S.No.181
Suppl. List

IN HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR.

HCP No.35/2024

Reserved on : 07.11.2024
Pronounced on: 22.11.2024

Dilawar Javid Bhat, Age 30 years
S/o Late Javid Ahmad Bhat
R/o Monghal, Anantnag
Through his mother
Afroza Akhter
…Appellant(s)/Petitioner(s)

Through:

Mr. S.T.Hussain, Sr. Adv. with Ms. Nida Nazir, Adv.

Vs.

UT of J&K through
Station House Officer,
Police Station Anantnag
...Respondent(s)

Through: Mr. Jahangir Ahmad Dar, GA

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

JUDGMENT

1. The petitioner, in the instant petition, has called in question the impugned order of detention bearing No.DIVCOM-'K'/138/2023 dated 31.07.2023 issued by the Divisional Commissioner Kashmir (the Detaining Authority) under the provisions of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988 for short ('the PITNDPS Act') by virtue of which the detenue has been placed under detention with a view to prevent him from committing any of the acts within the meaning of PITNDPS Act.

2. The Learned counsel for the petitioner at the very outset submits that the order of detention has been passed by the Divisional Commissioner Kashmir by placing reliance upon PITNDPS Act, 1988, which has since been repealed by the Jammu and Kashmir Reorganization Act, 2019 as it falls under serial 110 of fifth (V) Schedule of the repealed acts in the Union Territory of Jammu and Kashmir. He also submits that the order accordingly gets vitiated because it has been passed under an act which has since been repealed and accordingly, he seeks quashment of the same. Learned counsel has further drawn the attention of the Court to Article 22 of the Constitution of India with particular reference to Clause 4 and 5 of the Constitution of India. Clause 4 and 5 of Article 22 of the Constitution is reproduced as under:

> *4. No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless—*
>
> *(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention: Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or*
>
> *(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).*
>
> *(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.*

3. It is further submitted by the learned counsel that the detention of the detenue gets vitiated by an illegality born out of the fact that the opinion of the Advisory Board is *non-est* in the eyes of law, as the Advisory Board is not the one constituted under Central PITNDPS Act 1988, but under the repealed J&K Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, meaning thereby, it is not the Advisory Board constituted under the Central Act, but under the repealed State Act of the then State of Jammu & Kashmir, under which the Advisory Board purportedly has given its opinion to confirm the detention of the detenue.

4. Thus, the detention order which has been confirmed by the Advisory Board constituted under a repealed Act, has no sanctity in the eyes of law and accordingly, he submits that the detention order which has been extended beyond the period of three months on the advice of the Advisory Board (which is not constituted under an Act which is in vogue and rather constituted under a repealed Act), cannot be viewed as legally valid. No other point has been urged in the light of what has been argued.

5. With a view to support his arguments, he has relied upon the judgement passed by a coordinate Bench of this Court in case titled *Muzaffar versus UT* decided on 19th March, 2024 in WP (Crl) 156/2023.

6. Learned counsel further submits that since detention and continuance thereof is under an act which has since been repealed, therefore, the petitioner continues to be in illegal confinement for which he has sought the damages to the tune of Rs.10.00 lacs in the instant case.

7. He has further argued that in absence of any specific period mentioned in the order of detention, the order of detention becomes punitive and is liable to be quashed on this count only.

Arguments of Respondents.

8. With the view to counter the plea raised by the petitioner, learned counsel for the respondents has drawn the attention of this Court to the grounds of detention which has been mentioned by the Divisional Commissioner, Kashmir, a perusal whereof reveals that the concerned Divisional Commissioner has reached to the conclusion that it has become imperative to detain the detenue under Section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 [for short " the PITNDPS Act"]. Learned counsel has also drawn the attention of this Court to the Definition Clause of the PITNDPS Act, wherein appropriate Government has been defined. For facility of reference, same is reproduced as under:-

> ***"appropriate Government" means as respects a detention order made by the Central Government or by an officer of Central Government, or a person detained under such order, made by a State Government, and as respects a detention order made by a State Government, or by an officer of State Government, or a person detained under such order, the State Government;***

