

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

...

HCP no.11/2024

Reserved on: 19.12.2024

Pronounced on: 31.12.2024

Baidar Ahmad Mir

.....Petitioner(s)

Through: Mr. I. Sofi, Advocate
V/s

UT of J&K and others

.....Respondent(s)

Through: Mr. Syed Musaib, Dy.AG

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. Order No. DIVCOM-“K”/205/2023 dated 27.12.2023, passed by Divisional Commissioner, Kashmir (for short “detaining authority”), whereby detenu, namely, *Baidar Ahmad Mir S/o Ghulam Rasool Mir R/o Jaggerpora District Kupwara*, has been detained to prevent him from committing any of the acts within the meaning of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, is sought to be quashed and the detenu set at liberty on the grounds made mention of in the instant petition.

2. The main grounds on which impugned detention is sought to be quashed are that the grounds of detention are vague, indefinite and cryptic, inasmuch as detaining authority has not attributed any specific allegation against detenu; that grounds of detention are replica of dossier; that grounds of detention are not irrelevant but also stale; that two FIRs of 2012 pertain to ordinary offence, in which challans were presented and detenu acquitted and, therefore, reference made by detaining authorities to these FIRs has no relance qua impugned order of detention; that FIR no.103/2022 was registered in April 2022 and challan filed and said FIR cannot be relied in December 2023 for passing impugned order of detention; that detenu is not involved in FIR no.103/2022 nor has he ever been arrested in such FIR.

3. Counter affidavit has been filed by the respondents. They state that detenu was found involved in illicit trafficking of drugs. The detenu was given the material relied upon by detaining authority. They aver that detenu has criminal bent of mind which is evident from his conduct over a period of time. The grounds of detention are based on information and evidence available to detaining authority. Respondents admit that detenu made a representation through his wife just four days before filing of petition. Respondent also admit that while detenu expressed a desire for personal hearing before advisory board but such hearing is not a mandatory requirement because role of Advisory Board primarily involves reviewing detention and representation, if any, by person detained rather than conducting personal hearings. They also aver that impugned detention order is based on different legal framework, i.e., Prevention of Illicit Trafficking in Narcotic Drugs and Psychotropic Substances Act, 1988, and bail granted to detenu under NDPS Act will not affect legality of preventive detention order.

4. To rebut contentions of respondents, Rejoinder has been filed by petitioner, in which he states that grounds of detention are replica of dossier submitted by police and there is no independent application of mind by respondent. It is also stated by petitioner that in order of detention it is mentioned that detenu is involved in FIR no.103/2022 P/S Trehgam whereas detenu is not involved in such FIR and that copy of said FIR no.103/2022 P/S Trehgam has not been furnished to him. Although respondents admit submission of representation, yet they have not decided it and non-consideration of representation amounts to violation of Constitutional mandate as also provisions of the Act of 1988, thereby infringing his guaranteed rights. Neither Advisory Board considered the representation nor by respondents, rendering impugned detention illegal and unconstitutional.

5. I have heard learned counsel for parties. I have gone through the detention record produced by the counsel for the respondents and considered the matter.

6. In view of the rival contentions of parties and submissions made by the learned counsel for the parties, it would be relevant to go through the record on the file. Perusal of grounds of detention reveals that these are replica of dossier with interplay of some words here and there. This, thus,

shows non-application of mind and in the process of deriving of subjective satisfaction, has become causality. While formulating grounds of detention, detaining authority has to apply its own mind. It cannot simply reiterate whatever is written in the dossier. It is pertinent to mention here that the observations of the Supreme Court in the case of *Jai Singh and ors vs. State of J&K*” (AIR 1985 SC 764) which are reproduced hereunder:

“First taking up the case of Jai Singh, the first of the petitioners before us, a perusal of the grounds of detention shows that it is a verbatim reproduction of the dossier submitted by the Senior Superintendent of Police, Udhampur, to the District Magistrate requesting that a detention order may kindly be issued. At the top of the dossier, the name is mentioned as Sardar Jai Singh, father’s name is mentioned as Sardar Ram Singh and the address is given as village Bharakh, Tehsil Reasi. Thereafter it is recited “The subject is an important member of

Thereafter follow various allegations against Jai Singh, paragraph by paragraph. In the grounds of detention, all that the District Magistrate has done is to change the first three words “the subject is” into “you Jai Singh, S/o Ram Singh, resident of village Bharakh, Tehsil Reasi”. Thereafter word for word the police dossier is repeated and the word “he” wherever it occurs referring to Jai Singh in the dossier is changed into “you” in the grounds of detention. We are afraid it is difficult to find proof of non-application of mind. The liberty of a subject is a serious matter and is not to be trifled with in this casual, indifferent and routine manner.”

