

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

Pronounced on: 26.11.2024

Case No. :- HCP No. 87/2023

Suresh Kumar, Aged 50 years,
S/o Sh. Mangal Singh,
R/o W.No. 8, R.S.Pura, Jammu.
Presently lodged in District Jail
Kathua through Smt. Sonia Chib,
Aged 45 years W/o Sh. Suresh
Kumar, W.No. 8, R.S.Pura, Jammu.

..... Petitioner(s)

Through: Mr. Nitin Parihar, Advocate with
Mr. Siddharth Jamwal, Advocate.

Vs

1. Union Territory of Jammu and
Kashmir through Financial
Commissioner, Home
Department, Civil Secretariat,
Jammu/Srinagar.
2. Divisional Commissioner,
Jammu.
3. Superintendent District Jail,
Kathua.

..... Respondent(s)

Through: Mr. Amit Gupta, AAG with
Ms. Chetna Manhas, Advocate.

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

JUDGMENT

1. Impugned in the instant petition, filed under the provisions of Article 226 of the Constitution of India, by the petitioner is the order of Detention bearing No. PITNDPS 60 of 2023 dated 15.11.2023 passed by the respondent No.2 i.e. Divisional Commissioner, Jammu (hereinafter referred to as the “detaining authority”, for short), in exercise of his

powers vested under him in terms of the provisions of Section (3) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (hereinafter referred to as the PITNDPS Act, for short) read with SRO 247 dated 27.07.1988, whereby the petitioner was directed to be detained with a view to prevent him from engaging in Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act and lodged in Central Jail, Kathua.

2. The petitioner has assailed the order impugned on the grounds *inter alia* that he is a citizen of India and a domicile of UT, as such, fully entitled to seek the vindication of his fundamental rights guaranteed to him under the Constitution; that he is innocent and a respectable citizen of the Society, who was running a fast food restaurant under the name and style of M/s Chib Fast Food at W.No. 7, R.S.Pura, Jammu; that he is the only bread earner of his family consisting of two children i.e. son and daughter respectively of the age 21 years and 16 years; that his family was not aware about his arrest and knew about his detention in the District Jail, Kathua; that neither he nor his family members were provided with the copies of the detention record and it was with a great difficulty that his wife could be able to lay hands on the copies of the impugned order and the grounds of detention; that the detaining authority without application of its independent mind and while acting solely on the material supplied to him by the SSP, Jammu passed the impugned order and detained him in District Jail, Kathua; that the impugned detention has been passed on

three case FIR(s) registered against him bearing Nos. **97/2022** of Police Station, Miran Sahib, **92/2023** of Police Station, Miran Sahib and **109/2023** of Police Station, R.S.Pura, however, he was already admitted to bail by the competent court in FIR No. 92/2023 and in the said case FIR he was forcefully made to make confession by the police concerned before the competent court and sentenced to fine of Rs.3000/- and imprisonment till rising of the court; that the fact of case FIR No. 92/2023 of Police Station, Miran Sahib having been already disposed off on 17.10.2023 was not brought to the notice of the detaining authority by the police concerned in its dossier; the petitioner had been falsely and frivolously implicated in the third case FIR No. 109/2023 registered with Police Station, R.S.Pura in which he was already admitted to bail as alleged contraband in the said case was seized from his alleged associate; that he was implicated in the aforementioned criminal cases by the SHO Police Station concerned on account of his personal enmity and hostility with him as he used to give him threats that he shall teach him a lesson by getting him detained under the PSA; that the registration of the three case FIR(s) on false and frivolous grounds against him could not have been made the basis for invoking the preventive detention against him; that his wife had already filed a representation dated 27.11.2023 before the detaining authority as well as before the government in respect of his illegal detention but same was not considered; that the impugned detention order is totally illegal, arbitrary and contrary to the provisions of