9. Thus, the argument advanced by learned counsel for the petitioner that Divisional Commissioner is not a person specifically authorized by the State Government to pass detention order under the aforesaid Act, is not tenable in the eyes of law. In this regard learned counsel for the respondent-State submits that there is a specific authorization issued by the Government in favor of Divisional Commissioners Jammu/Srinagar for issuing the detention orders under the PITNDPS Act and he has drawn the attention of this Court to SRO 247 dated 27th July, 1988 issued by the Government, a perusal whereof reveals that in exercise of the powers conferred by sub-section (1) of Section

3 of the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988 (Ordinance No. 1 of 1988), the Government hereby specially empowered Divisional Commissioners Jammu/Srinagar also for purpose of said section.

10. Since there was an error in the aforesaid notification, the same was rectified by virtue of another corrigendum dated 14th October, 2015, wherein it has been ordered as under:-

> ***"Please read "Divisional Commissioner, Jammu /Srinagar", appearing in Notification SRO 247 dated 27th July, 1988 issued vide endorsement No. Home-189/ISA /88 dated 27.07.1988.***
> ***By order of the Government of Jammu and Kashmir.'***

11. The next argument raised by learned counsel for the petitioner that the Divisional Commissioner, who has been authorized under the old Act, which stood repealed, has no power and authorization to issue any such order under the new Act i.e., PITNDPS Act. With a view to answer the aforesaid issue, learned counsel for the respondents has placed reliance on the Jammu and Kashmir Re-organization (Removal of Difficulties) Order, 2019, dated 30th October, 2019 in the form of SO. 3912 (E), wherein the Jammu and Kashmir Re-organization Act, 2019 received the assent of the President on the 9th day of August, 2019 and notified in the official gazette on the same day. Learned counsel for the respondents has drawn attention particularly upon Clause 14 and 17 of the aforementioned SO.

12. Thus, from a conjoint reading of Clause 14 and 17, it is manifestly clear that anything done or any action taken earlier shall be deemed to have been done or taken under the corresponding provisions of the Central law which have been made applicable to the Union Territory of Jammu and Kashmir and Union Territory of Ladakh and shall continue to be in force accordingly, unless and until superseded by anything done or any action taken under the Central laws, which now, have been extended to the Union Territory of Jammu and Kashmir in the form of aforesaid SO.

13. The removal of difficulties order further clarify by virtue of Clause 17 that, when any authority constituted under any law in the existing State of Jammu and Kashmir immediately in force before the appointed day shall be deemed to have been constituted under the corresponding provisions of the Central laws applicable to the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh until a new authority is constituted under the law applicable to the Union Territory of J&K or Union Territory of Ladakh, as the case may be, and any proceedings initiated or action taken by such authority, shall, for all purposes, be deemed to be valid and operative.

14. Thus, the submission of learned counsel for the petitioner that the Divisional Commissioner was not authorized to issue the detention order under the provisions of new Central Act is bereft of any reason, therefore, is liable to be rejected.

15. It was further argued by Mr. Dar, learned GA, that in the instant case 31st July, 2023 is the relevant date which has to be construed for the purpose of applicability of the Central Act, because the Central laws were made applicable to the Union Territory of Jammu and Kashmir and Union Territory of Ladakh by virtue of ***Jammu and Kashmir Re-organization (Removal of Difficulties) Order, 2019, dated 30th October, 2019 in the form of SO. 3912 (E)***, and the order of detention has been passed subsequent to the aforesaid order (i.e. on 31-07-2023). Thus, it is the specific case of the respondents that on the said date when the order impugned was issued, the Central Act was made applicable.

16. Lastly, Mr. S.T. Hussain, learned senior counsel submits that no fresh Advisory Board has been constituted after the Re-organization Act came into force and the Union Territory has not constituted the fresh Advisory Board under the Central Act and in absence of Advisory Board, the action of the respondents will be violative of Article 22 of the Constitution of India.

