HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

HCP No. 37/2023

Reserved on: 22.12.2023
Pronounced on: 06.02.2024

Balwander Singh @ Goru (Aged: 20 years)
S/O Swaran Singh
R/O Rahya Ranjari District Samba
At present lodged in District Jail Kathua, J&K.

…Petitioner(s)

Through: Mr. K.S. Johal, Sr. Advocate with
Mr. Supreet Singh Johal, Advocate.

V/s

1. **Union Territory of Jammu & Kashmir through Commissioner cum Secretary to Government Home Department, Government of Jammu & Kashmir, Civil Secretariat, Jammu.**
2. **District Magistrate, Nandini Hills, Samba, J&K.**
3. **Senior Superintendent of Police, Samba, J&K.**
4. **Superintendent District Jail, Kathua, J&K.**

…Respondent(s)

Through: Mr. Vishal Bharti, Dy. AG.

CORAM: HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE.

JUDGMENT

1. Through the medium of the present petition, the petitioner (detenue) is seeking quashment of the order of detention bearing No. 04/PSA of 2023 dated ***22.07.2023*** *(hereinafter for short, the* '***impugned order***') passed by

District Magistrate, Nandini Hills, Samba, J&K (detaining authority) under ***Section 8*** of the J&K Public Safety Act, 1978 (*for short, the* ***Act of 1978***).

"Arguments on behalf of Petitioner"

2. It is contended by the learned counsel for the detenue that the impugned order is passed on the basis of four FIRs registered against the petitioner, out of which challan has been produced against the petitioner in **FIR No. 299/2021** dated **28.12.2021** for commission of offences under Section 341/323/406/504 Indian Penal Code and **FIR No. 50/2023** dated **29.4.2023** for commission of offences under Section 8/22/25 Narcotics Drugs and Psychotropic Substances Act, 1985 (Hereinafter NDPS Act) and in the FIR Nos. 26/2022 and 162/2023, the investigation is stated to be under process.

3. It is submitted that the impugned order and the grounds of detention had been passed on assumption and not on the basis of mandate of the Act 1978. It is further submitted that the grounds of detention are substantially based on FIRs registered against the petitioner and alleged offences stated in FIRs and the facts narrated, do not make any case for acting in any manner prejudicial to the maintenance of public order and, furthermore, the allegation made against the petitioner of "often indulging into of peddling of Narcotic" is not supported by the grounds of detention and only one FIR with respect to the offence under NDPS Act is registered against the petitioner, and as such, the threat to public order under Section 8 of the Act of 1978 is not coming forth from the impugned order.

4. It is further contended that the essential material that formed the basis for passing of the impugned order, i.e., dossier and the complete

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investigation of the FIRs alleged in the Dossier including the recovery memos, have not been supplied to the petitioner, as such, the petitioner has been prevented from making effective representation against the impugned order.

5. In FIR No. 299/2021, the charge-sheet is supplied to the detenue except for statement of witnesses, seizure memo, other evidence gathered against the petitioner during investigation and the petitioner has only been supplied with the charge-sheet alongwith list of witnesses.

6. In FIR No. 26/2022, no material whatsoever besides a Copy of the FIR is supplied to the petitioner. Further, in FIR No. 50/2023, no charge-sheet in this FIR much or less any material collected during investigation has been supplied to the petitioner except for a copy of the FIR, which has resulted in defeating the rights guaranteed to the petitioner in terms of Section 13 Clause (1) and (2) of the Public Safety Act, 1978 and Article 22 of the Constitution of India.

7. It is submitted that the provisions for execution of detention order as provided under Section 9 of the Act of 1978 have not been complied with in the present case, as the impugned order has not been read over and explained to the petitioner in the language he understands. It is submitted that the impugned order has been passed without application of mind and in an arbitrary manner, as at time of passing of the impugned order, the detaining authority was aware that the petitioner was already in judicial remand for seven days with effect from 20.07.2023 in District Jail, Kathua in connection with FIR No. 162/2023, registered with Police Station, Bari Brahmana .The fact that petitioner was already in judicial remand evidences

that the ordinary law was sufficient to deter the petitioner from commission of future offence and the detaining authority has failed to spell out the reasons, on the basis of which, the imposition of detention became imperative while the detenue was admittedly in judicial custody.

8. It is further submitted by the ld. Counsel for the detenue that the order impugned has neither been confirmed by the Advisory Board till date nor has the petitioner been communicated of any proceedings of the Advisory Board till date. Furthermore, the detention order passed by the District Magistrate, has not been approved by the Government within twelve days, as such, the impugned order deserve to be quashed.

