Copy of the execution report is enclosed and marked as Annexure-l. 4.*
- 4) That the Para No. 04 is the grounds for challenge of detention order:*

- i. *That the contents of Para (a) to (f) are false hence denied. It is submitted that the executing officer has informed the petitioner about his rights to make representation before the Detaining Authority or Government (Home Department). The detention order issued by the answering respondent No. 2 was confirmed by the Home Department vide Order No. Home/PB-V/651 of 2024 dated 04.04.2024 after seeking the opinion of the Advisory Board dated 18.03.2024 Copy of the confirmation order is enclosed and marked as Annexure-II.*
- ii. *That the contents of Para (g) to (i) are false hence denied. It is submitted that the allegations regarding informing the family members and providing of documents are vague as family members of the detenue/petitioner were well informed by the Executing Officer who has submitted the execution on affidavit. It is further submitted that the aspect of detenue on bail has specifically been mentioned in grounds of detention. The repeated and continuous involvement of the petitioner/detenue in illicit traffic has led to issuance of detention order. Moreover, the detention order issued by the answering respondent is supported by the judgment dated 16.08.2023 Divisional Commissioner passed by the Hon'ble High Court of Jammu & Kashmir in LPA No. 55/2023 titled Anil Sharma V/s UT of J&K & Ors wherein Hon'ble High Court was pleased to uphold the detention order issued by the detaining authority which 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..."

The Hon'ble Supreme Court has also issued the guidelines for preventive detention in case titled *Naresh Kumar Goyal Vs Union of India* (2005) 8 SCC 276] which is reproduced as under:

"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."

The issue of preventive detention has already been settled by the Hon'ble Apex Court of India in case titled *Haradhan Saha v/s. State of W. B.* (1975) 3 SCC

"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 or 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. In preventive detention, the past act is merely the material for inference about the future course of probable conduct on the part of the detenu."

5) That the contents of Para No. 5 are legal and also in the knowledge of the petitioner. The petitioner will prove it.

Heard learned counsel for the parties and perused the record.

4. Notwithstanding the multiple grounds of challenge urged by the petitioner herein in the instant petition, the counsel for the petitioner, however, would confine the challenge to the impugned order, to the ground that the petitioner herein submitted a representation before the respondent 1 herein against the impugned order on, 15.03.2024, which representation was sent to the respondent 1 by post, however, the said representation was never considered either by the Government or by the Detaining Authority, thus rendering the impugned order legally unsustainable.

Learned counsel for the petitioner would further contend that even the documents referred to and relied upon by the Detaining Authority in the impugned order were not served upon the petitioner, which rendered the petitioner incapable to make an effective representation against her detention, thus vitiating the impugned order.

It is lastly contended by the counsel for the petitioner that the detention order was executed against the petitioner in violation of provisions of Section 4 of the Act of 1988 read with Section 46 Cr. P.C., thus vitiating the impugned order.

5. On the contrary, the counsel for the respondents would oppose the submissions of counsel for the petitioner and would insist that the petitioner herein came to be detained under the Act of 1988 owing to her drug related activities after complying with and fulfilling all the statutory formalities and constitutional guarantees.
6. Insofar as the aforesaid first plea of the challenge urged by the counsel for the petitioner is concerned, the petitioner at ground (e) has specifically stated that a representation against the impugned order came to be submitted before the respondent 1/Government on 15.03.2024 through post, on which representation no action has been taken by the respondents.

Perusal of the counter affidavit filed by the respondents to the petition reveals that the said specific plea of the petitioner qua submission of representation has not been replied at all by the respondents, thus, under these circumstances, an adverse inference, in law, is drawn against the respondents herein, more so in view of the fact that upon examination of the detention record produced by the counsel for the respondents, the same would reveal that it contains a copy of the said representation of the petitioner submitted through her husband against her detention order addressed to the respondent 1. Not only that, a communication contained in the detention record also lend support to the plea of the counsel for the petitioner qua submission of representation, which communication has been addressed by the Deputy Secretary to Govt., Home Department, Govt. of J&K to Special DG of Police, CID, J&K bearing No. Home/PB-B-72/2024 (7409361) dated 30.04.2023, wherein it has been provided that a copy

of the representation of the petitioner herein has been forwarded for furnishing of report in the matter.

Under these circumstances, it cannot, but be said, that the respondents herein despite having received the representation of the petitioner against her detention have failed to address to the same, therefore, manifestly suggesting breach and violation of the Article 22(5) of the Constitution, rendering the impugned order legally unsustainable.

Under Article 22(5) of the Constitution, a constitutional protection is given to every detainee mandating the grant of liberty to the detainee to make representation against his detention as imperated under Article 22(5) of the Constitution, also, imperating the authority to whom the representation is addressed to deal with the same with utmost expedition and to consider it in right perspective keeping in view the fact that the detention of the detainee is based on the subjective satisfaction of the authority concerned and infringement of the constitutional right conferred under Article 22(5) would invalidate the detention order.

The aforesaid view has been expressed by the Apex Court in case titled as **Union of India and another vs. Chaya Ghoshal (Smt.) and another** reported in **2005 (10) SCC 97**.

7. The Apex Court in case titled as **Kamlesh Kumar Ishwar Das Patel vs. Union of India and others** reported in **1995(4) SCC 51** has in regard to right of the representation held that the fundamental rights available to the detainee must be strictly enforced irrespective of the nature of his activities, while holding further that preventive detention is a serious invasion of the personal liberty and such meagre

safeguards are the safeguards as the Constitution has provided against the improper exercise of power must be jealously watched and enforced through by the courts.

Having regard to the aforesaid position obtaining in the matter, the impugned order is not legally sustainable.

8. Having held above that the impugned order, for non consideration of the representation of the petitioner, is not legally sustainable, rest of the grounds urged by the counsel for the petitioner against the impugned order pale into insignificance and need not to be adverted to.
9. Resultantly, the instant petition succeeds, as a consequence whereof, the impugned order bearing No. PITNDPS 17 of 2024 dated 12.02.2024 passed by the respondent 2 is quashed, with a direction to the respondents including the concerned jail authority to release the petitioner from preventive detention forthwith, unless is required in any other case.
10. Detention record produced by the counsel for the respondents is returned back in the open court.
- 11. Disposed of.**

(JAVED IQBAL WANI)
JUDGE

Jammu
26.12.2024
Sahil Padha

Whether the order is speaking:	Yes/No.
Whether the order is reportable:	Yes/No.