

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

**LPA No. 114/2024 in
HCP No. 85/2023**

Priya Devi @ Mani, Aged 54 years,
W/o Kamlesh Kumar,
R/o Ward No. 4,
Near Govt. Middle School, Village Chak
Drab Khan, Tehsil Kathua, J & K
A/p District Jail, Kathua.

.....Appellant

Through :- Mr. Mayank Gupta, Advocate

v/s

1. UT of J & K through
Principal Secretary, Home Department,
J & K Civil Secretariat, Jammu.
2. Divisional Commissioner, Jammu
Panama Chowk, Jammu.
3. Senior Superintendent of Police, Kathua
DPO Kathua.
4. Superintendent of Jail,
District Jail Kathua, J & K.

.....Respondent(s)

Through :- Mr. Amit Gupta, AAG

**CORAM: HON'BLE MR. JUSTICE ATUL SREEDHARAN, JUDGE
HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE**

**ORDER
30.09.2024**

ORAL

(Atul Sreedharan-J)

1. The present petition has been preferred by the appellant, who is aggrieved of the order/judgment passed by the learned Single Judge in HCP No. 85/2023. By the said judgment, the petition for Habeas Corpus moved by the appellant herein was rejected by the learned Single Judge. The appellant is undergoing detention under the provisions of the Prevention of Illicit Traffic in Narcotic Drugs and

Psychotropic Substances Act, 1988 (hereinafter, for the sake of brevity as '**the PITNDPS Act**').

2. **The brief facts of the case which require reiteration herein are as follows:**

2.1 On the basis of information/material given to the Detaining Authority by the District Police, the Detaining Authority arrived at the subjective satisfaction that the appellant is a recidivist drug peddler who is engaged in illicit trade of narcotics and has been doing so since 2020. The appellant has been apprehended thrice and from her possession illicit drugs were recovered and FIRs against her have been registered in the Police Station concerned.

2.2 It was the case of the State before the learned Single Judge that the detaining authority was aware that the appellant had been enlarged on bail in all the three cases but was of the opinion that if the appellant was set at large, it will bolster her confidence and she would continue with her illegal activities and also may have the propensity of expanding her trade to other parts of the Union Territory, having a detrimental effect on the life of the youth in that area. Subjective satisfaction of the detaining authority was formed upon the material placed by the Police.

2.3 Before the learned Single Judge, there were four grounds that had been raised by the appellant;

2.3.1 Firstly, that the detention of the appellant was ordered by the detaining authority in contravention of the procedure laid down in the PITNDPS violating her constitutional safeguards;

- 2.3.2 Secondly, that the order of the detaining authority did not disclose application of mind and that he failed to appreciate that the appellant, though made an accused in three consecutive FIRs, was granted bail by the competent court, despite the rigors of Section 37 of the NDPS Act. It was also argued before the learned Single Judge that the State was not aggrieved by the enlargement of the appellant on bail as it never moved any application for cancellation of bail granted to the appellant which constituted non application of mind by the detaining authority as so stated by the learned counsel for the appellant;
- 2.3.3 Thirdly, it was argued before the learned Single Judge that the detaining authority failed to accord an appropriate opportunity to the appellant to make an effective representation and that the communication of the detaining authority informing the appellant of her right of making a representation did not indicate the time line within which such representation could have been made before the detaining authority and that the same violated the fundamental right of the detainee under Article 22 (5) of the Constitution of India;
- 2.3.4 Lastly, the ground was taken that the detaining authority failed to take into consideration the fact that the appellant, though involved in three different cases of illicit trafficking of narcotic drugs, the substantive law was sufficient enough and the same was already proceeding against her. In the absence of failure of the ordinary law of the land, the detaining authority could not have resorted to the provisions under the PITNDPS Act.

3. Learned counsel for the appellant has argued that his client is an illiterate housewife and is a resident of Kathua who only understood Punjabi language. He has further drawn our attention to the order of detention and also to the execution report. On the basis of the said documents, the learned counsel for the appellant has stressed that the said documents do not disclose that her right to make a representation before the detaining authority was informed to her in Punjabi language which according to learned counsel for the appellant is her mother-tongue.
4. Learned counsel for the appellant has also submitted that failure to inform the appellant about her right to move a representation before the detaining authority within a specified time limit, vitiated the order of detention, as the appellant was left without recourse to move a representation, after the Government had taken a decision approving the order of detention thereby, rendering the detaining authority *functus- officio*.
5. Learned counsel for the appellant has also placed before us a compendium of judgments but has sought to rely upon two of them. The first judgment has been passed by the learned Single Judge of this Court in **Sheela Devi @ Sheelo vs. UT of J & K & Ors.** in case bearing HCP No. 72/2023. He has specifically referred to Paragraph 15 of the said judgment. The other judgment that has been relied upon by the learned counsel for the appellant is a judgment passed by the Hon'ble High Court of Allahabad in **Jitendra vs. Dist. Magistrate** bearing Writ Petition No. 432 of

2003 (HC). He has specifically referred to Paragraphs 10 and 11 of the said judgment. We shall deal with the said judgments in due course.