"Arguments on behalf of Respondents"

9. *Per Contra*, learned counsel for the respondents have submitted that the petitioner is a notorious criminal involved in number of criminal activities and as many as four FIRs have been registered against him. Despite having so many FIRs being registered against him detnue has continuously been indulging in criminal activities and has not shown any respect for the law of land thereby has created a sense of alarm, scare and feeling of insecurity in the minds of the public of the area, and as such, has been detained under the Act of 1978 vide impugned order after perusing the grounds of detention with regard to the involvement of the petitioner in a number of criminal cases. It is further submitted that the order of detention has been passed after duly considering the dossier, copies of FIR's and other supporting documents received from the Respondent No.3, i.e., Senior Superintendent of Police, Samba alongwith the relevant statutory provisions. It is further submitted that the basis of detention was the satisfaction of the detaining authority on a

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reasonable probability of likelihood of detenue acting in a manner similar to his past acts and prevent him from doing the same. As per the stand of respondents, the petitioner has been found constantly involved in various criminal activities, therefore, while taking into account continuous past activities of the petitioner, the detaining authority has found it imperative and necessary to detain the petitioner, inasmuch as, preventing him from indulging in the said activities, however, not with an object to punish him for something he has done, but to prevent him from doing it.

10. It is specific stand of the learned counsel for the respondents that the grounds communicated to the petitioner are self-sufficient and self-explanatory, as they reveal the whole of the factual material considered by the detaining authority at the time of passing of the detention order. The order of detention has been passed by detaining authority as a precautionary measure based on a reasonable prognosis of the future behavior of the petitioner as well as his past conduct. It is submitted that at the time of passing of the impugned order, the District Magistrate was fully aware of the fact that the petitioner was in judicial remand of seven days i.e from 20-07-2023 in District Jail Kathua in connection with FIR No. 162/2023 u/s 307/452/147/504/506/ IPC 4/25 Arms Act and taking into account the materials produced before the District Magistrate by the respondent No. 3 including the dossier, FIRs along with the nature of the earlier activities of the petitioner, there were compelling reasons to believe that after his release from the custody, he would indulge in prejudicial activities and, as such, it became necessary to detain him to prevent the same .

11. It is further submitted that prior to the commission of the offences u/s 307/452/147/504/506/ IPC 4/25 of the Arms Act, the petitioner has been

bailed out in three of the cases, but despite that, the petitioner preferred not to mend his ways and again committed an offence, thus, making it clear that the earlier actions taken against the petitioner under the ordinary law from time to time have not proved to be deterrent so as to deter the detune for commission of future offences.

12. It is submitted that the execution report submitted by the Sr. Superintendent of Police, Samba vide No. Legal/ PSA/2023/1642-47 dated 28-07-2023 reveals that in compliance to the impugned detention order, the warrant was executed by Insp. Tribhawan Khajuria of P/S Vijaypur by supplying the copies of detention warrant, grounds of detention and other related documents against a proper receipt and the detenue was made aware that he may file representation to the Government against the order of detention, if he so desires and the detention warrant and grounds of detention were read over and explained to the him in Urdu, Hindi, Dogri, which he understood fully and his signatures also were obtained. It is contended that the case of the petitioner was referred to the Advisory Board for its opinion, which vide its opinion dated 27-07-2023 has observed that there is sufficient cause for detention of the detenue. Moreover, the impugned detention order, which was executed on 25-07-2023 has been approved by the Government vide Order No. Home/PB-V/1677 of 2023 dated 26-07-2023 and later on, confirmed by the Government vide Order No. Home/PB-V/1793 of 2023 dated 02-08-2023 for a period of three months at the first instance.

“Legal Analysis”

13. Heard learned counsel for the parties and perused the detention record supplied to this court by the respondents and with the consent of both of the counsels the case is taken for its final disposal.

14. A perusal of the execution report dated 25.07.2023, which forms part of the detention record, reveals that only a copy of detention order, letter addressed to the detenue and copy of grounds of detention (07 leaves) and other documents (23 leaves) have been provided to the detenue. The perusal of the execution report of detention warrant No. Legal/PSA 2023/1642-47 dated 28.07.2023 prepared by the respondent No. 3 reveals that while reporting the execution of detention warrants to respondent No. 2, fifty one (51) leaves are enclosed, whereas while executing the detention order upon the petitioner only seven (07) leaves consisting of detention order, letter addressed to the detenue and grounds of detention of alongwith other documents (23 leaves) have been handed over to the petitioner on 25.07.2023.