17. To counter the aforesaid argument made by the learned senior counsel, Mr. Dar learned G.A has produced the Government Order

No.Home/PB-V/123 of 2024 dated 15th January, 2024, From a bare perusal of the aforesaid order, it is apparently clear that the case of the detenue was referred to the Advisory Board for opinion as provided under Clause (b) of Section 9 of the Act and the Advisory Board vide its Notification dated 10th January, 2024, observed that there is a sufficient cause for detention of the detenue. Accordingly, in exercise of the power conferred by Clause (f) of Section 9 read with section 11 of the PITNDPS Act, the Government has confirmed the detention order dated 31st July, 2023 passed by the Divisional Commissioner and accordingly, directed to detain the detenue for a period of one year and was lodged to Central Jail Kotbhalwal.

18. For facility of reference Clause (b) and Clause (f) of Section 9 of the aforesaid Act is reproduced as under:-

> *"(b) save as otherwise provided in Section 10, the appropriate Government shall, within five weeks from the date of detention of a person under a detention order, make reference in respect thereof to the Advisory Board constituted under Cause (a) to enable the Advisory Board to make the report under Sub-Clause (a) of Clause (4) of Article 22 of the Constitution:*
>
> *(f) in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the Government shall revoke the detention order and cause the person to be released forthwith."*

LEGAL ANALYSIS:

19. After carefully considering the arguments from both sides and examining the record meticulously, I have given my thoughtful consideration to the relevant facts and the applicable law in this case.

20. The present case relates to illicit trafficking of narcotic drugs. The grounds of the detention indicate the alleged involvement of the detenu in the trafficking of 70 kg and 25 kg (In both FIRs) of Poppy Straw. The grounds of detention highlight the repeated occurrence of these offenses, which present a serious threat to public health and societal stability. Drug abuse not only harms individuals but also erodes the socioeconomic structure of communities. The interrelation of these crimes indicates a larger issue affecting both national security and public health. The worldwide drug crisis aggravates challenges for societies, especially as younger generations fall victim to addiction. Traffickers take advantage of vulnerabilities, ensuring a continuous supply of narcotics that further endangers public safety and well-being.

21. The argument of the Learned Counsel for the petitioner is that the detenue was already granted bail in both FIRs i.e. FIR No. 34/2022 under section 8/15 NDPS Act of Police Station Anantnag and FIR No. 40/2023 under section 8/15, 21, 29 of NDPS Act, 3/181 M.V Act of Police Station Qazigund, and despite the Detaining Authority being aware of these bail orders, it failed to provide sufficient reasons to justify the detention order. The Learned counsel for the detenue further points out that, after being released on bail, he did not engage

in any illegal activity, and there is no evidence to suggest otherwise. Therefore, the detenue contends that the detention order reflects a lack of proper consideration and subjective satisfaction by the Detaining Authority and he prays that the impugned order of detention may be quashed.

22. The learned Counsel appearing on behalf of petitioner has given much emphasis on the sole ground to challenge the impugned detention order which revolves around the promulgation of ***J&K reorganization Act 2019*** and consequent repeal of Erstwhile ***"The Jammu and Kashmir Prevention of Illicit Traffic in Narcotic drugs and Psychotropic Substances Act 1988"*** contending that since the erstwhile Act finds place at serial no 110 in Table-3 of fifth schedule containing list of repealed laws, as such, the order impugned is illegal and no further ground was urged by the learned counsel for the detenue.

23. It is also argued by the learned counsel for detenue that with the repeal of Erstwhile Act on 5th August 2019, and non application of central act on the said date renders all the authorities including advisory board constituted under the repealed Act, invalid. It is further argued that Divisional commissioner Kashmir was bereft of any authority to issue Detention order against the detenue. It is also impressed that during the intervening period of repeal of erstwhile state laws and subsequent application of central laws and at the time of passing of impugned order dated 31-07-2023, the central law was not made applicable to the UT of J&K and such renders the impugned order illegal.

