

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

WP(Crl) No. 254/2023

Reserved on: 12.12.2023

Pronounced on: 18.12.2023

Tariq Ahmad Wagay @ Tariq Choudary Aged 40 Yrs.
S/O Abdul Rehman Wagay
R/O Pazipora D H Pora District Kulgam
Through his wife Rehana Aged 35 years.

...Petitioner(s)

Through: Mr.Asif Ali Dar , Advocate.

vs.

1. U T of Jammu & Kashmir through
Principal Secretary to Govt. Home Department
Civil Secretariat Srinagar/Jammu.
2. Divisional Commissioner, Kashmir Srinagar

...Respondent(s)

Through: Mr. Sajad Ashraf, GA.

CORAM: HON'BLE MR. JUSTICE M. A. CHOWDHARY, JUDGE

JUDGMENT

1. Petitioner Tariq Ahmad Wagay @ Tariq Choudary (hereinafter called detenu) was taken into preventive custody under Section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (for short 'the Act') in terms of the order of detention bearing No. DIVCOM-K/328/2022 dated 23.12.2022 passed by respondent no. 2 (for short 'the impugned order) and the same has been challenged and sought to be quashed through the medium of this criminal writ petition.

2. The impugned order is assailed by the petitioner on the grounds that the allegations made in the grounds of detention are vague, non-existent and no prudent man can make a representation against such allegation and passing of detention order on such grounds is unjustified and unreasonable; that the detaining authority has mentioned one FIR in the grounds of of detention, however, no specific allegation has been given regarding the involvement of the detenu in the cases mentioned in grounds of detention/dossier as such the impugned order of detention suffers from complete non-application of mind on the part of detaining authority; that the respondents have not followed the provisions of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 and the same has caused great prejudice to the petitioner, therefore, the impugned order passed by respondent no. 2 is bad in the eyes of law; that the allegations against the petitioner in the dossier are full of flaws and same needs to be quashed.; that the detaining authority has not prepared the grounds of detention by itself, which is a pre-requisite for it before passing any detention order; that the respondent no. 2 has not furnished the relevant material like copy of dossier and so called connected material as per record furnished to the detaining authority by police to the detenu so as to enable him to make an effective and meaningful representation to the competent authority against his detention, therefore the constitutional rights guaranteed to the detenu

under Article 22(5) of the Constitution of India stand infringed and for that reason and that for the aforestated reasons the impugned order vitiates and is liable to be quashed.

3. Respondents pursuant to notice, have not chosen to file their counter affidavit, however, record has been produced which reveals that the detenu indulged in drug trafficking and smuggling. The detenu was apprehended by Police in a case registered vide FIR No. 120/2021 U/Ss 8/21/29 NDPs Act at P/S Bahu Fort Jammu during Naka checking at JDA parking near Bahu Fort Jammu, on 16.04.2021 and at the time of arrest, 30 grams of brown sugar was recovered/seized from his possession. The material seized from the detenu was sent to Forensic Science Laboratory, to ascertain its veracity; that the detenu was clandestinely dealing in illegal business of Narcotics and in order to carry out this illegal trade, the detenu was exploiting the immature minds of the younger generation by making them dependent on drugs and habitual addicts. The detenu was ordered to be detained in accordance with the provisions of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988; that the detenu is an active member of the drug mafia which is hell bent to spoil the life and career of young generation by selling drugs to them. The detention of the detenu has been passed in accordance with the law and all the statutory and constitutional safeguards were observed, as such, the impugned order being legal in nature, requires to be upheld.

4. Learned counsel for the petitioner submits that the allegations made in the grounds of detention are vague, non-existent and no prudent man can make a representation against such allegations and passing of detention on such grounds is unjustified and unreasonable. It is urged by learned counsel for the petitioner that the impugned order on the ground that the detaining authority has not mentioned in the grounds of detention that the detenu has been granted bail in FIR No. 120/2021 which speaks volumes about the non-application of mind on the part of the detaining authority; that the entire material has not been given to the detenu which formed basis for passing detention order; that the alleged activity mentioned in the grounds of detention is of the year 2021 i.e. FIR No. 120/2021, whereas impugned detention order has been passed after more than a year that is on 23.12.2022; that no fresh activity, according to him, between the last alleged activity and passing of impugned detention order renders unsustainable; that the petitioner had been bailed out in case FIR No. 120/2021 of P/S Bahu Fort Jammu on 21.8.2022, having been arrested on 16.4.2021, whereas detention order was passed on 23.12.2022, however no mention has been made with regard to grant of bail in favour of the petitioner in the Detention Order by the Detaining Authority indicating non-application of mind; that there was inordinate delay in execution of the detention order

having been executed on 15.05.2023 after a period of about six months, which also renders the order, there being no urgency, unsustainable. He lastly prayed that the order impugned, whereby petitioner's liberty has been curtailed be set aside and quashed in the interest of justice.

