

HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

HCP No. 40/2016

Date of Decision:- 29.06.2016

Mohammad Asif Wani
vs.
Principal Secretary to Govt. Home Deptt. & Anr.

Coram:

Hon’ble Mr. Justice Mohammad Yaqoob Mir, Judge.

Whether to be reported in Media/Press	:	Optional
Whether to be reported in Journal/Digest	:	Yes

Appearing counsel:-

For the petitioner(s): Mr. Manzoor A.Dar, Advocate.

For the respondent(s): Mr. R.A.Khan, AAG.

1. Vide order no. Div.Com-K/22/2016 dated 23.02.2016 in exercise of powers vested under Section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988, the Divisional Commissioner has directed the Detenue to be detained and to be lodged in District Jail Kathua for a period to be specified by the Government. Aggrieved thereof instant petition has been filed.
2. Respondents have not chosen to file counter affidavit despite repeated opportunities given in this regard; finally their right has been closed.
3. The detention records as produced by the learned AAG suggest that vide Government order No.

Home/PB-V/270/2016 dated 20.04.2016 the period of detention has been fixed as six months in the first instance which is to expire on 23.08.2016; by now Detenue is already in detention for more than four months.

4. It is projected by learned counsel for the petitioner that the order of detention smacks non-application of mind because the detaining authority has recorded that for preventing the Detenue from committing any of the acts within the meaning of illicit traffic of narcotic drugs and maintenance of public order. Under Section 3 of the said Act, he can be detained only when he is required to be prevented from committing the act of illicit traffic of narcotic drugs. For maintenance of public order, orders could be passed under Public Safety Act. That submission is well founded.

5. It is further submitted that the learned Divisional Commissioner was required to go through the entire material thereafter to formulate the grounds of detention so as to derive subjective satisfaction about the requirement of prevention and detention. All that the detaining authority has said in the order is that the dossier and other connected documents were produced by the SSP Baramulla; on careful perusal of

the same he was satisfied to pass the preventive order.

6. The said satisfaction appears to be casual one because in the grounds of detention, reference of which is not made in the order, the allegations against the Detenue is that he was apprehended by the police P/S Pattan along-with vehicle (Swift Dezire) bearing registration No. JK05E-4291; on its checking 61 bottles of Onerex were recovered and case was registered as FIR No. 219/2015 under Sections 8/22, 29 NDPS Act in the P/S Pattan. It is further mentioned in the grounds of detention that the Detenue has clandestinely started dealing in illegal business of Psychotropic substances like Cozine, Codine etc. in and around Pattan and Krerri areas without following the laws and rules governing the purchases and sale of such substances. In order to carry out his illegal trade, the detenue is exploiting the immature minds of the younger generation by making them dependent on drugs and to make them habitual addicts. He is also distributing small quantity of drugs among them free of cost and thereafter is supplying them the same against hefty amounts, which in turn exposes the teen-aged boys to different kinds of immoral and criminal tendencies,

as such, resort to thefts and other illegal activities in order to purchase drugs from the detainee. The drug mafia of which detainee is an active member is hell bent to spoil the life and career of younger generation by selling drugs to them.

7. The records more particularly grounds of detention suggest that the Detenue had been arrested by the police on 28.12.2015; then he had been released on bail on 05.02.2016 but was not released till 23.02.2016 when the order of detention was passed. The fact of release on bail has not been made mention of in the grounds of detention nor it has been explained as to whether in compliance to the order of the Magistrate Detenue was actually released or not. This also shows that there has been lack of application of mind.

8. No-doubt allegations against the Detenue are very serious but those allegations are not substantiated by the records. If the allegations, as referred to above, were true what prevented the authorities in not seeking cancellation of bail as has been granted in favour of the Detenue by the court of learned Sessions Judge Baramulla. That also shows that the detaining authority has not applied its mind, otherwise police would have been asked to explain as to why the application for

cancellation of bail has not been filed before the trial court. It is further projected by the counsel for the Detenue that the material forming base for detention order has not been furnished to the Detenue, as such, has been deprived of making effective representation. The detention records, as produced, on its perusal do not reveal that the said material has been furnished to the Detenue. It is violation of the guaranteed right under Article 22 of the Constitution.

9. Preventive detentions are jeopardizing a person's liberty. Liberty, as guaranteed under Article 21 of the Constitution, cannot be trampled unless in due course of law. When a person is found indulging in such activities prevention may be necessary but while having resort to preventive measures, procedural safeguards are to be respected. Law has to be followed in any case. Any small deviation in not following the law provides a chance to a person to successfully challenge the action initiated against him.

10. Detenue had filed the representation seeking revocation of the order of detention; through the same representation dated 01.03.2016 he had apprised the respondent authorities that the grounds of detention

furnished to him do not contain the copies of the material as were stated to have been submitted by the SSP Baramulla on 10.02.2016. In absence thereof he was not able to make effective and meaningful representation. In spite of not having been furnished requisite material Detenu had requested by the medium of the representation for having fresh look into the matter but the said representation has not been decided. The said contention has also not been controverted.

11. In this connection Para-9 of the judgment rendered in the case *Smt. Gracy vs. State of Kerala reported in AIR 1991 SC 1090* is advantageous to quote”-

“9. It being settled that the aforesaid dual obligation of consideration of the detenu’s representation by the Advisory Board and independently by the detaining authority flows from Art.22(5) when only one representation is made addressed to the detaining authority, there is no reason to hold that the detaining authority is relieved of his obligation merely because the representation is addressed to the Advisory Board instead of the detaining authority and submitted to the Advisory Board during pendency of the reference before it. It is difficult to spell out such an inference from the contents of Art.22(5) in support of the contention of the learned Solicitor General. The contents of Art.22(5) as well as the nature of duty imposed thereby on the detaining authority support the view that

so long as there is a representation made by the detenue against the order of detention, the aforesaid dual obligation under Art.22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the Advisory Board or to both. The mode of address is only a matter of form which cannot whittle down the requirement of the constitutional mandate in Art.22(5) enacted as one of the safeguards provided to the detenue in case of preventive detention.”

12. The Detenue by now is in the custody for more than four months out of the fixed period of six months that means substantial part of the detention has been served.

13. For the stated reasons, the law and the fact that more than four months detention period out of the six months which the Detenue has served, the order of detention does not survive, as such, is quashed. Detenue namely Mohammad Asif Wani S/o Assadulla Wani R/o Tapper Balla Tehsil Pattan District Baramulla, Kahsmir, is directed to be released forthwith provided he is not required in connection with any other case.

14. Detention records, as produced by learned AAG, be returned back to him.

15. Disposed of as above.

(Mohammad Yaqoob Mir)
Judge

Srinagar
29.06.2016
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