24. The learned counsel further submits that the issuing authority has exercised its power in terms of the Act that stands repealed; therefore, the same is bad in the eyes of law. He submits that in terms of the Central PITNDPS Act, it is the officer of the rank of Secretary to Government or the Joint Secretary specially empowered in this behalf who is competent to issue a detention order and the Divisional Commissioner, in the instant case, is not as such competent to issue the impugned order

25. This court with a view to proceed further deems it proper to formulate some important questions for determination which are as follows:

a. Whether Divisional Commissioner Kashmir was empowered/authorized to issue orders under The Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988?

b. Whether the "appropriate Government" as defined under Section 2(a) of the Central Act, encompass the Union Territory as well?

c. Whether the Central Act of 1988 has been applied to the Union Territory of Jammu and Kashmir?

d. Whether the Divisional Commissioner of Kashmir still holds the authority to issue detention orders under the Central Act?

e. Whether the Advisory Board warranted under Section 9 of the Central Act has been reconstituted under the new Act post abrogation?

26. At the very outset, the submission of the learned counsel for the petitioner in respect of the order being without jurisdiction having been issued by an incompetent authority needs to be addressed as the

other grounds would definitely be subservient to the primary issue of jurisdiction.

27. Let us take a look at clause (1) of Section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, in the first instance:-

> *"3. Powers to make orders detaining certain persons.—(1) The Government or any officer of the Government, not below the rank of the Secretary to Government, specially empowered for the purposes of this section by the Government, may, if satisfied, with respect to any person (including a foreigner) that, with a view to preventing him from committing any of the acts within the meaning of 'illicit traffic' as defined in clause (c) of section 2, it is necessary so to do, make an order directing that such person be detained."*

28. The learned counsel for respondents has placed on record a notification issued by the Government authorizing the Divisional Commissioners, Jammu/Kashmir, for issuing the detention orders under PITNDPS. i.e. SRO 247 of 1988 issued on 27-07-1988. For facility of reference, the same is reproduced hereunder:

> ***SRO 247. In exercise of the powers conferred by Sub-section (1) of Section 3 of the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance. 1988 (Ordinance No.1 of 1988), the Government hereby specially empower Divisional Commissioner Jammu/Srinagar also for purposes of the said section.***

29. A bare reading of the aforementioned SRO 247 makes it clear that both the Divisional Commissioners Jammu and Kashmir, have been specifically authorized for the purposes outlined in subsection (1) of

Section 3 of the PITNDPS Act. The petitioner's argument that the Divisional Commissioner of Kashmir is not empowered under the PITNDPS Act, 1988, is not tenable, as the relevant provisions in SRO 247 explicitly grant such authority to the Divisional Commissioner of Kashmir and Jammu as well.

30. A similar argument was raised and answered by a coordinate bench of this Court in the case titled ***"Khaleeq Ahmad Sheikh v. State of J&K and Ors." (HCP 278/2018),*** **decided on 06.02.2019**. The following has been held as under :

> ***"7.Upon consideration of the rival contentions and going through the record of the detention, which contains a copy of SRO 247 of 1988 dated 27th July 1988, issued by the State Government, this Court does not find any merit in the submission made by the learned senior counsel for the petitioner. As per Section 3 of PITNDPS, the detention order can be passed by the Government or any officer of the Government not below the rank of Secretary to Government, specially empowered for the purposes of the Section 3, by the Government. The Government in exercise of powers vested in it under Section 3(1) of PITNDPS, has issued SRO 247 of 1988, which for facility of reference is reproduced hereunder:***
>
> ***"Notification,***
>
> ***Srinagar, the 27th of July, 1988.***
>
> ***SRO 247.-- In exercise of the powers conferred by Sub-section (1) of Section 3 of the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988 (Ordinance No. 1 of 1988), the Government hereby specially empower Divisional Commissioner Jammu/Srinagar also for purposes of the said section.By order of the Government of Jammu & Kashmir."***

> ***8. From bare reading of SRO, it is clear that the Divisional Commissioner, Jammu, and Divisional Commissioner, Srinagar, have been specially empowered for the purposes of the Section 3 of PITNDPS. The plea of the learned senior counsel for the petitioner that the general authorisation given to the Divisional Commissioners under the J & K Public Safety Act, 1978, is not enough and is not compliance of Section 3, is totally misconceived. The Divisional Commissioner, Kashmir, has been specially authorised as is evident from the aforesaid SRO".***

31. Thus from a bare perusal of the aforesaid provisions, the plea of the petitioner that the Divisional Commissioner is not competent to issue the order impugned, is totally misconceived and rejected as is evident that both the Divisional Commissioners of Jammu and Kashmir have been expressly authorized for the purposes stated in sub-section (1) of Section 3 of the PITNDPS Act.