15. From the record, it is clear that the copy of the police dossier and other relevant documents, on the basis of which, the impugned order is passed have not been supplied to the detenue. Thus, the contention of the petitioner that whole of the material relied upon by the detaining authority, while framing the grounds of detention have not been supplied to him, appears to be well-founded. It needs no emphasis that the detenue cannot be expected to make an effective representation which is his right guaranteed under Article 22(5) of the Constitution of India and Section 13 of the Act of 1978, unless and until the material, on which detention order is based, is supplied to him. The failure on the part of the detaining authority to supply material, renders detention illegal and unsustainable. In the present case, the petitioner has been denied the right to make effective representation against his detention order, as a result of which his detention was confirmed. The petitioner, thus, cannot be said to be provided with whole of the record on

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which his detention is based, so as to make an effective representation. Thus, failure on part of detaining authority to supply material, relied at the time of making detention order to detenue, renders detention order illegal and unsustainable.

16. In this context, I am supported by the observation made by the Hon'ble Supreme Court in case titled ***"Abdul Latif Abdul Wahab Sheikh vs B.K. Jha & Anr.*** reported in ***1987 (2) SCC 22,*** wherein the Hon'ble Supreme Court has observed as follows:

> ***"In a Habeas Corpus proceeding, it is not a sufficient answer to say that the procedural requirements of the Constitution and the Statute have been complied with before the date of hearing and therefore, the detention should be upheld. The procedural requirements are the only safeguards available to a detenu since the court is not ,expected to go behind the subjective satisfaction of the detaining authority. 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."***

17. Furthermore, the Hon'ble Apex Court in case titled, *"**Sophia Ghulam Mohd. Bham vs State Of Maharashtra & Ors*** reported in ***AIR 1999 SC 3051***, has also held as under: -

> ***"The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the grounds are based flows from the right given to the detenue to make a representation against the order of detention. A representation can be made and the order of detention can be assailed only when all the grounds on which the order is based are***

communicated to the detenu and the material on which those grounds are based are also disclosed and copies thereof are supplied to the person detained, in his own language."

18. It is a settled position of law that supply of legible copies of the documents relied upon by the detaining authority is a sine qua non for making an effective representation which is the fundamental right of detenue guaranteed under Article 22(5) of the Constitution. The non-supply of same is in stern violation of Article 22(5) of the Constitution.

19. In this regards the court is fortified by the view taken in case titled "***Shalini Soni (Smt.) & Others v. Union of India and Others*** *(1980) 4 SCC 544"*, Hon'ble Apex Court has aptly observed as under:-

> ***"....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***

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> ***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'."***

20. Again, the Apex Court in "***Sophia Gulam Mohd. Bham v. State of Maharashtra*** reported in (***1999) 6 SCC 593***" in para 11, has 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 its opinion were supplied to him.

21. The same view was reiterated by the Hon'ble Supreme Court in "***Thahira Haris v Govt. of Karnataka***, reported in *2009 11 SCC 438"* and the following observations were made:

> ***"12. The right which the detenu enjoys under Article 22(5) is of immense importance. In order to properly comprehend the submissions of the detenu, Article 22(5) is reproduced as under:***
>
> ***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." 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 representation against the detention order be provided.***
>
> ***29. There were several grounds on which the detention of the detenue was challenged in these appeals, but it is not necessary to refer to all the grounds since on the ground of not supplying the relied upon document, continued detention of the detenue becomes illegal and the detention order has to be quashed on that ground alone."***

22. Our Constitution provides adequate safeguards under ***clauses (5) and (6) of Article 22*** to the detenue who has been detained in pursuance of the order made under a law providing for preventive detention. He has the

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right to be supplied with copies of all documents, statements and other materials relied upon in the grounds of detention without any delay. The predominant object of communicating the grounds of detention is to enable the detenue at the earliest opportunity to make effective and meaningful representation against his detention. Thus, the detaining authority is required to communicate to the detenue,

> *(i)* ***Grounds of detention;***
>
> *(ii)* ***All the documents referred to in the grounds of detention;***
>
> *(iii)* ***All the documents and material which the detaining authority considers while framing his subjective satisfaction;***
>
> *(iv)* ***Detention order and also the police report or dossier if any***.

23. From the foregoing discussion of law on the subject, it is clear that an order of preventive detention becomes unsustainable in law if the detenue has not been provided with all the material that has formed basis of his detention. As already noted, the petitioner has not been furnished the whole of the material relied upon by the detaining authority for effecting detention. Hence, the impugned order of detention has been rendered unsustainable in law.

