

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

...
HCP No. 19/2023
CM No. 4789/2023

*Reserved on: 31.05.2024
Pronounced on: 06.06.2024*

Shabir Ahmad Parray alias Kamal, Aged 40 years
S/o Mohammad Kamal Parray
R/o Chersoo Katipora Tehsil Awantipora, Pulwama
through his father Mohammad Kamal Parray Aged 70 Years
S/o Ab. Karim Parray
R/o Chersoo Katipora, Pulwama Kashmir.

.....Petitioner(s)

Through:
Mr. Usman Gani, Advocate

Versus

1. UT of Jammu and Kashmir through Commissioner Secretary to Government
Home Department Civil Secretariat, Srinagar.
2. Divisional Commissioner, Kashmir
3. Superintendent Central Jail, Kot Bhalwal, Jammu

.....Respondent(s)

Through:
Mr. Mubeen Wani, Dy. AG

CORAM:

HON'BLE MS JUSTICE MOKSHA KHAJURIA KAZMI, JUDGE

J U D G M E N T

1. Challenge is made in the instant petition to the order No. Divcom/RA-Detn./427/7213108/2023 dated 06.07.2023 of Divisional Commissioner, Kashmir– respondent No.2 herein, whereby one *Shabir Ahmad Parray Alias Kamal Son of Mohammad Kamal Parray Resident of Chersoo Katipora Tehsil Awantipora, District Pulwama* (herein after referred to as “detenue”) has been placed under preventive detention primarily on the grounds of non-

application of mind; representation having not been considered and the non-furnishing of the requisite material.

BRIEF FACTS

2. Precisely, the detenue has been placed under preventive detention after having been found involved in case FIR Nos., 41 of 2010 and 54 of 2023 of Police Station, Awantipora, for the commission of offences punishable in terms of Sections 15/18 and 8/20-29 of NDPS Act, respectively.

3. It is being pleaded that the detenue after having been arrested in the aforesaid FIRs, has been released on bail by the competent Court of jurisdiction. The detenue is pleaded to be innocent, having been falsely implicated in the aforesaid FIRs on the basis of certain personal enmity.

4. It is also pleaded in the petition that the procedural safeguards have not been followed in the instant case, resulting in infringement of fundamental rights of the detenue. In support of such plea it is pleaded that the documents on the basis of which the preventive detention was ordered have not been furnished to the detenue thereby depriving him from making an effective representation against his detention. However, the detenue made a representation to the higher authorities on the basis of whatever documents were furnished to him which too was not considered, as no decision was conveyed to the detenue in this behalf. It is submitted that the dossier has been sent to the detaining authority by Senior Superintendent of Police concerned on 31.05.2023, while as the detention order was issued on 06.07.2023, after a period of 35 days, meaning thereby that the activities of the detenue were not found so prejudicial by the detaining authority to detain the detenue under preventive detention instantly.

5. Per contra, the respondents, in their counter affidavit, have stated that the detainee had been arrested in case FIR No. 54 of 2023 under Section 8/20-29 NDPS Act of Police Station, Awantipora while he was carrying 5 grams of Heroin and 170 grams of Ganja. The detainee is also stated to have been involved in case FIR No. 41 of 2010 under Section 15/18 NDPS Act, of Police Station, Awantipora. Furthermore, the respondents have stated in their counter affidavit that the detainee is clandestinely dealing in illegal business of Narcotics and is exploiting the younger generation by making them dependent on drugs. The activities of the detainee have been stated to be highly prejudicial having adverse effects on the society and his remaining at large would cause a great risk to the society in general and the younger generation in particular. The activities of the detainee warranted exercise of preventive detention.

6. Heard learned counsel for the parties and considered the submissions made.

7. The perusal of the material placed on record would reveal that the respondents have not effectively controverted the pleas raised by the detainee in his petition. The detainee in his petition has taken as many as 31 grounds (a to z and aa to ee) to question and challenge the veracity of the detention order, however, the respondents in their counter affidavit have only replied a few of such grounds (a to o).

