HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

...

WP(Crl) No.165/2021

Reserved on: 15.02.2022

Pronounced on: 25.02.2022

Shabir Ahmad Malik

.....Petitioner(s)

Through: Mr Syed Musaib, Advocate

Versus

Union Territory of J&K and another

.....Respondent(s)

Through: Mr M.A.Chashoo, AAG

CORAM:
HON'BLE MR JUSTICE TASHI RABSTAN, JUDGE

JUDGEMENT

1. Through the medium of this writ petition, the petitioner is praying for quashment of the Order No.35/DMA/PSA/DET/2021 dated 17.10.2021, whereby the District Magistrate, Anantnag (respondent No.2), has placed the detenu, namely, Shabir Ahmad Malik S/o Abdul Rashid Malik R/o Bonagund, Verinag District Anantnag, under the preventive detention to prevent him from the activities which are prejudicial to the security of the State.

2. Reply Affidavit has been filed by respondents.

3.

4. Heard and considered.

5. Learned counsel for petitioner, to strengthen what has been submitted and averred in this petition, has stated that the cases mentioned in the grounds of detention have no nexus with the detenu as the cases/FIRs, heavily relied upon by the detaining authority to arrive at subjective satisfaction, had been registered way back in the year 2013 and 2016. He, thereafter, asserts that allegations made in grounds of detention are vague, non-existent and no

prudent man can make a representation against such allegation and passing of detention on such grounds is unjustified and unreasonable and that detaining authority has mentioned two FIRs in grounds of detention, but according to learned counsel, the allegations against detenu are far from reality. The allegations as reflected in the grounds of detention, as vehemently maintained by learned counsel for petitioner, are vague and do not justify passing of detention order on the basis of such allegations and that detaining authority has not given any reasonable justification to pass detention order, and therefore, impugned order suffers from complete non-application of mind on part of detaining authority. It is also stated that the detaining authority has not attributed any fresh activity which would have warranted passing of the order of detention and detaining authority has in mechanical manner mentioned that normal law has not proved sufficient whereas his own grounds negate this contention. It is also stated that the detaining authority has not furnished the relevant material, like the copy of dossier, the order of detention and the connected material as per the record furnished to the detaining authority by the police and relied upon by the detaining authority for passing the impugned order of detention, nor the relevant material, like copies of FIRs, statement under Section 161 Cr. P.C. of the cases mentioned in the grounds of detention, the seizure memos, the arrest memos, the bail orders have been furnished to the detenu to enable him to make an effective representation by giving his version of facts attributed to him and make an attempt to dispel the apprehensions nurtured by the detaining authority as regards the alleged involvement of the detenu in the alleged activities, against the said order to the competent authority of the detenu in the alleged activities, against the said order to the competent authority since filing of an effective representation is a constitutional right and to enable the detenu to file such a representation it is necessary to provide him the copies of dossier, connecting material to the detenu, therefore, the constitutional right guaranteed to the detenu under Article 22(5) of the Constitution of India stands infringed.

6. *Per contra* learned counsel for respondents has averred that the material, which was relied by the detaining authority, was furnished to the detenu besides the grounds of detention along with the order of detention was supplied to the detenu against proper receipt and the grounds of detention are precise, proximate, pertinent and relevant, and that there is no vagueness or

staleness in the grounds coupled with the definite indications as to the impact thereof, which has been precisely stated in the grounds of detention and the incidents clearly substantiate the subjective satisfaction arrived at by the detaining authority.

7. The reverence of life is insegragably concomitant with the dignity of a human being who is basically divine, not obsequious. A human personality is indued with potential infinitude and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, "a brief candle", or "a hollow bubble". The spark of life gets more splendiferous when man is treated with dignity *sans* humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence". When a dent is created in the reputation, humanism is paralysed. Reverence for the nobility of a human being has to be the cornerstone of a body polity that believes in orderly progress. But, some, the incurable ones, become totally oblivious of the fact that living with dignity has been enshrined in our Constitutional philosophy and it has its ubiquitous presence and the majesty and sacrosanctity dignity cannot be allowed to be crucified in the name of precautionary incarceration. *Albert Schweitzer*, highlighting on Glory of Life, pronounced with conviction and humility, "the reverence of life offers me my fundamental principle on morality". The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands.