32. *So Question No.1 is accordingly answered.*

33. Insofar as question no.2 is concerned "***Whether the "appropriate Government" as defined under Section 2(a) of the Central Act, encompass the Union Territory as well?"***

34. Let us first examine section 2(a) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 which is reproduced as under:

> ***(a) "appropriate Government" means, as respects a detention*** **order made by the Central Government or by an officer of the Central Government, or a person detained under such order, the Central Government, and as respects a detention order made by a State Government or by an officer of State**

Government, or a person detained under such order, the State Governments

35. To address the issue, whether the Union Territory of J&K falls within the scope and ambit of the aforementioned definition clause of appropriate Government, it is pertinent to quote **Section 3(58) of the General Clauses Act, 1897:** which is reproduced as under:

(58) State;

(a) as respects any period before the commencement of the Constitution (Seventh Amendment) Act 1956, shall mean a part A State , a Part B State or a Part C State; and

(b) as respects any period after such commencement, shall mean a State specified in the First Schedule to the Constitution and shall include a Union Territory;

36. It would also be appropriate to refer to the judgment of the Division Bench of this Court in the case titled ***"Yawar Ahmad Malik v. Union Territory of J&K" (LPA 191/2023), decided on 03-07-2024***. The relevant paras are as under:

20. Article 12 of the Indian Constitution States that,

"Definition: In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

There is no doubt that the definition of State as contained in [Section 3 (58) of General Clauses Act, 1897] includes Union Territory. The term, "all local or other authorities within the territory of India or under the control of the Government of India" comprises States and Union Territories. The term State includes the Government of each State that is the State Executive and legislature of each State that is the State legislatures. It is pertinent to mention that it includes Union Territories as well.

> ***21. We do not subscribe to the view taken by the learned Single Bench in the case supra and we, accordingly, held that the Judgment rendered by the Single Bench is not applicable to the instant case.***

37. Thus a combined reading of the provisions mentioned above, i.e. Section 2(a) of the PITNDPS Act, 1988, and Section 3(58) of the General Clauses Act, 1897, and also in the light of the law laid down by the Division Bench of this Court in the case titled ***"Yawar Ahmad Malik v. Union Territory of J&K"*** *(Supra)*, dispels any doubts regarding the exclusion of the Government of the Union Territory from the definition of **"appropriate government"** as defined under Section 2(a) of the 1988 Act. Thus it can safely be concluded that the appropriate Government includes Union Territory as well.

38. *So Question No.2 is accordingly answered.*

39. The next question for the determination of this Court is "***Whether the Central Act of 1988 has been applied to the Union Territory of Jammu and Kashmir?"***

40. The learned counsel for the respondents appraised the court by submitting a copy of ***"The Jammu and Kashmir Reorganization (Removal of Difficulties) Order 2019," dated 30.10.2019.*** This order extended all laws that were applicable to the rest of the country to the Union Territory of Jammu and Kashmir, in addition to the laws listed in Table-2 of Fifth Schedule of the J&K Reorganization Act. As a result, the PITNDPS Act, 1988, was also made applicable to the Union Territory of Jammu and Kashmir from the appointed day. Clause 5 of this order is reproduced as follows:

> ***(5) All those Central Laws, Ordinance and rules, which are applicable to the whole of India except the existing State of Jammu and Kashmir immediately before the appointed day , shall now be applicable to the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh in addition to the Central Laws specified in Table-1 of the Fifth Schedule to the Principal Act.***

41. So along with the laws outlined in the Fifth Schedule of the Reorganization Act, all Central laws, including the PITNDPS Act, 1988 (which had not been extended to the State of Jammu and Kashmir earlier), have now been made applicable to the Union Territory of Jammu and Kashmir under the provisions of the above-mentioned SO 3912 (E) issued by the Ministry of Home Affairs on 30.10.2019 by way of J&K Reorganization (Removal of Difficulties) order 2019 .