law and Constitution; that the impugned detention order cannot sustain as the detaining authority has totally observed in breach the procedural safeguards available to him (petitioner) as per the mandatory provisions of Article 22 (5) of the Constitution; that the grounds of detention were not also explained to him in the language understandable by him; that the detaining authority has not complied with the provisions of Section 3 of the PIT NDPS Act by failing to submit the impugned detention order to the government within the stipulated period for approval; that his detention on unjustified grounds has violated his most cherished human right of liberty guaranteed under Article 21 of the Constitution; that his case has never been referred to the Advisory Board for opinion as envisaged under the PITNDPS Act; that his detention has been ordered in violation of the law laid down by the Hon'ble Supreme Court of India in **State of Maharashtra and others Vs. Bhaurao Punjabrao Gawande (2008) 3 SCC 613** and that he has no other efficacious remedy than to file the instant petition.

3. The respondents through the reply affidavit filed by the detaining authority have resisted the petition in hand on the grounds that the petitioner has no cause of action to prefer the instant petition as none of his Constitutional, legal or statutory rights stand infringed or violated by them. That petitioner has raised disputed questions of facts which cannot be adjudicated upon through the medium of a writ petition. That the petitioner has already availed an alternative remedy by filing the

representation before the detaining authority which forwarded the same to the government for consideration. That the preventive detention of the petitioner was found imperative by the detaining authority upon his application of mind to the material i.e. dossier and other documents submitted by the Superintendent of Police concerned. That the petitioner after getting the bail in one case used to repeat the crime and, as such, his detention was necessary to prevent him from indulging in activities in relation to the narcotic drugs and psychotropic substances. That the copies of the detention record were furnished in entirety to the petitioner who was also informed of his right to make a representation which he did and came to be considered. That the petitioner has admitted in the petition that he was sentenced to pay a fine of Rs.3000/- and imprisonment till rising of the court upon his conviction in one of the case FIR against him. That the detention of the petitioner was ordered also keeping in view the law laid down by this Court in LPA No. 55/2023 titled “Anil Sharma Vs. UT of J&K & Ors.”, decided on 16.08.2023 and also by the Hon’ble Supreme Court in case titled “Naresh Kumar Goyal Vs. Union of India”, [(2005) 8 SCC 276] and in “Haradhan Saha Vs. State of W.B”, (1975) 3 SCC, in which cases it has been held that it is not the number of acts that are to be determined for detention of an individual but it is impact of an act which is material and determinative. It is a trite law that the order of detention is not curative or reformatory or punitive action but a prevention action, avowed object of which is being to prevent the anti-social and subversive

elements from imperiling the welfare of the Country or the Society. That the power of a 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.

4. I have heard learned counsel for the parties.
5. The learned counsel for the petitioner while reiterating his stand taken in his grounds of petition submitted that the impugned detention order suffers from non-application of mind because the allegations against the petitioner regarding his involvement in case FIR numbers in which he was already on bail with the disposal of one of the cases was not sufficient to invoke the stringent provisions of the PITNDPS Act to illegally justify his preventive detention. He further argued that the copies of the detention record were not furnished to him in full and in time thereby preventing him from making a representation at an earliest. That the representation which was made on behalf of the petitioner was not considered.
6. Per contra, the learned State counsel very vehemently argued that the impugned detention order does not suffer from any illegality or non-application of mind as alleged because his preventive detention was found imperative on account of his continued and repeated criminal acts in relation to Narcotic Drugs and Psychotropic Substances Act. He contended that the petitioner was convicted in one of the case FIR(s) as fairly admitted by him in his petition. That the copies of the detention

record were furnished to him in entirety at the time of the execution of the detention warrant and the contents of the same were also read over to him in his own language. The learned State counsel in support of his arguments placed reliance on the authoritative judgments cited as **“Naresh Kumar Goyal Vs. Union of India”**, [(2005) 8 SCC 276] and **“Haradhan Saha Vs. State of W.B”**, (1975) 3 SCC and the Division Bench Judgment of this Court titled **“Anil Sharma Vs. UT of J&K & Ors.”** decided on 16.08.2023.

Learned State counsel contended that the Division Bench of this Court in LPA No. 55/2023 titled **“Anil Sharma Vs. UT of J&K and Ors.”** 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 detainee 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...”