8. Article 22(3)(b) of the Constitution of India, which vouchsafes preventive detention, is only an exception to Article 21 of the Constitution. An exception is an exception and cannot ordinarily nullify the full force of main rule, which is right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting civil liberties of people and not to put them in immurement for a long period shorn of recourse to a lawyer and without a trial. It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is that in essence a detention order of three months, or any other period(s), is a punishment of that particular period's incarceration. What difference is it to detenu whether his immurement is called preventive or punitive? Besides, in cases of preventive detention no offence is proved and justification of such detention is suspicion or reasonable probability, and there is no conviction that can only be warranted by legal evidence. Preventive detention is every so often described as a '*jurisdiction of suspicion*', the detaining authority passes the detention order on the subjective satisfaction. The preventive detention is, by nature,

repugnant to the democratic ideas and an anathema to the rule of law. Since Clause (3) of Article 22 specifically excludes applicability of clauses (1) and (2), the detenu is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with procedural safeguards, howsoever technical, is mandatory and vital.

9. The Supreme Court in ***Rekha v. State of Tami Nnadu AIR 2011 SCW 2262***, while making reference to law laid down in ***Kamleshwar Ishwar Prasad Patel v. Union of India and Others (1995) 2 SCC 51***, observed that history of liberty is history of procedural safeguards. These procedural safeguards are required to be zealously watched and enforced by the Court and their rigour cannot be allowed to be diluted on the basis of nature of alleged activities of detenu. The Supreme Court quoted with approval the observation made in ***Ratan Singh v. State of Punjab and others 1981 (4) SCC 481*****,** emphasising need to ensure that the Constitutional and Statutory safeguards available to a detenu were pursued in letter and spirit 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 detenu's.*"

10. The procedural requirements are only safeguards available to a detenu, for the reason that the Court is not expected to go behind the subjective satisfaction of detaining authority. As laid down by the Supreme Court in ***Abdul Latif Abdul Wahab Sheikh v. B. K. Jha and another (1987) 2 SCC* 22**, 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.

11. From the above overview of the case law on the subject of preventive detention, the baseline, that emerges is that whenever the preventive detention is called in question in a court of law, first and foremost task before the Court is to see whether the procedural safeguards guaranteed under Article 22(5) of the Constitution of India and the Preventive Detention Law pressed into

service to slap the detention, are adhered to.

12. The preventive detention is a serious invasion of the personal liberty and the safeguards that the Constitution provides against the improper exercise of the power, must be jealously watched and enforced by the Court, has been said by the Supreme Court in the case of ***Dr. Ram Krishan Bhardwaj v. The State of Delhi and ors 1953 SCR 708***. The detenu has a right, under Article 22(5), to be furnished with the particulars of the grounds of his detention, sufficient to enable him to make a representation, which on being considered may give relief to him. This Constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, and if the same has not been done, the detention cannot be held to be in accordance with the procedure established by the law within meaning of Article 21. The detenu is, therefore, entitled to be released and set at liberty.

13. The right which the detenu enjoys under Article 22(5) is of immense importance. In order to properly grasp the submissions of petitioner stated in the petition on hand, Article 22(5) is gainful to be reproduced hereunder:

> "22(5). When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

14. This Article of the Constitution can be broadly classified into two categories: (i) the grounds on which the detention order is passed must be communicated to the detenu as expeditiously as possible; and (ii) proper opportunity of making the representation against the order of detention be provided.

15. The Constitution Bench of the Supreme Court, more than six decades ago, has interpreted Article 22(5) of the Constitution in ***Dr Ram Krishan Bhardwaj v. The State of Delhi and others, 1953 SCR 708***, observed as under:

> ".....Preventive detention is a serious invasion of personal liberty and such meager safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court. In this case, the petitioner has the right, under article 22(5), as interpreted by this Court by majority, to be furnished with

> particulars of the grounds of his detention "sufficient to enable him to make a representation which on being considered may give relief to him." We are of opinion that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under clause (6) of article 22. That not having been done in regard to the ground mentioned in sub-paragraph (e) of paragraph 2 of the statement of grounds, the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of article 21. The petitioner is therefore entitled to be released and we accordingly direct him to be set at liberty forthwith."