5. Learned counsel for the respondents, ex-adversus, argued that the detention of the detenu was required to prevent him from anti-social activities as he was indulging in Drug Trafficking and 30 Grams of Brown Sugar had been recovered from his possession and he was detained in a case FIR No. 120/2021 registered at Police Station Bahu Fort Jammu; that the activities of the detenu were detrimental to the society as he was found to be indulging in the drug trafficking; that it is settled law that the preventive detention can be ordered by the detaining authority in case a satisfaction is drawn with regard to his activities prejudicial to the public order, as well as, to protect society from anti-social activities. He has further argued that the petitioner had been provided entire record which was based to order his detention and further submitted that the petitioner was informed about his legal right of filing representation against his detention to the detaining authority, as well, as to the Govt., however, the detenu had not opted to file the representation. He further submitted that while passing detention order the constitutional and statutory requirements were fulfilled by the detaining authority and the petitioner has no case for breach of any of these provisions. The contents of the detention order/warrant and the grounds of

detention had been read over and explained to the detinue in the language which he fully understood and in lieu whereof the detinue subscribed his signatures of the Execution report/order; that the detinue was also well informed about his right of making of representation to the detaining authority and to the Govt. against his detention. The respondents in the process have complied with all statutory, constitutional provisions and followed all requisite formalities, as such, had not violated any of them. The order in question has been issued validly and legally. It is further submitted that the grounds of detention are precise, proximate, pertinent and relevant and there is no vagueness or staleness in the grounds of detention coupled with definite indications, as to the impact thereof which has been precisely stated in the grounds of detention. The incidents clearly substantiate the subjective satisfaction arrived at by the answering respondents and finally it was prayed that the petition be rejected.

6. Heard learned counsel for both sides and considered. Record has been also perused.
7. On perusal of the detention record produced by learned counsel for the respondents, the ground projected regarding vagueness of the averments made in the grounds of detention, appears to be forceful. A perusal of the grounds of detention would show that there is no mention of the particulars of the places, period and the identity of the operatives of the alleged drug mafia. These grounds, being vague and lacking in material particulars, the

detenue could not have made an effective representation against his detention. Thus, there has been violation of constitutional guarantees envisaged under Article 22(5) of the Constitution. Therefore, the detention order is unsustainable. In my aforesaid view, I am fortified by the judgments of the Supreme Court in the case of *Jahangir khan Fazal Khan Pathan vs. Police Commissioner, Ahmadabad, (1989) 3 SCC 590, Abdul Razak Nane khan Pathan v. Police Commissioner, Ahmadabad, AIR 1989 SC 2265, , Mohd. Yousuf Rather vs. State of J&K & Ors, 1979 4 SCC 370 and Piyush Kantilal Mehta vs. The Commissioner of Police, Ahmedabad City and Ors. 1989 (1) Crimes 176 (SC).*

8. So far as the ground other projected by learned counsel for the petitioner that entire record which based the impugned order has not been supplied to the detenue is concerned, a perusal of the detention record reveals that the petitioner has been provided copies of detention warrant and grounds of detention only. Apart from this, if we have a look at the grounds of detention, it bears reference to FIR No.120/2021 for offences under Sections 8/21/22/29 of NDPS Act registered with Police Station, Bahu Fort, Jammu and there is no mention with regard to other FIRs. It was incumbent upon respondents to furnish not only the copy of the FIR but also the statements of witnesses recorded during investigation of the said FIR and other material on the basis of which petitioner's involvement in the FIR is shown. Copies of

dossier, FIR, Statements of witnesses and other related documents have not been provided to him. Thus, contention of the petitioner that whole of the material relied upon by the detaining authority, while framing the grounds of detention has not been supplied to him, appears to be well-founded. Thus, vital safeguards against arbitrary use of law of preventive detention have been observed in breach by the respondents in this case rendering the impugned order of detention unsustainable in law.

9. It needs no emphasis that the detenu cannot be expected to make an effective and purposeful representation, which is his constitutional and statutory right guaranteed under Article 22(5) of the Constitution of India, unless and until the material, on which detention is based, is supplied to the detenu. The failure on the part of detaining authority to supply the material renders detention order illegal and unsustainable. While holding so, I am fortified by the judgments rendered in *Sophia Ghulam Mohd. Bham V. State of Maharashtra and others (AIR 1999 SC 3051)* and, *Haris Etc. Etc Thahira. V. Government of Karnataka & Ors (AIR 2009 SC 2184)*.
10. In view of the legal position, as discussed hereinabove, and in particular, having regard to the fact of non-furnishing of entire material, on which the detention order has been based, to the detenu has made him disabled to make an effective and meaningful representation against the detention order, vitiates the same which is not sustainable and is, therefore, liable to be quashed on this count alone.

