

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

HCP No.31/2023

Reserved on : 19.03.2024

Pronounced on : 02.04.2024

Sahil Choudhary, age 25 years
S/o Karnail Singh, R/o Village Chak Alawal
Tehsil R.S.Pura, Jammu through his mother Nirmal Devi ...Petitioner(s)

Through:- Mr. Anmol Sharma, Advocate

V/s

Union Territory of Jammu and Kashmir through

1. Divisional Commissioner, Jammu
2. Senior Superintendent of Police, Jammu
3. Incharge Jail, Ambphalla, Jammu

...Respondent(s)

Through:- Mr. Amit Gupta, AAG

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. Impugned in this petition filed by the petitioner through his mother is an order of detention No.PITNDPS-12 of 2023 dated 02.05.2023 passed by the Divisional Commissioner, Jammu [“the Detaining Authority”] under Section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 [“the Act”], whereby the petitioner has been placed under preventive detention

with a view to prevent him from indulging in illicit trafficking in narcotic drugs and psychotropic substances.

2. The impugned detention is made upon subjective satisfaction arrived at by the Detaining Authority on the basis of material supplied by the District Police in the shape of dossier. The petitioner, as is apparent from the grounds of detention allegedly served upon him, is involved in three FIRs registered in the year 2022 and 2023 in the Police Station, Miran Sahib under different Sections of the Narcotic Drugs and Psychotropic Substances Act, 1985 [“NDPS Act”]. It is on the basis of these FIRs and some DDRs submitted by the District Police, the Detaining Authority arrived at its subjective satisfaction that the repeated involvement of the petitioner in illicit drug trafficking is a serious threat to the society in general and health and welfare of the youth of the UT of Jammu & Kashmir and District Jammu, in particular.
3. The impugned detention order is assailed by the petitioner on multiple grounds. The grounds of challenge, which were emphasized by the learned counsel for the petitioner during the course of arguments, can be summed up in the following manner:-
 - i) The detention order was passed on 2nd May, 2023 but the same was executed on 23rd June, 2023 and, therefore, there has been inordinate and unexplained delay in execution of the detention order, more particularly, when the petitioner was already in judicial custody since 13th March, 2023.

- ii) The impugned order of detention suffers from total non-application of mind by the Detaining Authority, in that, the Detaining Authority has nowhere in the grounds of detention shown its awareness with regard to the petitioner being already in judicial custody nor has the Detaining Authority given any reason or justification necessitating passing of the detention order while the petitioner was already in custody of the State.
4. The Detaining Authority has filed counter affidavit wherein the Detaining Authority while relying upon a judgment of the Supreme Court in the case of **Hardhan Saha v. State of West Bengal, (1975) 3 SCC 198** has submitted that the preventive detention and prosecution are not synergies and the purpose of two are different. The power of preventive detention is a preventive measure and is exercised in reasonable anticipation but it may or may not relate to an offence.
5. With a view to justify the detention of the petitioner, who, as per the Detaining Authority, is an incorrigible drug peddler and a serious threat to the health and welfare of the youth of District Jammu, it is submitted that the subjective satisfaction was arrived on the basis of cogent relevant material in relation to the activities of the petitioner provided by the district police. The averments made in the petition with regard to the non-compliance of the mandatory requirements of

law have been sought to be met by placing reliance on the record of detention.

6. Having heard learned counsel for the parties and perused the material on record, I am of the considered opinion that the impugned detention order does not survive for more than one reason.
7. Indisputably, there is enough material on record to show that from the year 2022 the petitioner has been consistently indulging in illicit drug trafficking of Narcotics and Psychotropic Substances and has been booked thrice in various offences under the NDPS Act. With reference to an occurrence dated 08.10.2022, about 4.5 gms of heroin like substance was recovered from the petitioner and FIR No.127/2022 was registered in Police Station, Miran Sahib. The mater was investigated and, accordingly, challan against the petitioner was presented before the competent Court of jurisdiction. He, however, was bailed out by the Court in the above said case. The petitioner was again caught on 28th February, 2023 by the policy party of Police Station, Miran Sahib and heroin like substance weighing 200 gms was recovered from the possession of the petitioner and his two other associates. The petitioner has succeeded in persuading the Court to grant him bail in the aforesaid case also.
8. There is another FIR No.60/2023 registered against the petitioner and that is with respect to recovery of 35 to 45 gms of heroin like substance by the police party of Police Station, Miran Sahib on

13.03.2023 during checking at naka laid at Kotli Mian Fateh. It was reported by the Senior Superintendent of Police, Jammu that the petitioner, who was earlier arrested in FIR No.53/2023 and was later released by the Court, was again taken into custody in FIR No.60/2023 dated 30.03.2023 and the petitioner was in police custody.