16. In ***Shalini Soni (Smt.) & Others v. Union of India and Others (1980) 4 SCC 544***, it was aptly observed that the accused must have proper opportunity of making an effective representation. The Court observed thus:

> "...Communication of the grounds presupposes the formulation of the grounds and formulation of the grounds requires and ensures the application of the mind of the detaining authority to the facts and materials before it, that is to say to pertinent and proximate matters in regard to each individual case and excludes the elements of arbitrariness and automatism (if one may be permitted to use the word to describe a mechanical reaction without a conscious application of the mind). It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only eschewing the irrelevant and the remote. Where there is further an express statutory obligation to communicate not merely the decision but the grounds on which the decision is founded, It is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went in to make up the mind of the statutory functionary and not merely the inferential conclusions. Now, the decision to detain a person depends on the subjective satisfaction of the detaining authority. The Constitution and the statute cast a duty on the detaining authority to communicate the grounds of detention to the detenu. From what we have said above, it follows that the grounds communicated to the detenu must reveal the whole of the factual material considered by the detaining authority and not merely the inferences of fact arrived at by the detaining authority. The matter may also be looked at from the point of view of the second facet of Article 22(5). An opportunity to make a representation against the order of detention necessarily implies that the detenu is informed of all that has been taken into account against him in arriving at the decision to detain him. It means that the detenu is to be informed not merely, as we said, of the inferences of fact but of all the factual material which have led to the inferences of fact. If the detenu is not to be so informed the opportunity so solemnly guaranteed by the Constitution becomes reduced to an exercise in futility. Whatever angle from which the question is looked at, it is dear that "grounds" in Article 22(5) do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual

> inferences. The 'grounds' must be self-sufficient and self-explanatory. In our view copies of documents to which reference is made in the 'grounds' must be supplied to the detenu as part of the 'grounds'.

17. In ***Icchu Devi Choraria (Smt.) v. Union of India and others (1980) 4 SCC 531***, the Supreme Court dealt with in great detail significance of clause (5) of Article 22 and subsection 3 of Section 3 of COFEPOSA Act. The Court observed:

> "Now it is obvious that when Clause (5) of Article 22 and Sub-section (3) of Section 3 of the COFEPOSA Act provide that the grounds of detention should be communicated to the detenu within five or fifteen days, as the case may be, what is meant is that the grounds of detention in their entirety must be furnished to the detenu. If there are any documents, statements or other materials relied upon in the grounds of detention, they must also be communicated to the detenu, because being incorporated, in the grounds of detention, they form part of the grounds and the grounds furnished to the detenu cannot be said to be complete without them. It would not therefore be sufficient to communicate to the detenu a bare recital of the grounds of detention, but copies of the documents, statements and other materials relied upon in the grounds of detention must also be furnished to the detenu within the prescribed time subject of course to Clause (6) of Article 22 in order to constitute compliance with Clause (5) of Article 22 and Section 3, Sub-section (3) of the COFEPOSA Act. One of the primary objects of communicating the grounds of detention to the detenu is to enable the detenu, at the earliest opportunity, to make a representation against his detention and it is difficult to see how the detenu can possibly make an effective representation unless he is also furnished copies of the documents, statements and other materials relied upon in the grounds of detention. There can therefore be no doubt that on a proper construction of Clause (5) of Article 22 read with Section 3, Sub- section (3) of the COFEPOSA Act, it is necessary for the valid continuance of detention that subject to Clause (6) of Article 22 copies of the documents, statements and other materials relied upon in the grounds of detention should be furnished to the detenu alongwith the grounds of detention or in any event 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. If this requirement of Clause (5) of Article 22 read with Section 3, Sub-section (3) is not satisfied, the continued detention of the detenu would be illegal and void."