8. It needs no emphasis that the detainee cannot be expected to make a meaningful exercise of his Constitutional and Statutory rights guaranteed under Article 22 (5) of the Constitution of India and Section 13 of Jammu and Kashmir Public Safety Act, 1978, unless and until the material on which the detention order is based, is supplied to detainee. It is only after the detainee has

the entire material available, that he can make an effort to convince the Detaining Authority and thereafter Government that their apprehensions, as regards his activities, are baseless and misplaced. The learned counsel for the detainee while making submissions had submitted that the detainee was not provided the material, therefore, he could not file an effective representation against his detention, which is controverted by the respondents. The perusal of the record would show that the detainee has not been provided the legible documents forming basis for his detention, therefore, even if the argument of the respondents, that the detainee was provided the material relied upon, is taken to be correct, yet the detainee is deprived of his right of making an effective representation to the detaining authority for having not been provided the legible documents. While holding so, I draw support from *Tahira Haris etc. etc. Vs. Government of Karnataka, reported as AIR 2009 SC 2184*.

9. There is no doubt that the Courts cannot, on a review of the grounds, substitute its own opinion for that of the detaining authority, and cannot act as a court of appeal, it is solely the domain of the detaining authority to reach to a subjective satisfaction. However, this does not mean that the subjective satisfaction of the detaining authority is wholly immune from judicial reviewability. The courts have by judicial decisions carved out an area, limited though it be, within which the validity of the subjective satisfaction can yet be subjected to judicial scrutiny. The basic postulate on which the courts have proceeded, is that the subjective satisfaction being a condition precedent for the exercise of the power conferred on the Executive, the Court can always examine whether the requisite satisfaction is arrived at by the authority: if it is not, the condition precedent to the exercise of the power would not be fulfilled

and the exercise of the power would be bad. There are several grounds evolved by judicial decisions for saying that no subjective satisfaction is arrived at by the authority as required under the statute. The simplest case is whether the authority has not applied its mind at all; in such a case the authority could not possibly be satisfied as regards the fact in respect of which it is required to be satisfied.

10. The very vital aspect of the matter is that the father of the detenu is on record of having submitted a representation to the detaining authority, as would the receipt placed on record show, which does not appear to have been considered and decided as there is nothing available on the file to suggest so. Once the fundamental right envisaged by the Constitution is violated with impunity by the detaining authority while issuing the detention order, the whole detention order itself gets clouded. Reliance in this behalf is placed on the Judgment of Supreme Court titled as ***Sarabjeet Singh Mokha Vs. The District Magistrate, Jabalpur & Ors.***, reported as **2021 SCC online SC 1019**. Para 46 being relevant is taken note of:-

“46 By delaying its decision on the representation, the State Government deprived the detenu of the valuable right which emanates from the provisions of Section 8(1) of having the representation being considered expeditiously. As we have noted earlier, the communication of the grounds of detention to the detenu “as soon as may be” and the affording to the detenu of the earliest opportunity of making a representation against the order of detention to the appropriate government are intended to ensure that the representation of the detenu is considered by the appropriate government with a sense of immediacy. The State Government failed to do so. The making of a reference to the Advisory Board could not have furnished any justification for the State Government to not deal with the representation independently at the earliest. The delay by the State Government in disposing of the representation and by the Central and State Government in communicating such rejection, strikes at the heart of the procedural rights and guarantees granted to the detenu. It is necessary to understand that the law provides for such procedural safeguards to balance the wide powers granted to the executive under the NSA. The State Government cannot expect this Court to uphold its powers of subjective satisfaction to detain a person, while violating the procedural guarantees of the detenu that are fundamental to the laws of preventive detention enshrined in the Constitution.”

11. It is quite explicit that the basis for issuing the preventive detention in question had been the two FIRs registered against the detainee wherein he has admittedly been granted bail by the competent court of law. This important aspect of the matter has been lost sight of by the respondents as the Counter affidavit does not contain any specific averment in this behalf. All that is reflected therein is a general averment that the respondents enjoy the power and authority to pass detention order even after the bail has been granted in favour of the accused/detenu. This proves the allegation of non-application of the mind on the part of the detaining authority. In this regard reference is made to the Judgment rendered recently in case titled **Ameena Begum Vs. State of Telangana** reported as (2023) 9 SCC 587.

12. Viewed thus, the petition is allowed and detention order No. Divcom/RA-Detn./427/7213108/2023 dated 06.07.2023 of Divisional Commissioner, Kashmir—respondent No.2 herein, whereby one *Shabir Ahmad Parray Alias Kamal Son of Mohammad Kamal Parray Resident of Chersoo Katipora Tehsil Awantipora, District Pulwama, was detained*, is quashed and the respondents are directed to release the detainee forthwith, if not required in any other case.

13. Disposed of.

(MOKSHA KHAJURIA KAZMI)
JUDGE

Srinagar

06.06.2024

"Mohammad Yasin Dar"

Whether the Judgment is reportable: Yes/No.
Whether the Judgment is speaking: Yes/No.