42. *So Question No.3 is accordingly answered.*

43. The next question that needs to be decided by this Court is: ***"Whether the Divisional Commissioner of Kashmir still holds the authority to issue detention orders under the Central Act?"***

44. With a view to answer the above question, it would be proper to reproduce clause 14 of ***Jammu and Kashmir Reorganization (Removal of Difficulties) Order 2019*** provides as under:

> *"(14) Anything done or any action taken including any appointment or delegation made , notification , instruction or direction issued form , byelaw or Scheme framed, certificate obtained, permit or license granted or registration effected or agreement executed under any law shall be deemed to have been done or taken under the corresponding provisions of the Central laws* ***now extended and applicable to the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh shall***

> ***continue to be in force accordingly , unless and until superseded by anything done or any action taken under the Central laws now extended."***

45. Further clause 17 of the aforesaid order provides :

> *(17) Any authority constituted under any law in the existing State of Jammu and Kashmir immediately in force before the appointed day* ***shall be deemed to have been constituted under the corresponding provisions of the Central laws applicable to the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh, until a new authority is constituted under the law applicable to the Union Territory of Jammu and Kashmir or the Union Territory of Ladakh, as the case may be, and any proceeding initiated or action taken by such authority shall for all purposes be deemed to be valid and operative.***

46. The above referred provisions of law, when read in conjunction, would make it clear that the competent authority to detain a person in terms of the relevant provisions of the NDPS Act continues to be same as it was prior to commencement of J&K Reorganization Act, 2019, unless superseded by any action under the Central laws now extended and any action taken by such authority shall be deemed to have been taken under the corresponding provisions of the Central laws and shall be valid and operative.

47. Therefore, the Ordinance No. 1 of 1988 notified in terms of SRO 247 of 1988, that confers powers, under sub-section 1 of Section 3 of the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance, upon the Divisional Commissioner Kashmir and Jammu, continues to have the same force as it had before the commencement of the J&K Reorganization Act, 2019, because there is absolutely no material before the court to come to the

conclusion that an action has been taken under the Central laws pursuant to the J&K Reorganization Act, 2019 that amounts to supersession of the earlier arrangement. Moreover, there is no document on record that would show that subsequently a new authority has been appointed in this behalf.

48. That being the case, the submission of the learned counsel for the petitioner that the Divisional Commissioner, Kashmir, was not competent to issue the detention order under the provisions of NDPS Act, is bereft of reasons, therefore, is turned down.

49. Similar view has been taken by a Coordinate Bench of this Court in case titled Maqsood Ahmad Shah vs. Union Territory of J&K and others in WP(C) 254/2022 decided on 19.10.2022.

50. *So Question No.4 is accordingly answered.*

51. The last question for the Court to resolve is: **"*Whether the Advisory Board warranted under Section 9 of the Central Act has been reconstituted under the new Act post abrogation?"*** In this regard the counsel for respondents has placed on record a copy of Government order No. Home/PB-V/1450 of 2020 dated 31.07.2020.

52. So, the Advisory Board in respect of the aforesaid Acts was constituted in terms of Government order No.Home/PB-V/1450 of 2020 dated 31.07.2020, followed by different Government orders, as the members of the Advisory Board are being replaced by new members.

53. In the instant case, it is important to note that the detenue was arrested in 2022 in connection with case FIR No.34/2022 under the NDPS Act, of Police Station Anantnag and later granted bail by the

competent court. Despite his previous arrest, a year later, he was apprehended again, and another FIR (No. 40/2023) under section 8/15, 21, 29 of NDPS, 3/181 MV Act of Police Station Qazigund was registered against him, with 25 kgs of poppy straw found in his possession. Once again, he was granted bail in the subsequent case by the competent court.