6. Learned counsel for the Union Territory, on the other hand, has vehemently opposed any interference by this Court against the order passed by the learned Single Judge, which the learned counsel for the respondents submits has been a well considered judgment and which has been passed after discussing the facts and circumstances of the case. Our attention has been drawn to Paragraph 16 of the said judgment, which we shall refer to in due course.

7. **Heard learned counsel for the parties and pursued the documents along with the appeal and the record of the case.**

8. The appellant has been arrested on 05.09.2023 and allegedly Heroin was recovered from her between 02 to 04gms which constitutes small quantity. It is undisputed by the Union Territory that she was granted bail in the said case. The ground of bail has been considered by the detaining authority in the grounds of detention. There were two other cases against the appellant in the year 2022 which is also not disputed by the learned counsel for the appellant which were also under the same provisions of the NDPS Act in which she was apprehended and from her possession small quantity of Heroin was recovered. Undisputedly, in those two cases also, the appellant was granted bail by the learned Trial Court. However, the same notwithstanding, in the judgment of the detaining authority, it

was found necessary to detain the appellant under the stringent provisions of the PITNDPS Act as she was repeatedly found in possession of Heroin in three different cases, back to back, within a period of two years. Thus, there was a reasonable apprehension that arose that the appellant may not have been merely a consumer of the drugs but was deliberately carrying small quantities of Heroin in order to ensure that she would get the benefit of a bail order in her favour in the event she was apprehended.

9. In this regard, in Paragraph 16 of the judgment passed by the learned Single Judge, it has been taken into account that the appellant was indulging in illicit trafficking of drugs but carrying the same in small quantity so that bail would be therefore the asking, if she ever caught and the rigors of Section 37 of the NDPS Act would not apply. Here also, it has never been stated by the appellant that she was a user of the said drug and was a drug addict. Under the circumstances, the apprehension of the Detaining Authority that the appellant may be indulging in a drug trade appears to be reasonable.
10. The next contention of the learned counsel for the appellant that the finding of the learned Single Judge in Paragraph 19 is defective where the learned Single Judge has held that the failure of the State to move an application before the learned Court below for cancellation of bail granted to the appellant would have been futile and not be yielded any result, which the learned counsel for the appellant says was speculative as it was for the learned court below,

to decide whether any such application for cancellation of bail ought to be granted or not. This Court is of the considered opinion that the observation/finding of the learned Single Judge cannot be faulted as, the law relating to cancellation of bail has crystallized over a long period of time. The benefit of bail once granted can be cancelled by the same court that has granted the bail only where the conditions of the bail have been violated. In other words, if the conditions laid down by the learned Court below at the time of granting bail have not been violated by the recipient of the bail, the court that granted bail could not have cancelled it. The Superior Court can cancel the bail on the additional ground that the order granting bail was out rightly perverse and ought not to have been granted and ground of such bail would detrimentally effect the ongoing investigation or that the bail order was passed without taking material on record into consideration.

11. Thus, the finding of the learned Single Judge in Paragraph 19 of the impugned order cannot be faulted, as moving an application for cancellation of bail is not something that can be resorted to in routine. There has to be ample grounds for moving an application for cancellation of bail and it is also the discretion of the police as the prosecuting authority, whether such an application should be moved.
12. As regards the judgments which have been referred and relied upon by the learned counsel for the appellant, the judgment passed by the learned Single Judge in **Sheela Devi @ Sheelo** (supra) with specific

reference to Paragraph 15 would not apply in the facts and circumstances of the present case, as in **Sheela Devi @ Sheelo's** case, the learned Single Judge held that there was no receipt of the documents, as in that case, some of the documents that were supplied to the detenu were blank and legible copies of the same were not furnished to the detenu. In the present case, there is no such ground taken.

13. As far as, the judgment of Allahabad High Court in **Jitendra** (supra) is concerned, the Court held that the order of detention was vitiated as the detenu's right to make a representation to the Detaining Authority was only available to him till the approval of the detention order by the Government. Whenever a judgment has to be examined as a precedent in the backdrop of the facts and circumstances of that case.
14. In this case, the undisputed fact is that the appellant has never moved a representation till date either before the District Magistrate or the Government. Merely because there was a failure of the Detaining Authority to inform the detenu that her representation before the detaining authority ought to be made within a time frame before the approval of the order of detention by the Government, rendering the detaining authority *functus-officio*, cannot be applied pedantically. It could have been considered by this Court had the appellant made a representation before the Detaining Authority which disclosed its inability to consider the same on account of having become the *functus-officio*, as the Government had already

approved the order of detention before the presentation of the representation before the Detaining Authority. In such a case, this Court may have been persuaded to take the view that there is prejudice caused to the detainee, as one available forum for being heard was lost. However, that is not the case in the present appeal, as the undisputed fact is that no representation was ever made and has not been made till date by the appellant.

15. In view of what has been argued and considered, we find no reason to interfere with the order passed by the learned Single Judge and accordingly, **this appeal is dismissed** along with connected application(s), if any.

16. **Interim direction, if any, shall stand vacated.**

(Sanjay Dhar)
Judge

(Atul Sreedharan)
Judge

JAMMU
30.09.2024
Manan

Whether the order is speaking : *Yes*

Whether the order is reportable : *No*