7. This Court in the case of *Noor-ud-Din Shah v. State of J&K and others 1989 SLJ 1*, quashed the detention order as it was found that grounds of detention was reproduction of the dossier supplied to the detaining authority and held that it amounted to non-application of mind. The Court observed:

“I have thoroughly by examined the dossier submitted by the Superintendent of Police, Anantnag, to District Magistrate, Anantnag as also the grounds of detention formulated by the latter for the detention of the detenu in the present case, and I find the said grounds of detention are nothing but the verbatim reproduction of the dossier as forwarded by the Police to the detaining authority. He has only changed the number of paragraphs, trying in vain to give it a different shape. This is in fact a case of non-application of mind on the detaining authority. Without applying his own mind to the facts of the case, he has acted as an agent of the police. It was his legal duty to find out if the allegations levelled by the police against the detenu in the dossier were really going to effect the maintenance of public order, as a result of the activities, allegedly, committed by him. He had also to find out whether such activities were going to affect the public order is future also as a result of which it was necessary to detain the detenu, so as to prevent him from doing so. After all, the preventive detention envisaged under the Act is in fact only to prevent a person from acting in any manner which may be prejudicial to the maintenance of public order, and not to punish him for his past penal acts. The learned District Magistrate appears to have passed the impugned order in a routine manner being in different to the import of preventive detention as or detained in the Act, Passing of an order without application of mind goes to the root of its validity, and in that case, the question of going into the genuineness or otherwise of the grounds does not arise. Having found that the detaining authority has not applied his mind to the facts of the case while

passing the impugned order, it is not necessary to go to the merits of the grounds of detention, as mandated by Section 10-A of the Act.”

8. In view of above settled legal position grounds of detention and dossier, if similar in language, it tantamounts to non-application of mind on the part of detaining authority. As already noted, in the instant case, it is evident from that dossier and grounds of detention contain similar expressions which show that there has been non-application of mind on the part of detaining authority. Impugned order of detention is, therefore, unsustainable in law on this ground.

9. The submission urged by learned counsel for detenu, as is also mentioned in the petition, is that representation made by detenu through his wife has not been considered by respondents. Respondents admit making of representation by detenu's wife, but according to them it is not mandatory to consider or decide it. Such a submission of respondents is misconceived. The reason being that law in this regard is settled. The Supreme Court in *Tara Chand v. State of Rajasthan and others*, 1980 (2) SCC 321 and *Raghavendra Singh v. Superintendent, District Jail, Kanpur and others* (1986) 1 SCC 650, has held that if there is inordinate delay in considering the representation that would clearly amount to violation of the provisions of Article 22(5) as to render the detention unconstitutional and void. In *Rajammal v. State of Tamil Nadu and others*, 1999(1) SCC 417, it has been held that it is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay. Though no period is prescribed by Article 22 of the Constitution for the decision to be taken on the representation, the words “as soon as may be” in clause (5) of Article 22 convey the message that the representation should be considered and disposed of at the earliest.

10. In *K. M. Abdulla Kunhi v. Union of India* (1991) 1 SCC 476, it has been held that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in disposal of representation would be breach of the constitutional imperative and it would render the continued detention impermissible and illegal.

11. Right to make a representation is an enshrined right guaranteed under Article 22(5) of the Constitution of India. It incorporates a dual requirement: first, it requires detaining authority to communicate grounds of detention as soon as may be; and second, it requires to afford detenu an earliest opportunity

to make a representation. Both these procedural requirements are mutually reinforcing. The communication, as soon as may be, of the grounds of detention is intended to inform the detenu of the basis on which the order of detention has been made. The expression “as soon as may be” imports a requirement of immediacy. The communication of grounds is in aid of facilitating right of detenu to submit a representation against order of detention. In absence of grounds being communicated, detenu would be left in the dark about the reasons which have led to issuance of order of detention. The importance which the constitutional provision ascribes to communication of grounds as well as affording of an opportunity to make a representation is evident from the use of the expression “as soon as may be” in the first part in relation to communicating the grounds and allowing the detenu “the earliest opportunity” of availing of the right to submit a representation. Thus, the significance of Article 22 of the Constitution is that representation submitted by detenu must be disposed of at an early date. The communication of grounds of detention, as soon as may be, and the affording of earliest opportunity to submit a representation against the order of detention will have no constitutional significance unless detaining authority deals with representation and communicates its decision with expedition.

12. The provisions of J&K Public Safety Act subscribe to the mandate of Article 22(5). Section 13 thereof contains a requirement that when a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than ten days from the date of detention communicate to him, in the language which is understandable to him the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation, against the order to the Government.