24. A perusal of the grounds of detention reveals that the following FIRs have been relied upon by the detaining authority:-

1. **FIR No. 299/2021 U/S 341/323/506/504/IPC of P/S Bari Brahmana.**
2. **FIR No. 26/2022 U/S 307/323/34/IPC, 4/25 Arms Act of P/S Bari Brahmana.**
3. **FIR No. 50/2023 U/S 8/21/22/NDPS Act of P/S Vijaypur.**
4. **FIR No. 162/2023 U/S 307/452/147/504/ 506/IPC 4/25 Arms Act of P/ S Bari Brahmana.**

25. From the record, it is clear that the detention of the petitioner has been ordered on the basis of the aforementioned FIRs, The allegations contained in the said FIRs, which is made basis of the detention order, even if taken to be true on their face value, do not constitute an act which has the potentiality of disturbing the public order and only one FIR No. 50/2023 for the commission of offences punishable U/S 8/21/22 NDPS Act had been registered in the year 2023 and the said FIR also does not disclose any heinous offence.

26. It is to be noted that live and proximate link between the past conduct of the detenue and the imperative need to detain have to be harmonized to rely upon the alleged illegal activities of the detenue. A preventive detention order that is passed without examining a live and proximate link between the event and the detention is tantamount to punishment without trial as has been held by Hon'ble Apex Court in ***"Sama Aruna Vs State of Telangana & Anr."*** *reported as (2018) 12 SCC 150*. Relevant paragraph No. 17 is reproduced as under:-

> ***"17. We are, therefore, satisfied that the aforesaid detention order was passed on grounds which are stale and which could not have been considered as relevant for arriving at the subjective satisfaction that the detenu must be detained. The detention order must be based on a reasonable prognosis of the future behaviour of a person based on his past conduct in light of the surrounding circumstances. The live and proximate link that must exist between the past conduct of a person and the imperative need to detain him must be taken to have been snapped in this case. A detention order which is founded on stale incidents, must be regarded as an order of punishment for***

> ***a crime, passed without a trial, though purporting to be an order of preventive detention. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it."***

27. In this regard I am fortified by the observation made Hon'ble Apex Court in "***Khaja Bilal Ahmed v. State of Telangana,*** reported in (***2020) 13 SCC 632***,

> ***"The satisfaction to be arrived at by the detaining authority must not be based on irrelevant or invalid grounds. It must be arrived at on the basis of relevant material; material which is not stale and has a live link with the satisfaction of the detaining authority. The order of detention may refer to the previous criminal antecedents only if they have a direct nexus or link with the immediate need to detain an individual. If the previous criminal activities of the appellant could indicate his tendency or inclination to act in a manner prejudicial to the maintenance of public order, then it may have a bearing on the subjective satisfaction of the detaining authority. However, in the absence of a clear indication of a causal connection, a mere reference to the pending criminal cases cannot account for the requirements of Section 3. It is not open to the detaining authority to simply refer to stale incidents and hold them as the basis of an order of detention. Such stale material will have no bearing on the probability of the detenu engaging in prejudicial activities in the future."***

28. In the present case, the allegations in the FIRs registered against the petitioner-detenue may be a problem of law and order but would not certainly come within the purview of the term 'public order'. The grounds of detention state that the petitioner often remain indulged in criminal activities including peddling of Narcotic and as such is disturbing the peace of the area. The allegation made against the petitioner of "often indulging into peddling of Narcotic" is not supported by the grounds of detention. Only one FIR with respect to the offence under NDPS Act is registered against the petitioner.

29. There is nothing mentioned in the grounds of detention to demonstrate that the activities of the detenue, on the basis of which the FIRs came to be registered against him, had an impact of disturbing the life of the community or had the effect of affecting the public at large. Thus, it is only on the basis of these allegations contained in the FIRs, the detaining authority arrived at subjective satisfaction to detain the detenue in order to restrain him from acting in any manner prejudicial to the maintenance of public order. Thus, the impugned order is passed on assumptions and not on the basis of mandate of Public Safety Act, 1978.