9. Interestingly, the Detaining Authority has missed to take note of this fact and has, in the grounds of detention, shown its complete unawareness that the petitioner at the time of passing the order of detention, was already in police custody. The Detaining Authority has instead indicated in the grounds of detention that the petitioner is out on bail and is still indulging in sale and purchase as well as transportation of illicit drugs. The Detaining Authority does not seem to have gone through the material provided by the Senior Superintendent of Police, Jammu carefully.
10. The fact that the petitioner was in police custody on the date of passing of the detention order has either been overlooked by the Detaining Authority or has escaped its attention at the time of arriving at subjective satisfaction with regard to the necessity of placing the petitioner in preventive detention. Both ways, it is reflective of total non-application of mind by the Detaining Authority.

11. Non-consideration of the relevant material vitiates subjective satisfaction, which is *sine qua non* for placing an individual under preventive detention under the Act. Not only the Detaining Authority was required under law to show its awareness about the petitioner being in custody of State but it was equally incumbent upon it to disclose cogent reasons and provide justification for placing the petitioner under preventing detention.
12. From a reading of the grounds of detention and the supportive counter affidavit filed, it is evident that neither the Detaining Authority was aware that the petitioner was already in custody of the State nor has it indicated any reasons as to why the detention of the petitioner was necessitated despite the fact that he was already in the custody of the State. It is nowhere indicated by the Detaining Authority that the petitioner was likely to be released on bail and there was apprehension that upon such release, he would again indulge in the drug trafficking.
13. As a matter of fact, the detention order has preceded on the premise that the petitioner is already at large after obtaining bail in the matters registered against him and while being at large is again indulging in the similar activities, which, however, is factually incorrect.
- 14.** Viewed thus, this Court is of the considered opinion that the very *sine qua non* for putting a citizen under preventive detention that is

subjective satisfaction of the Detaining Authority is vitiated by total non-application of mind. In **Sayed Abul Ala vs Union Of India & Ors, (2007) 15 SCC 208** Hon'ble Supreme Court in paragraph No.25 has very succinctly stated the legal position as under:-

“25. No doubt antecedents of the detenu would be a relevant factor but the same by itself may not be sufficient to press an order of detention in as much as the principles which govern the field so as to enable the court to arrive at a decision that the order of detention can be validly passed despite the detenu being in custody are:

(1) if the authority passing the order is aware of the fact that he is actually in custody;

(2) if he had a reason to believe on the basis of reliable material placed before him

(a) that there is a real possibility of his being released on bail, and

(b) that on being released, he would in all probability indulge in prejudicial activities; and

(3) it is felt essential to detain him to prevent him from so doing.”

15. Equally tenable is the ground of challenge urged by the learned counsel for the petitioner that in the given facts and circumstances, delay in execution of the detention order is also fatal. Admittedly, the order of detention was passed on 2nd May, 2023. Although, delay in execution of the detention order which is slightly less than two months may not be fatal in all circumstances, yet in the instant case where the petitioner was already in the custody of police, such delay, in the absence of any cogent explanation, would vitiate the order of detention. Hon'ble Supreme Court in the case of **Sushanta Kumar Banik v. State of Tripura and others, 2022 Live law SC 813** has observed as follows:-

“ It is manifestly clear from a conspectus of the above decisions of this Court, that the underlying principle is that if there is unreasonable delay between the date of the order of detention & actual arrest of the detenu and in the same manner from the date of the proposal and passing of the order of detention, such delay unless satisfactorily explained throws a considerable doubt on the genuineness of the requisite subjective satisfaction of the detaining authority in passing the detention order and consequently renders the detention order bad and invalid because the “live and proximate link” between the grounds of detention and the purpose of detention is snapped in arresting the detenu. A question whether the delay is unreasonable and stands unexplained depends on the facts and circumstances of each case.”

16. For the foregoing reasons, this Court is inclined to accept the petition and quash the impugned order of detention.

Ordered accordingly.

The respondents shall release the petitioner from preventive custody forthwith provided he is not required in any other case.

Record be returned back to the learned counsel for the respondents.

**(Sanjeev Kumar)
Judge**

Srinagar.
02.04.2024
Vinod.

Whether the order is reportable: Yes