18. The Supreme Court in ***Khudiram Das v. State of West Bengal and others (1975) 2 SCC 81***, observed that Article 22(5) insists that all the basic facts and particulars which influenced the detaining authority in arriving at requisite satisfaction leading to passing of the order of detention, must be communicated to detenu. the para 13 of the said judgement is seemly to be reproduced hereunder:

> "..... Section 8(1) of the Act, which merely re-enacts the constitutional requirements of Article 22 (5), insists that all basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to the making of the order of detention must be communicated to the detenu, so that the detenu may have an opportunity of making an effective representation against the order of detention. It is, therefore, not only the right of the Court, but also its duty as well, to examine what are the basic facts and materials which actually and in fact weighed with the detaining authority in reaching the requisite satisfaction. The judicial scrutiny cannot be foreclosed by a mere statement of the detaining authority that it has taken into account only certain basic facts and materials and though other basic facts and materials were before it, it has not allowed them to influence its satisfaction. The Court is entitled to examine the correctness of this statement and determine for itself whether there were any other basic facts or materials, apart from those admitted by it, which could have reasonably influenced the decision of the detaining authority and for that purpose, the Court can certainly require the detaining authority to produce and make available to the Court the entire record of the case which was before it. That is the least the Court can do to ensure observance of the requirements of law by the detaining authority."

19. The Supreme Court in ***Vakil Singh v. State of J&K and another (1975) 3 SCC 545***, clarified that the grounds mean the materials on which the order of detention was primarily based, that is to say, all the primary facts though not subsidiary facts or evidential details. In ***Ganga Ramchand Bharvani v. Under Secretary to the Government of Maharashtra and others (1980) 4 SCC 624***, the Supreme Court observed at paragraph 16 in the following terms:

> "The mere fact that the grounds of detention served on the detenu are elaborate, does not absolve the detaining authority from its constitutional responsibility to supply all the basic facts and materials relied upon in the grounds to the detenu. In the instant case, the grounds contain only the substance of the statements, while the detenu had asked for copies of the full text of those statements. It is submitted by the learned Counsel for the petitioner that in the absence of the full texts of these statements which had been referred to and relied upon in the grounds 'of detention', the detenus could not make an effective representation and there is disobedience of the second constitutional imperative pointed out in *Khudiram's* case. There is merit in this submission."

20. The Supreme Court in ***S. Gurdip Singh v. Union of India and others (1981) 1 SCC 419***, while reiterating the legal position, observed that the failure to furnish the documents or the materials, which formed the basis of the detention order along with the grounds of detention and even on demand subsequently made by the detenu, would amount to failure to serve the

grounds of detention and, therefore, would vitiate the detention order and make it void *ab initio*.

21. In ***Khudiram Das's*** case (supra), Article 22 has been concisely examined. The Supreme Court observed that the detaining authority cannot take away a person and put him behind the bar at its own sweet will. It must have the grounds for doing so and those grounds must be communicated to detenu as expeditiously as possible, so that he can make an effective representation against the order of detention. It was further observed that Article 22 provides various safeguards calculated to protect the personal liberty against the arbitrary restraint without trial. These safeguards are essentially procedural in character and their efficacy depends on the care and caution and the sense of responsibility with which they are regarded by the detaining authority. These are the barest minimum safeguards which must be strictly observed by an executive authority.

22. A four-Judge Bench of The Supreme Court in ***Golam alias Golam Mallick v. State of West Bengal (1975) 2 SCC 4***, reiterated the legal position. The Supreme Court observed as under:

> "No doubt, Clause (5) of Article 22 of the Constitution and Section 8 of the Act do not, in terms, speak of 'particulars' or 'facts', but only of 'grounds' to be communicated to the detenu. But this requirement is to be read in conjunction with and subservient to the primary mandate: "and shall afford him the earliest opportunity of making a representation against the order", in the aforesaid Clause (5). Thus construed, it is clear that in the context, 'grounds' does not merely mean a recital or reproduction of a ground of satisfaction of the authority in the language of Section 3 of the Act; nor is its connotation restricted to a bare statement of conclusions of fact. It means something more. That 'something' is the factual constituent of the 'grounds' on which the subjective satisfaction of the authority is based. All the basic facts and material particulars, therefore, which have influenced the detaining authority in making the order of detention, will be covered by "grounds" within the contemplation of Article 22(5) and Section 8, and are required to be communicated to the detenu unless their disclosure is considered by the authority to be against public interest."