30. The distinction between a disturbance to law and order and a disturbance to public order has been clearly settled by a Constitution Bench in case titled **Ram Manohar Lohia v. State of Bihar, reported in AIR 1966 SC 740**. The Court has held that every disorder does not meet the threshold of a disturbance to public order, unless it affects the community at large. The Constitution Bench held:-

> ***"51. We have here a case of detention under Rule 30 of the Defence of India Rules which permits apprehension and detention of a person likely to act in a manner prejudicial to the maintenance of public order. It follows that if such a person is not detained public disorder is the apprehended result. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. Does the expression "public order" take in every kind of disorders or only some of them? The answer to this serves to distinguish "public order" from "law and order" because the latter undoubtedly takes in all of them. Public order if***

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disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival communities and one of them tried to raise communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before if can be said to affect public order, it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances which subvert the public order are. A District Magistrate is entitled to take action under Rule 30(1)(b) to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances.

52. It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. By using the expression "maintenance of law and order" the District Magistrate was widening his own

field of action and was adding a clause to the Defence of India Rules."

31. In "***Banka Sneha Sheela v. State of Telangana and ors.***, reported in ***2021(9) SCC 415***, the Hon'ble Supreme Court, in paragraphs No. 13, 14 and 19 has held as under:-

> ***"13.There can be no doubt that for 'public order' to be disturbed, there must in turn be public disorder. Mere contravention of law such as indulging in cheating or criminal breach of trust certainly affects 'law and order' but before it can be said to affect 'public order', it must affect the community or the public at large.***
>
> ***14.There can be no doubt that what is alleged in the five FIRs pertain to the realm of 'law and order' in that various acts of cheating are ascribed to the Detenu which are punishable under the three sections of the Indian Penal Code set out in the five FIRs. A close reading of the Detention Order would make it clear that the reason for the said Order is not any apprehension of widespread public harm, danger or alarm but is only because the Detenu was successful in obtaining anticipatory bail/bail from the Courts in each of the five FIRs. If a person is granted anticipatory bail/ bail wrongly, there are well-known remedies in the ordinary law to take care of the situation. The State can always appeal against the bail order granted and/or apply for cancellation of bail. The mere successful obtaining of anticipatory bail/bail orders being the real ground for detaining the Detenu, there can be no doubt that the harm, danger or alarm or feeling of security among the general public spoken of in Section 2(a) of the Telangana Prevention of Dangerous Activities Act is make believe and Ptotally absent in the facts of the present case.***

19. To tear these observations out of context would be fraught with great danger when it comes to the liberty of a citizen under Article 21 of the Constitution of India. The reason for not adopting a narrow meaning of public order' in that case was because of the expression "in the interests of" which occurs to Article 19(2) to 19(4) and which is pressed into service only when a law is challenged as being unconstitutional for being violative of Article 19 of the Constitution. When a person is preventively detained, it is Article 21 and 22 that are attracted and not Article 19. Further, preventive detention must fall within the four corners of Article 21 read with Article 22 and the statute in question. To therefore argue that a liberal meaning must be given to the expression 'public order' in the context of a preventive detention statute is wholly inapposite and incorrect. On the contrary, considering that preventive detention is a necessary evil only to prevent public disorder, the Court must ensure that the facts brought before it directly and inevitably lead to a harm, danger or alarm or feeling of insecurity among the general public or any section thereof at large."

32. A bare perusal of the grounds of detention reveals that the detenue was bailed out in connection with FIR no 299/2021, FIR no 26/2022 and FIR no 50/2023 . Further perusal of the grounds of detention reveals that at the time of passing the impugned detention order, the detenue was in judicial remand of seven days w.e.f 20.07.2023 in District Jail Kathua in connection with FIR no. 162/2023. The detaining authority was aware of the custody of the petitioner in judicial remand and has failed to illustrate as to how the ordinary law was not sufficient to deter the petitioner from commission of future offences. The offences with which the detenue has been charged in the

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FIRs are substantive offences and the ordinary law of the land is sufficient to deal with the detenue. Moreover, the detaining authority as also the State machinery is well within its rights to oppose the bail and, if granted, takes remedial measures by way of approaching the higher forum.

33. It is pertinent to mention here that for a preventive detention order to be passed, the detaining authority has to review the material placed before it by the police or any other agency asking for the detention, apply their mind, and then take a decision whether to authorize it. Further, the detaining authority while issuing the detention order must provide convincing compelling reasons so as to justify the preventive detention of the detenue. As far as the present petition is concerned the detaining authority has not shown any compelling reason for ordering his detention under the provisions of the Public Safety Act in face of the fact that the detenue was already in preventive custody.

