HIGH COURT OF JAMMU AND KASHMIR-
SRINAGAR

Case No: HC(p) 75/2018 **Dated** : of July., 2018

NAZIR AHMAD KHAWAJA ***VERSUS*** *STATE AND ORS.*

ORDER SHEET

CORAM:

HON'BLE *MR. JUSTICE M.K.HANJURA- JUDGE*

i. ***Whether to be approved for reporting in NET :*** ***Yes/No***

ii. ***Whether to be approved for reporting in Digest/Journal :*** ***Yes/No***

FOR THE PETITIONER/s : MR. SHAFAQAT NAZIR

FOR THE RESPONDENT/s: . MR. ASIF MAQBOOL, GA

(M.K.HANJURA-J)

1/ The detenue - Nazir Ahmad Khawaja, was detained vide order No. 194/DMB/PSA of 2018 dated 15-03-2018 passed by District Magistrate, Baramulla, in exercise of powers vested in him under clause (a) of section (8) of the Jammu & Kashmir Public Safety Act, 1978 (for short Act of 1978) and he was kept in Central Jail Kotbhalwal, Jammu. The detenue continues to be there at the moment. The grounds of detention, along with the allied documents, are said to have been served on the detenue and the contents thereof, as contended, have been read over and explained to him in the language which he understood fully well.

02/ The order of detention has been challenged on the grounds, inter alia, that the detenue could not have been detained under the provisions of PSA when he was already in the custody of the respondents in connection with F.I.R No. 343/2017 for the offences punishable u/s 153-A RPC. It is also argued that the detenue has been deprived of the right to file an effective representation against the order of his detention, as the relevant material, relied upon by the Detaining Authority while passing the impugned order of detention, in the form of the dossier, copy of the FIR, the statement u/s 161 Cr.PC etc., have not been furnished to him.

03/ In the counter affidavit, the respondents have pleaded that the order of detention has been passed after taking into consideration the relevant provisions of J & K Public Safety Act. 1978 (JKPSA). The grounds of detention have been conveyed to the detenue in the language with which he is conversant and these have been read over and explained to him. Therefore, the order of detention does not suffer from any vice. It has been passed with due diligence and it will sustain in the eyes of the law. The arguments of the learned counsel for the respondents are in tune and in line with the pleadings of the respondents.

04/ **Heard** and considered. The detention record has also been perused.

05/ As already stated, the impugned order of detention has been challenged chiefly, on the ground that the detenue could not have been detained under the provisions of PSA when he was already booked in substantive offence in connection with F.I.R No. 343/2017 for an offence punishable u/s 153-A RPC, registered in Police Station Sopore. As stated in the petition, the detenue on his own appeared before the S.H.O Police Station, Sopore, on 25-01-2018 and he was kept in the illegal custody there till the time the impugned order of detention came to be passed.

06/ Preventive detention, as has been held in the cases of **A.K.Gopalan v. State of Madras (1950) SCR 88** and **Rekha vs. State of Tamil Nadu (AIR 2011 SCW 2262)**, is, by nature, repugnant to democratic ideas and an anathema to the rule of law. The Supreme Court in Rekha's case (supra) emphasized that article 22 (3) (b) of the Constitution of India is to be read as an exception to article 21 of the Constitution of India and not allowed to nullify the right to personal liberty guaranteed under article 21. The Supreme

Court further observed that since article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous, historic struggles. It has, therefore, to be understood that if the ordinary law of the land (India Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal. The Supreme Court added that it must be remembered that if, in the case of preventive detention, no offence is proved and there is no conviction, which can only be sanctioned by legal evidence, preventive detention is often described as "jurisdiction of suspicion." To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however, technical, is, in our opinion, mandatory and vital. The Supreme Court, after putting reliance on the law laid down in Kamleshwar Ishwar Prasad Patel vs. Union of India and others (1995) 2 SCC 51 (para 49) observed that the history of liberty is the history of procedural safeguards. These procedural safeguards are required to be zealously watched and enforced by the Court and their rigor cannot be allowed to be diluted on the basis of the nature of alleged activities of the detenue. The Supreme Court quoted with approval the observation made in **Ratan Singh Vs. State of Punjab and others 1981 (4) SCC**, emphasizing the need to ensure that the constitutional and statutory safeguards available to a detenue are followed in letter and spirit. It observed, *but the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty are to have any meaning in our democratic set up, it is essential that at least those safeguards are not denied to the detenues.*

07/ The procedural requirements are the only safeguards available to a detenue since the Court is not expected to go behind the subjective satisfaction of Detaining Authority. As laid down by the Apex Court in the case of **Abdul Latif Abdul Wahab Sheikh v. B.K.Jha and anr. (1987) 2 SCC 22**, the procedural requirements are, therefore, to be strictly complied with, if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard.

08/ Looking at the instant case from the above perspective, the detenue was already booked in a substantive offence in connection with F.I.R No. 343/2017 for an offence punishable u/s 153-A RPC, registered in Police Station Sopore. He was in the custody of the respondents from 25-01-2018 and continued to be so at the time of the passing of the impugned order of detention. The said F.I.R forms the baseline of the order of the detention of the detenue. The question, which arises for consideration, therefore is, can an order of detention be passed on the face of what has been detailed above. The answer to this question can be a big ***"No"*** taking into consideration the law laid down by the Apex Court of the Country at para 24 sub para (6) of the judgment delivered in the case of Sama Aruna Vs. State of Telangana and another, reported in AIR 2017 SC 2662, which reads as under:-

> *"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 carry on 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."*

09/ The same view has been repeated and reiterated by the Hon'ble Supreme Court in paragraph 13 of the judgment delivered in

the case of V.Shanta Vs. State of Telangana and others, reported in AIR 2017 SC 2625, which reads as follows:

> *"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 detenue 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."*

10/ Testing the case on hand on the touchstone of the law laid down above, the detenue could not have been detained after taking recourse to the provision of PSA, when he was involved in the commission of substantive offences and was in the custody of the respondents. So much so, he had not applied for bail. The proper course would have been to challenge the order of bail, if granted to him. He could not have been detained preventatively. This single infraction renders the order of detention liable to be set aside.

In front of the

11/ Viewed in the context of all that has been said and done above, the petition is allowed, as a consequence of which, the order of detention bearing No. 194/DMB/PSA/2018 dated 15-03-2018 passed by the respondent No.2 – District Magistrate, Baramulla, is **quashed** with a further direction to the respondents to release the person of Nazir Ahmad Khawaja, S/O Ghulam Nabi Khawaja R/O Seeloo, Sopore, District Baramulla, Kashmir, forthwith from the preventive custody, unless required in any other case.

12/ The petition is, accordingly, **disposed** of along with connected IAs. The record shall be returned to the learned counsel for the respondents.

TARIQ **Mota**
SRINAGAR
-07-2018

(M.K.HANJURA)
JUDGE


HIGH COURT
JAMMU & KASHMIR