23. The Supreme Court in ***Mohd. Alam v. State of West Bengal, (1974) 4 SCC 463***, observed that the non-communication of the material was violative of Article 22(5) of the Constitution and the Act, inasmuch as it did not intimate

to the detenu the full grounds or the material to enable him to make an effective representation.

24. In ***Kirit Kumar Chaman Lal Kundaliya v. Union of India and others (1981) 2 SCC 436***, it was observed that once the documents are referred to in the grounds of detention it becomes bounden duty of the detaining authority to supply the same to the detenu as part of the grounds or *pari passu* grounds of detention. In the case of ***Ramachandra A. Kamat v. Union of India an dothers (1980) 2 SCC 270***, the Supreme Court clearly held that even the documents referred to in the grounds of detention have to be furnished to the detenu.

25. The Supreme Court in ***Tusha Thakker (Shri) v. Union of India and others (1980) 4 SCC 499***, mentioned that the detenu had a Constitutional right under Article 22(5) to be furnished with copies of all the materials relied upon or referred to in the grounds of detention, with reasonable expedition.

26. In ***Ram Baochan Dubey v. State of Maharashtra and Another (1982) 3 SCC 383***, this Supreme Court reiterated the legal position and observed that mere service of the grounds of detention is not a compliance of the mandatory provisions of Article 22(5) unless the grounds are accompanied with the documents which are referred to or relied on in the grounds of detention. Any lapse would render the detention order void. In ***Sophia Mohd. Bham v. State of Maharashtra and others (1999) 6 SCC 593***, it was observed that effective representation by the detenu can be made only when copies of the material documents which were considered and relied upon by the Detaining Authority in forming his opinion were supplied to him.

27. It was again reiterated in ***District Collector, Ananthapur & Another v. V. Laxmanna (2005) 3 SCC 663***, that the documents and materials relied upon by the detaining authority must be supplied to the detenu for affording him opportunity to make an effective representation.

28. It is worthwhile to mention here that the preventive detention law makes room for the detention of a person without a formal charge and without trial. The person detained is not required to be produced before the Magistrate within 24 hours, so as to give an opportunity to the Magistrate to peruse the record and decide whether the detenu is to be remanded to police or judicial

custody or allowed to go with or without bail. The detenu cannot engage a lawyer to represent him before the detaining authority. In the said background it is of utmost importance that whatever procedural safeguards are guaranteed to the detenu by the Constitution and the preventive detention law, should be strictly followed. Right to liberty guaranteed by Article 21 implies that before a person is imprisoned a trial must ordinarily be held giving him full opportunity of hearing, and that too through a lawyer, because a layman would not be able to properly defend himself except through a lawyer. The importance of a lawyer to enable a person to properly defend himself has been elaborately explained by the Supreme Court in ***A.S. Mohd. Rafi Vs. State of Tamilnadu AIR 2011 SC 308*** and ***Md. Sukur Ali Vs. State of Assam, JT 2011 (2) SC 527***. As observed by *Mr Justice Sutherland* of the U.S. Supreme Court in ***Powell Vs. Alabama, 287 U.S. 45 (1932)*** "*Even the intelligent and educated layman has small and sometimes no skill in the science of law*", and hence, without a lawyer he may be convicted though he is innocent. Article 22(1) of the Constitution makes it a fundamental right of a person detained to consult and be defended by a lawyer of his choice. But Article 22(3) specifically excludes the applicability of clause (1) of Article 22 to cases of preventive detention. Therefore, we must confine the power of the preventive detention to the very narrow limits, otherwise the great right to liberty won by our Founding Fathers, who were also the freedom fighters, after long, arduous, historical struggles, will become nugatory. In ***State of Maharashtra & Ors. Vs. Bhaurao Punjabrao Gawande, (2008) 3 SCC 613*** this Supreme Court observed:

> "...Personal liberty is a precious right. So did the Founding Fathers believe because, while their first object was to give unto the people a Constitution whereby a government was established, their second object, equally important, was to protect the people against the government. That is why, while conferring extensive powers on the government like the power to declare an emergency, the power to suspend the enforcement of fundamental rights or the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights which they regarded as fundamental. The imperative necessity to protect these rights is a lesson taught by all history and all human experience. Our Constitution makers had lived through bitter years and seen an alien Government trample upon human rights which the country had fought hard to preserve. They believed like Jefferson that "an elective despotism was not the Government we fought for". And, therefore, while arming the Government with large powers to prevent

> anarchy from within and conquest from without, they took care to ensure that those powers were not abused to mutilate the liberties of the people. (vide *A.K. Roy Vs. Union of India (1982) 1 SCC 271, and Attorney General for India Vs. Amratlal Prajivandas, (1994) 5 SCC 54*."

29. The Constitution Bench of the Supreme Court in ***M. Nagaraj & ors. Vs. Union of India & ors. (2006) 8 SCC 212***, observed:

> "It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race."

30. The Nine Judge Constitution Bench of the Supreme Court in ***I.R. Coelho (dead) By LRs. Vs. State of T.N., (2007) 2 SCC 1***, observed:

> "It is necessary to always bear in mind that fundamental rights have been considered to be the heart and soul of the Constitution..... Fundamental rights occupy a unique place in the lives of civilized societies and have been described in judgments as & "transcendental", & inalienable, and primordial".

31. In the present case, the contention of the learned counsel for the respondents is that there are very serious allegations against the detenu as he has been creating a feeling of insecurity, pain and fear in the minds of the general public and disturbing the peace and tranquility in the UT of J&K, especially in Anantnag and in this regard the criminal cases are already going on against detenu under various provisions of the Penal Laws and if he is found guilty, he will be convicted and given appropriate sentence. Maybe, offences allegedly committed by detenu attract the punishment under the prevailing laws but that has to be done under the prevalent laws and taking recourse to the preventive detention laws would not be warranted. The detention cannot be made a substitute for ordinary law and absolve the investigating authorities of their normal functions of investigating the crimes, which the detenu may have committed. After all, the preventive detention cannot be used as an instrument to keep a person in the perpetual custody without trial. The Supreme Court in ***Rekha's*** case (supra), while emphasising need to adhere to procedural safeguards, observed:

> "It must be remembered that in case of preventive detention no offence is proved and the justification of such detention case is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as "jurisdiction of suspicion", The Detaining Authority passes the order of detention on subjective satisfaction. Since Clause (3) of Article 22

> specifically excludes the applicability of Clauses (1) and (2), the detenue is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. 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."

32. The Constitution of India – Article 22(5) and Section 13, J&K Public Safety Act 1978, guarantee two important safeguards to detenu – first that detenu is informed of grounds of detention that prompted detaining authority to pass detention order and second that detenu is allowed to represent against his detention immediately after order of detention is made or executed. The Constitutional and Statutory safeguards guaranteed to detenu are to be meaningful only if detenu is handed over material referred to in grounds of detention that lead to subjective satisfaction that preventive detention of detenu is necessary to prevent him from acting in any manner prejudicial to the security of the State or public order and further it is ensured that the grounds of detention are not vague, sketchy and ambiguous so as to keep the detenu guessing about what really weighed with the detaining authority to make the order.

33. Learned counsel for petitioner states, and rightly so, that the detaining authority has not followed the Constitutional and Statutory procedural safeguards as envisioned under Article 22 (5) of the Constitution read with Section 13 of the J&K Public Safety Act, 1978. Grounds of detention are vague and non-existent in the eye of law. His further submission is that there is no nexus, proximate and live link between the allegations levelled in the grounds of detention inasmuch as the last activity referred to and attributed to detenu is of the year 2013/2016, and that imminent threat to the security of the State could not, thus, be deduced possible and preventive detention of the detenu necessitated.