34. This Court in ***Mohammad Maqbool Beigh Vs. State of J&K, reported as 2007 (I) SLJ 89*** has been pleased to observe as under:

> ***"Thus, the authority while passing the detention has to give the compelling circumstances on the basis of which he proceeds to direct preventive detention of the detenue."***
>
> ***"Since no compelling reasons have been recorded by the detaining authority the present case, I find the order impugned cannot stand. The petition is, therefore, allowed and detention order is hereby quashed ."***

35. The judgment passed by the Hon'ble Division Bench of this Court ***in Umar Yousaf Naik vs State of J&K & Anr.*** reported in 2021 (2) SLJ (HC) 519, in which it has been held as under :-

> ***"Having heard learned counsel for the parties and perused the record, we are of the considered opinion that the view taken by the Writ Court is not a correct view in the eye of law. Admittedly, on the date of detention the detenue was already in jail in FIR No. 65/2018 for very serious non-bailable offences. The detenue had not even applied for bail before any competent Court of law. And it is because of this reason perhaps the detaining authority did not voiced his apprehension of likelihood of the detenue being released on bail. That being the situation, it was incumbent on the detaining authority to indicate compelling reasons for resorting to provisions of Section 8(a) of the J&K Public Safety Act, 1978 and place the detenue under preventive detention. If the idea of issuing the detention order was to prevent the detenue from acting in any manner prejudicial to the security of the State, that objective stood already achieved with the arrest of the detenue in connection with commission of substantive offences. In these circumstances the detaining authority could not have absolved itself of the responsibility to, at least, indicate the compelling circumstances for taking such decision. In that view of the matter, the detention of the detenue, when he was already in custody cannot be said to have been made because of any undisclosed compelling reasons, and, therefore, cannot be justified in view of the law laid down by Supreme Court in Surya Prakash Sharma vs. State of UP and ors, 1994 Supp (3) SCC 195. When the principles laid down in the aforesaid case are applied to the facts of the instant case, there***

is no escape from the conclusion that the impugned order of detention cannot be sustained and so is the fate of the order impugned in this appeal.

36. The Hon'ble Supreme Court in the case of ***Rekha v. State of T. N,*** reported in (***2011) 5 SCC 244*** discussed the nature and scope of preventive detention. Paragraphs No. 29 and 30 of the judgment are relevant and, same are reproduced as under

> ***"29. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, 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 and historic struggles It, follows, therefore, that if the ordinary law of the land the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.***
>
> ***30. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal. In the present case, the charge against the detenu was of selling expired drugs after changing their labels Surely the relevant provisions in the Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation Hence, in our opinion, for this reason also the detention order in question was illegal."***

37. The Hon'ble Supreme Court in ***V. Shantha versus State of Telengana and Ors (2020)13 SCC 632*** has observed as under:-

> ***"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."***

38. From the above analysis and the law laid down by Hon'ble Supreme Court this Court is of the of the view that the cases of preventive detention must be authorized by the law and not at the will of the executive which means the executive cannot use this power of preventive detention arbitrarily and it must have the backing of law.

39. Since the detenue was denied of his right of making effective representation as the dossier was not given to the detenue, which is the basic right enshrined under the Constitution. Such a violation of fundamental rights provided under Constitution amounts to gross violation of personal liberty and right to life. Thus the order impugned which is violative of basic fundamental rights cannot sustain the test of law and is liable to be set aside. Moreover, no compelling reason have been recorded by the detaining

authority which could be the basis of detaining the detenue and on this ground also, the impugned order cannot sustain in the eyes of law.

40. From the factual position coupled with the settled legal prepositions laid down in the afore-mentioned judgments, the present petition is ***allowed***. The impugned Order of Detention bearing No. 04/PSA of 2023 dated 22.07.2023 issued by Respondent No. 2-District Magistrate, Nandini Hills, Samba, under the provision of Section 8 of the Jammu and Kashmir Public Safety Act, 1978, is set aside/quashed. The detenue, namely, Balwander Singh @ Goru S/o Swaran Singh, R/o Rahya Ranjari, District Samba. J&K, (Presently lodged in District Jail Kathua, J&K) is ordered to be released from the preventive custody forthwith, provided he is not required in connection with any other case(s).

41. Writ petition is **disposed of** in the manner indicated above.

42. Registry is directed to return the record to the learned counsel for the respondents.

(WASIM SADIQ NARGAL)
JUDGE

<u>**JAMMU:**</u>
06.02. 2024
Ram Krishan

HIGH COURT
JAMMU & KASHMIR AND LADAKH

i. Whether the Judgment is Reportable: Yes/No

ii. Whether the Judgment is Speaking: Yes/No