13. Article 22(5) of the Constitution provides for communication of grounds on which order of detention is made by detaining authority “as soon as may be”. Section 13 (1) of the Act uses the expression “as soon as may be”, qualifying it with the requirement that the communication of grounds should ordinarily not be later than five days and, in exceptional circumstances, for reasons to be recorded in writing not later than ten days from the date of detention. Section 8(1) of the Act, thus, also embodies the second requirement

of Article 22(5) of affording to detenu the earliest opportunity of making a representation against the order to the appropriate government.

14. Section 15 of the Act mandates a reference to the Advisory Board constituted under Section 14 of the Act. What Section 15 says is profitable to be reproduced hereunder:

“Section 15. Reference to Advisory Board.

In every case where a detention order has been made under this Act, the Government shall, within four weeks from the date of detention under the order place before the Advisory Board constituted by it under section 14, the grounds on which the order has been made, the representation, if any, made by the person affected by the order and in case where the order has been made by an officer, also report by such officer under sub-section (4) of section 8.”

15. Under Section 15, the appropriate government has to place the grounds on which the order of detention has been made within four weeks from the date of detention of the person together with a representation, if any, made by the person affected by the order of detention before the Advisory Board constituted under the provisions of Section 14 of the Act. The Advisory Board, under the provisions of Section 16 of the Act, after considering the material placed before it and after calling for such further information as it may deem necessary from the Government or from the person called for the purpose through the Government or from the person concerned and if in any particular case it considers it essential so to do or, if the person concerned desires to be heard, after hearing him in person, submit its report to the Government within six weeks from the date of detention.

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

17. As noted above, it has been contention of learned counsel for petitioner that a representation was made by detenu's wife, but that has not been considered and decided. The requirement under Section 13 of the Act of the

disclosure and communication of grounds of detention and affording of an opportunity to detenu to make a representation against such an order to appropriate government, is distinct from reference to the Advisory Board. The Supreme Court in *Jayanarayan Sukul v. State of West Bengal, (1970) 1 SCC 219*, laid emphasis on the expeditious consideration of the representation by the appropriate government. In the said case, a representation was made by petitioner against detention order to the State Government on 23rd June 1969, which was rejected on 19th August 1969, as a reference regarding detention order was pending before Advisory Board. The Court held that there was an inordinate delay in considering representation of petitioner. It was observed:

“18. It is established beyond any measure of doubt that the appropriate authority is bound to consider the representation of the detenu as early as possible. The appropriate Government itself is bound to consider the representation as expeditiously as possible. The reason for immediate consideration of the representation is too obvious to be stressed. The personal liberty of a person is at stake. Any delay would not only be an irresponsible act on the part of the appropriate authority but also unconstitutional because the Constitution enshrines the fundamental right of a detenu to have his representation considered and it is imperative that when the liberty of a person is in peril immediate action should be taken by the relevant authorities.

[...]

20. Broadly stated, four principles are to be followed in regard to representation of detenus. First, the appropriate authority is bound to give an opportunity to the detenu to make a representation and to consider the representation of the detenu as early as possible. **Secondly, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detenu by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration.** It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but **it has to be remembered that the Government has to be vigilant in the governance of the citizens. A citizen's right raises a correlative duty of the State.** Fourthly, the appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board.”
(emphasis supplied)

18. As has been held by the Supreme Court in *Jayanarayan Sukul* (supra), four principles are required to be followed with respect to representation of a detenu. First, appropriate authority is bound to give an opportunity to detenu to make a representation and to consider it as early as possible. Secondly, consideration of detenu's representation by appropriate authority is entirely independent of any action by Advisory Board including consideration of representation of detenu by Advisory Board. Thirdly, there should not be any delay in the matter of consideration and it has to be remembered that

Government has to be vigilant in governance of citizens. A citizen's right raises a correlative duty of the State. Fourthly, appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to Advisory Board.

19. In the case in hand, it is an admitted position that representation had been made by petitioner, but same was not considered and/or decided by respondents. The detention record includes report of the Advisory Board. It mentions that although detenu was informed about his right of making representation against his detention to detaining authority as also government, but no such representation seems to have been made by detenu because no such representation was lying on the material before the Advisory Board. This would show and suggest that respondents have not placed copy of representation before the Advisory Board as was required of them under and in terms of Section 15 of J&K Public Safety Act. In that view of matter, impugned order of detention is vitiated.

20. Further to add here that in *Ankit Ashok Jalan v. Union of India (2020) 16 SCC 127*, it was observed by the Supreme Court that consideration of representation(s) by appropriate Government and by Advisory Board would always be qualitatively different and the power of consideration by appropriate Government must be completely independent of any action by Advisory Board. In the case of *Pankaj Kumar Chakrabarty [Pankaj Kumar Chakrabarty v. State of W.B., (1969) 3 SCC 400]*, it was stated by the Supreme Court that the obligation on the part of the Government to consider representation would be irrespective of whether the representation was made before or after the case was referred to the Advisory Board. Any delay in consideration of representation would not only be an irresponsible act on the part of appropriate authority but also unconstitutional.