34. The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped, depends on the facts and circumstances of each case. Nevertheless, when there is undue and long delay between the prejudicial activities and the passing of the detention order, the court has to scrutinise whether the detaining

authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such delay has occasioned, when called upon to answer and further the court has to investigate whether the casual connection has been broken in the circumstances of each case. Verily, there is no cogent explanation coming forth from perusal of the grounds of detention as regards live-link between the prejudicial activities and the purpose of detention and as a result whereof the impugned order of detention is liable to be quashed. Reference in this regard is made to ***T.A.Abdul Rahman v. State of Kerala (1989) 4 SCC 741*** and ***Rajinder Arora v. Union of India and others (2006) 4 SCC 796***].

35. It is relevant to say here that the individual liberty is a cherished right that is one of the most valuable fundamental rights guaranteed by our Constitution to the citizens of the country. In the scheme of the Constitution, utmost importance has been given to life and personal liberty of individual. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established. In the matter of preventive detention, there is deprivation of liberty, therefore, safeguards provided by Article 22 of the Constitution of the India, have to be scrupulously adhered to. Procedural reasonableness, which is invoked, cannot have any abstract standard or general pattern of reasonableness. The nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, all provide the basis for considering the reasonableness of a particular provision. The procedure embodied in the Act has to be judged in the context of the urgency and the magnitude of the problem, the underlying purpose of the restrictions and the prevailing conditions.

36. The history of the liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the Court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is of great importance. Personal liberty protected under Article 21, is so sacrosanct and so high in the scale of constitutional values that it is the

obligation of detaining authority to show that impugned detention meticulously accords with the procedure established by law. However, the constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of State's security, public order, disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions. In a case of preventive detention, no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. But at the same time, when a person's greatest of human freedoms, i.e. personal liberty, is deprived, the laws of preventive detention are required to be strictly construed, and a meticulous compliance with the procedural safeguards, howsoever technical, has to be mandatorily made. Reference in this regard is made to ***Haradhan Saha v. The State of West Bengal & Others, (1975) 3 SCC 198*** and ***Union of India v. Paul Manickam & Another, (2003) 8 SCC 342***.

37. It may not be out of place to mention here that preventive detention is not a quick alternative to normal legal process, is the saying of the Supreme Court in ***V. Shantha v. State of Telangana & ors, AIR 2017 SC 2625***. The Supreme Court has held that *preventive detention of a person by a State after branding him a 'goonda' merely because the normal legal process is ineffective and time-consuming in 'curbing the evil he spreads', is illegal* and that detention of a person is a serious matter affecting the liberty of the citizen. Preventive detention cannot be resorted to when sufficient remedies are available under the general laws of the land for any omission or commission under such laws, the Supreme Court observed. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detenu from indulging in further activities which are prejudicial to security of the State or 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. To classify the detenu as a '*notorious stone pelter*' cannot be sufficient to invoke the statutory powers of the preventive

detention. No doubt the offences alleged to have been committed by the detenu are such as to attract the punishment under the prevailing laws but that has to be done under the said prevalent laws and taking recourse to the preventive detention laws would not be warranted. The preventive detention involves the detaining of a person without trial in order to prevent him from committing certain types of offences. But such a detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating the crimes which the detenu may have committed. After all, the preventive detention cannot be used as an instrument to keep a person in the perpetual custody without trial. My views are supported by the views as ingeminated in the judgements rendered in ***Rekha's*** case and ***V. Shantha v. State of Telangana*** case (supra) and ***Sama Aruna v. State of Telengana AIR 2017 SC 2662***.

38. For the reasons discussed above, the petition is disposed of and detention Order No.35/DMA/PSA/DET/2021 dated 17.10.2021, passed by District Magistrate, Anantnag – respondent no.2, directing preventive detention of *Shabir Ahmad Malik S/o Abdul Rashid Malik R/o Bonagund, Verinag District Anantnag*, quashed. Respondents are directed to set detenu at liberty if not required in any other offence. **Disposed of**.

(Tashi Rabstan)
Judge

Srinagar
25 .02.2022
'Shamim Dar'

Whether the order is reportable: Yes