11. In view of the case set up and submissions made by learned counsel for the parties, it would be appropriate to say that perusal of grounds of detention reveals that last activity, in which detenu allegedly indulged took place in the year 2021 and not only this, the detenu had been admitted to bail in that case. The detention of the detenu has been ordered on the basis of FIR No. 120/2021 registered in the year 2021, therefore, this case has no proximity of time with the detention order. Respondents have failed to explain the delay in passing the order of detention and therefore, on this ground alone impugned order is liable to be quashed. This important fact of the matter is missing in the grounds of detention and reliance on case-FIR No.120/2021 by detaining authority to arrive at subjective satisfaction, amounts to non-application of mind on the part of detaining authority. The Supreme Court in ***Rajinder Arora v. Union of India (2006) 4 SCC 696*** has held that if no explanation is furnished for long delay in passing order of detention, the same is vitiated in law. Live and proximate link between the past conduct of the detenu and the imperative need to detain have to be harmonized to rely upon the alleged illegal activities of the detenu. Old and stale incidents shall be of no use to order detention, as has been held in “**Sama Aruna Vs State of Telangana & Anr.**” reported as (2018) 12 SCC 150.

Relevant paragraph No.16 is extracted as under:

“16. Obviously, therefore, the power to detain, under the Act of 1986 can be exercised only for preventing a person from engaging in or pursuing or taking some action which adversely affects or is likely to affect adversely the maintenance of public order; or for preventing him from making preparations for

engaging in such activities. There is little doubt that the conduct or activities of the detenu in the past must be taken into account for coming to the conclusion that he is going to engage in or make preparations for engaging in such activities, for many such persons follow a pattern of criminal activities. But the question is how far back? There is no doubt that only activities so far back can be considered as furnish a cause for preventive detention in the present. That is, only those activities so far back in the past which lead to the conclusion that he is likely to engage in or prepare to engage in such activities in the immediate future can be taken into account. In Golam Hussain vs State of W.B, this Court observed as follows:(SCC p.535 para 5)

5. "No authority, acting rationally, can be satisfied, subjectively or otherwise, of future mischief merely because long ago the detenu had done something evil. To rule otherwise is to sanction a simulacrum of a statutory requirement. But no mechanical test by counting the months of the interval is sound. It all depends on the nature of the acts relied on, grave and determined or less serious and corrigible, on the length of the gap, short or long, on the reason for the delay in taking preventive action, like information of participation being available only in the course of an investigation. We have to investigate whether the causal connection has been broken in the circumstances of each case".

Suffice it to say that in any case, incidents which are said to have taken place nine to fourteen years earlier, cannot form the basis for being satisfied in the present that the detenu is going to engage in, or make preparation for engaging in such activities".

12. Another important aspect of the case is that there was inordinate and unexplained delay in execution of the impugned order. Detention order was passed by the detaining authority on 23.12.2022, however, the same was executed on 15.05.2023, after an inordinate delay of more than five months, without any difficulty faced in execution thereof. Resort to preventive detention has to be taken only in cases where there is an urgent need to detain a person so as to prevent him from indulging in activities which are prejudicial to the maintenance of public order or security of the State. When there is unsatisfactory and unexplained delay in executing the order of detention, such delay

would throw considerable doubt on the genuineness of the subjective satisfaction recorded by the detaining authority. This would lead to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu.

13. The Supreme Court has, in the case of *Manju Ramesh Nahar vs. Union of India and others*, AIR 1999 SC 2622, while considering a similar situation observed as under:

“This object can be achieved if the order is immediately executed. If, however, the authorities or those who are responsible for the execution of the order, sleep over the order and do not execute the order against the person against whom it has been issued, it would reflect upon the satisfaction of the detaining authority and would also be exhibitiv of the fact that the immediate necessity of passing that order was wholly artificial or non-existent”.

In another decision in *SMF Sultan Abdul Kader vs. Jt. Secy, to Govt. of India & Ors.*, (1998) 8 SCC 343, the Supreme Court has held unexplained delay in execution of the order of detention to be fatal.

14. For the foregoing reasons and the discussion made hereinabove, this petition is allowed. The impugned Detention Order bearing No. DIVCOM-K/328/2022 dated 23.12.2022, is quashed. The detenu namely Tariq Ahmad Wagay @ Tariq Choudary S/O Abdul Rehman Wagay R/O Pazipora DH Pora, District Kulgam is directed to be released from custody, if not required in any other case(s). Detention record produced by learned GA be returned to him in the open court.

15. Disposed of accordingly.

(M. A. CHOWDHARY)
JUDGE

Srinagar
18.12.2023
Mujtaba.

Whether the order is reportable: Yes / No