21. In *Sarabjeet Singh Mokha v. District Magistrate Jabalpur and others* reported in *(2021) 20 SCC 98*, the Supreme Court has reproduced certain observations made by the Supreme Court on the consideration of representation by appropriate government and by the Advisory Board in *Ankit Ashok Jalan* (supra), which are reproduced hereunder:

“39 In a recent decision of a three judge Bench of this Court in *Ankit Ashok Jalan v. Union of India*⁵¹, Justice UU Lalit revisited the body of precedent on the subject and noticed the qualitative difference between the consideration of a representation by the appropriate government on the one hand and by the Advisory Board

on the other. Justice UU Lalit, speaking for himself and Justice Indu Malhotra (with Justice Hemant Gupta dissenting⁵²) observed:

“16. These decisions clearly laid down that the consideration of representations by the appropriate Government and by the Board would always be qualitatively different and the power of consideration by the appropriate Government must be completely independent of any action by the Advisory Board. In para 12 of the decision in Pankaj Kumar Chakrabarty [Pankaj Kumar Chakrabarty v. State of W.B., (1969) 3 SCC 400 : (1970) 1 SCR 543] it was stated that the obligation on the part of the Government to consider representation would be irrespective of whether the representation was made before or after the case was referred to the Advisory Board. As stated in para 18, this was stated so, as any delay in consideration of the representation would not only be an irresponsible act on the part of the appropriate authority but also unconstitutional. The contingency whether the representations were received before or after was again considered in para 29 of the decision in Haradhan Saha [Haradhan Saha v. State of W.B., (1975) 3 SCC 198 : 1974 SCC (Cri) 816].”

Justice UU Lalit categorized the different stages for when a representation is received and disposed, with the underlying principle that the representation must be expeditiously disposed of, at every stage:

“17. In terms of these principles, the matter of consideration of representation in the context of reference to the Advisory Board, can be put in the following four categories:

17.1. If the representation is received well before the reference is made to the Advisory Board and can be considered by the appropriate Government, the representation must be considered with expedition. Thereafter the representation along with the decision taken on the representation shall be forwarded to and must form part of the documents to be placed before the Advisory Board.

17.2. If the representation is received just before the reference is made to the Advisory Board and there is not sufficient time to decide the representation, in terms of law laid down in Jayanarayan Sukul [Jayanarayan Sukul v. State of W.B., (1970) 1 SCC 219 : 1970 SCC (Cri) 92] and Haradhan Saha [Haradhan Saha v. State of W.B., (1975) 3 SCC 198 : 1974 SCC (Cri) 816] the representation must be decided first and thereafter the representation and the decision must be sent to the Advisory Board. This is premised on the principle that the consideration by the appropriate Government is completely independent and also that there ought not to be any delay in consideration of the representation.

17.3. If the representation is received after the reference is made but before the matter is decided by the Advisory Board, according to the principles laid down in Haradhan Saha [Haradhan Saha v. State of W.B., (1975) 3 SCC 198 : 1974 SCC (Cri) 816], the representation must be decided. The decision as

well as the representation must thereafter be immediately sent to the Advisory Board.

17.4. If the representation is received after the decision of the Advisory Board, the decisions are clear that in such cases there is no requirement to send the representation to the Advisory Board. The representation in such cases must be considered with expedition.

18. [...] it is well accepted that the representation must be considered with utmost expedition; and the power of the Government is completely independent of the power of the Advisory Board; and the scope of consideration is also qualitatively different, there is no reason why the consideration by the Government must await the decision by the Advisory Board. None of the aforesaid cases even remotely suggested that the consideration must await till the report was received from the Advisory Board.”

22. Right to make a representation by detenu, it has been said in *Sarabjeet Singh Mokha* (supra), creates a corresponding duty upon the Government to consider the same expeditiously and delay occasioned in deciding it and delay occasioned in deciding representation renders detention of detenu illegal. Detenu has every right to know that as to whether his representation was considered by respondents justly, fairly and reasonably.

23. There is no gainsaying that representation of detenu in the present case has not been considered muchless decided by respondents, which violates the procedural rights under the Constitution and the Statute and as a corollary thereof vitiates and invalidates impugned order of detention.

24. For the reasons discussed above, the petition is disposed of and detention Order No.DIVCOM-“K”/205/2023 dated 27.12.2023, passed by Divisional Commissioner, Kashmir, is quashed. Respondents, including Superintendent Jail concerned, are directed to release the detenu forthwith, provided he is not required in any other case. **Disposed of.**

25. Detention record be returned to counsel for respondents.

(Vinod Chatterji Koul)
Judge

Srinagar
31.12.2024
Qazi Amjad Secy.

Whether approved for reporting? Yes/No