HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

HCP No. 13/2018

Date of Order: 28th of June, 2018.

Tawseef Ahmad Mir Vs. State of JK & Anr.

Coram:

Hon'ble Mr Justice M. K. Hanjura, Judge.

Appearance:

For the Petitioner(s): Mr Shafqat Nazir, Advocate.
For the Respondent(s): Mr M.I. Dar, AAG.

i) *Whether approved for reporting in Law Journals etc.:* *Yes/No*
ii) Whether approved for publication in Press: *Yes/No*

01. By the dint of order bearing No. 115/DMS/PSA/2018 dated 18th of January, 2018, passed by the Respondent No.2/District Magistrate, Shopian, in exercise of the powers conferred in him under clause (a) of Section 8 of the J&K Public Safety Act, 1978 (for short "The Act of 1978"), one Tawseef Ahmad Mir S/o Late Bashir Ahmad Mir R/o Chakoora, Pulwama, Tehsil & District Pulwama, has been detained and lodged in Central Jail, Srinagar.

02. The detenue has challenged the said order of detention, chiefly, on the grounds that the detaining authority has failed to apply its mind to the fact whether the preventive detention of the detenue was imperative, notwithstanding his custody in a substantive offence. The detenue had filed a bail application in case FIR No. 43/2017, registered at Police Station, Zainapora, which was allowed by the Court of competent jurisdiction. It has also been stated that the Respondent No. 2 has passed the order of detention on

the dictates of the sponsoring agency, i.e. the Officer who has prepared the police dossier and no attempt has been made by the Respondent No.2 to scan and evaluate it before passing the order of detention.

03. Counter has been filed by the respondents, wherein it is stated that the grounds of detention have been furnished to the detenue. The detaining authority has complied with the requirement of Clause 5 of Article 22 read with Article 21 of the Constitution of India. The detenue has failed to avail the remedy prescribed under the Act. He has not filed the representation against the order of detention. It has also been stated that the detenue is involved in case FIR No. 43/2017, registered at Police Station, Zainapora, for the commission of offences punishable under Section 18 of the ULA (P) Act. In the end, it has been urged that since the order of detention has been passed on justifiable grounds, therefore, the instant Habeas Corpus petition merits dismissal, and it may, accordingly, be dismissed.

04. **Heard** and considered.

05. The main plank of the argument of the learned counsel for the detenue is that since the detenue was admitted to bail in case FIR No.43/2017 by the Court of competent jurisdiction, that formed the baseline of the order of the detention, therefore, the detenue could not have been detained under the provisions of "The Act of 1978". Testing this argument on the touchstone of the law laid down by the Apex Court of the country in paragraph No.24 of the judgment delivered in the case of ***"Sama Aruna v. State of Telangana & Anr."***, reported in ***"AIR 2017 SC 2662***", such a view is not supported by the law. Paragraph No.24 of the said judgment reads as under:

> *"24. There is another reason why the detention order is unjustified. It was passed when the accused was in jail in Crime No. 221 of 2016. His custody in jail for the said offence was converted into custody under the impugned detention order. The incident involved in this offence is sometime in the year 2002-03.*

The detenue could not have been detained preventively by taking this stale incident into account, more so when he was in jail. In Ramesh Yadav v. District Magistrate, Etah and ors, this Court observed as follows:

> *"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenue was released on bail he would again carryon his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed."*

06. The same view has been repeated and reiterated by the Hon'ble Supreme Court at paragraph No. 13 of the judgment delivered in the case of ***"V. Shantha v. State of Telangana & others"***, reported in ***"AIR 2017 SC 2625***", that reads as under:

> *"13. The order of preventive detention passed against the detenue states that his illegal activities were causing danger to poor and small farmers and their safety and financial well being. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detenu from indulging in further prejudicial activities in the business of spurious seeds, affecting maintenance of public order, and that there was no other option except to invoke the provisions of the Preventive Detention Act as an extreme measure to insulate the society from his evil deeds. The rhetorical incantation of the words "goonda" or "prejudicial to maintenance of public order" cannot be sufficient justification to invoke the draconian powers of preventive detention. To classify the detenue as a "goonda" affecting public order, because of inadequate yield from the chilli seed sold by him and prevent him from moving for bail even is a gross abuse of the statutory power of Preventive Detention. The grounds of detention are ex facie extraneous to the Act."*

07. Looking at the instant case on the parameters of the law laid down above, the detenue could not have been detained after taking recourse to the provisions of "The Act of 1978", when he was already admitted to bail in the case, the details whereof have been given hereinbefore. The State could have exercised its right to knock at the doors of a higher forum and seek the reversal of the order(s) of bail so granted to the detenue by the Court. This single infraction knocks the bottom out of the contention raised by the State that the detenue can be detained preventatively, when he was already admitted to bail. It cuts at the very root of the State action. The State ought to have taken recourse to the ordinary law of the land.

08. Life and liberty of the citizens of the State are of paramount importance. A duty is cast on the shoulders of the Court to enquire that the decision of the Executive is made upon the matters laid down by the Statute and that these are relevant for arriving at such a decision. A citizen cannot be deprived of personal liberty, guaranteed to him/her by the Constitution and of which, he/she cannot be deprived except in due course of law and for the purposes sanctioned by law.

09. The learned counsel for the detenue has also argued that the Officer, who handed over the detenue to the jail authorities of the Central Jail, Srinagar, along with the relevant documents, should have filed an affidavit in the mater, which has not been done. From a bare glimpse of the execution report (annexed with the detention record), what gets revealed is that the detention warrant has been executed on 16th of February, 2018. It also states that the contents of the detention warrant and the grounds of detention were read over to the detenue in English language and explained to him in Kashmiri language, which language he understood fully well and, in token thereof, his signature was attained on the Execution Report itself. To eradicate all doubts, it was incumbent on the part of the officer, namely, SI, Sareer Ahmad, who did the exercise of handing over the

documents and conveying the contents thereof to the detenue, to file an affidavit in order to attach, at least, a semblance of fairness to his statement. Resort can, in this behalf, be had to the law laid down by the apex Court of the country in the case of ***"State Legal Aid Committee, J&K v. State of J&K & Ors."***, reported in ***"AIR 2005 SC 1270"***, wherein it has been held as under:

> *"1. Though several questions have been raised in this petition, it is not necessary to deal with them in detail as we find that there is no definite material to show that the requirements of section 13 of the Jammu & Kashmir Public Safety Act, 1978, (in short the Act), requiring the grounds of order of detention to be disclosed/communicated to the person affected by the order has been complied with. Though in the affidavit filed by the State, it has been stated that the contents of the warrants and grounds of detention were served, read over and explained to the assesse and he was informed about his right to make a representation against the detention, if he so desired, there is no material placed on record to substantiate this stand. It is stated in the affidavit that the detenue refused to receive copy of the detention order and also refused to put his signatures on the documents. The least the State could have done is to file an affidavit of the person who wanted to serve the relevant documents and an endorsement to the effect that there was refusal. Even the name of the official has not been indicated in the affidavit. That would have been sufficient to comply with the requirements of section 13 of the Act."*

10. In the backdrop of what has been said and done above, the instant Habeas Corpus petition is **allowed**, as a consequence of which, the order of detention bearing No. 115/DMS/PSA/2018 dated 18th of January, 2018, passed by the Respondent No.2/District Magistrate, Shopian, is quashed with a further direction to the respondents to release the person of Tawseef Ahmad Mir S/o Late Bashir Ahmad Mir R/o Chakoora, Pulwama, Tehsil & District Pulwama,, forthwith from the preventive custody, if not required in any other case.

11. The record, as produced by the learned Additional Advocate General, be returned to him with utmost dispatch.

(M. K. Hanjura)
Judge

SRINAGAR
June 28th, 2018
"TAHIR"