He further contended 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 imperiling the welfare of the country or the security of the nation or from disturbing the public tranquility 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. 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.”

7. I have perused the record of the instant file especially the petition and the reply affidavit.
8. The detention record has also been perused.
9. Keeping in view the aforementioned perusal and consideration of the rival arguments advanced on both the sides, this Court in the light of the law on

the subject is of the opinion that there was no legal justification for the detaining authority to pass the impugned detention order in respect of the petitioner. The, “application of mind” of the detaining authority and the “inevitability of the detention” which are *sine qua non* for passing of a detention order appear to have been compromised in the instant case. Besides the communication of the order of detention to the petitioner so as to enable him to make an effective representation to the concerned authorities at an earliest also does not seem to have been made effectively in the case. Section (3) of the PITNDPS Act which confers the power on the competent authority to make orders for detaining certain persons is reproduced as hereunder for ready reference:-

“3. Powers to make orders detaining certain persons. —

(1) The Central Government or a State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of Secretary to that Government, specifically empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner) that, with a view to preventing him from engaging in illicit traffic in narcotic drugs and psychotropic substances, it is necessary so to do, make an order directing that such person be detained.

(2) When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order.

(3) For the purpose of clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in

writing, not later than fifteen days, from the date of detention.”

10. The Hon’ble Supreme Court in case of **“Rekha Vs. State of Tamil Nadu through Secretary to Government and another”**, reported in (2011) 5 SCC 244 has laid emphasis on the fundamental right to life and personal liberty of a citizen of India guaranteed under Article 21 of our Constitution and has, accordingly, stressed for taking great care and caution while passing any preventive detention orders so that same are passed in case of genuine and inevitable need only without any misuse or abuse of the powers.
11. The detaining authority has passed the impugned detention order on the basis of three case FIR numbers as hereinbefore mentioned in which one had been disposed of, though with his conviction when in other cases he was on bail. Since the petitioner/detenu had already been dealt with, under the normal criminal law, as such, there was no justification for his preventive detention by invoking the stringent provisions of the PITNDPS. The detaining authority has not mentioned in the grounds of detention, that the normal criminal law has proved inadequate to tackle with the petitioner.
12. The petitioner has pleaded that copies of the detention record were not furnished either to him or to his home people immediately upon his arrest in execution of the impugned detention order and his wife could after a great efforts lay her hands on the same. Such an approach and lapse on the part of the detaining authority violates the constitutional safeguards

guaranteed under Article 22 (5) of the Constitution. It is also believed that the detaining authority has failed to ensure that contents of the detention order and the grounds of detention are read over and made understandable by the petitioner in his own language with further information to him that he is at liberty to make a representation to the detaining authority or the government in respect of his detention.

13. The representation made by the petitioner was also not duly considered by the government. However, the contentions of the petitioner that the impugned detention order was not approved by the government and was not sent to the Advisory Board for opinion are unsustainable in the light of the perusal of the record.
14. In the opinion of the court, the impugned detention order suffers from non-application of mind and besides the mandatory procedural requirements as guaranteed under Article 22 (5) of the Constitution and the provisions of the PITNDPS Act appear to have been observed in breach. It is needful to mention that after reserving the matter, myself was assigned roster at the Srinagar Wing of this Court owing to which fact the passing of appropriate orders in the case was delayed.
15. In view of the date of passing of the detention order, it is believed that petitioner may have already been released from his preventive detention in the case.
16. For the foregoing discussion, the petition is allowed and the impugned detention order bearing No. PITNDPS 60 of 2023 dated 15.11.2023

passed by the respondent No.2 i.e. Divisional Commissioner, Jammu is quashed with the direction to the respondents to release the petitioner from preventive detention in the case forthwith, if not already released.

17. The detention record is directed to be returned back to the office of the learned Additional Advocate General concerned against proper acknowledgment.

18. Disposed off.

(Mohd. Yousuf Wani)
Judge

JAMMU :
26.11.2024
Pawan Chopra