54. It is pertinent to mention that the detenue has also preferred detailed representation on 09.01.2024 which was considered and rejected on 04.06.2024 by the Government as the same was without any merit.

55. The record further reveals that the detenue after getting released on bail in the aforementioned cases instead of showing reforms in the behavior, the detenue re-engaged in the trade of NDPS and remained in association with such people involved in narcotic trade to earn easy money thereby getting himself completely involved in drug trade. The detenue since then, has been perpetually indulging in drug trafficking which is a serious threat to the health, welfare and peace among the people of the area and further endangers the national economy and social stability. In these circumstances it appears that normal law of land was not sufficient to restraint the detenue from indulging in illegal trade.

56. This court is further fortified by view taken by the Hon'ble Supreme Court in the case titled ***Haradhan Saha vs State of West Bengal (1975) 3 SCC 198"*** The relevant Para is as under:

> ***34. The recent decisions of this Court on this subject are many. The decisions in Borjahan Gorey v. The State of W. B., Ashim Kumar Ray V. State of W. B.; Abdul Aziz v. The District Magistrate, Burdwan and Debu Mahto v. State of W. B.***

correctly lay down the principles to be followed as to whether a detention order is valid or not. The decision in Biram Chand v. State of U. P. which is a Division Bench decision of two learned Judges is contrary to the other Bench decisions consisting in each case of three learned Judges. The principles which can be broadly stated are these. First, merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act. Second, the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the Code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention. Third, where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardize the security of the State or the public order. Fourth, the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order. Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behavior of a person based on his past conduct in the light of the surrounding circumstances.

57. The Hon'ble Supreme Court in the case titled ***"Union of India v. Paul Manickam (2003) 8 SCC 342"*** has upheld the validity of preventive detention in cases, where there is credible and substantive evidence of an individual's involvement in activities that pose a significant threat to national security and public health.

58. The Hon'ble Supreme Court, in case titled "***Union of India and Another v. Dimple Happy Dhakad reported as (2019)20 SCC 609***", has held that an order of detention is not a curative, reformative, or punitive action, but a preventive action. The avowed objective of preventive detention is to preclude antisocial and subversive elements from imperiling the welfare of the country, compromising public health and national security or disturbing public tranquility.

59. This Court in the case titled ***Happy Singh vs. Union of India*** reported as ***2023 LiveLaw (JKL) 238*** has outlined the impact of trafficking of narcotic drugs and psychotropic substances on the economy of the nation, the relevant para is as under:

> *"30. The Court must be conscious that the satisfaction of the detaining authority is "subjective" in nature and the Court cannot substitute its opinion for the subjective satisfaction of the detaining authority and interfere with the order of detention. It does not mean that the subjective satisfaction of the detaining authority is immune from judicial reviewability. By various decisions, the Supreme Court has carved out areas within which the validity of subjective satisfaction can be tested. In the present case, the detenue was involved in trafficking of huge amount of heroine and was also caught in possession of the same. The detaining authority recorded finding that this has serious impact on the economy of the nation and is also satisfied that the detenue has propensity to indulge in the same act of smuggling and passed the order of preventive detention, which is a preventive measure. Based on the documents and the materials placed before the detaining authority and considering the individual role of the detenue, the detaining authority satisfied itself as to the detenue continued propensity and his inclination to indulge in acts of prejudicial 16 WP(Crl) No. 19/2023 activities of illicit*

traffic of narcotics and psychotropic substances which poses threat to the health and welfare to the citizens of this country. The offences committed by the detenue are so interlinked and continues in character and are of such nature that these affect security and health of the nation."

60. Recently, Hon'ble Supreme Court in the case titled as ***PESALA NOOKARAJU versus THE GOVERNMENT OF ANDHRA PRADESH & ORS*** reported as ***2023 INSC 734,*** has outlined the essential concept of preventive detention, the relevant paras are as under:

ESSENTIAL CONCEPT OF PREVENTIVE DETENTION

16. The essential concept of the 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. The basis of detention is the satisfaction of the executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. A criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. There is no parallel between the prosecution in a Court of law and a detention order under the Act 1986. One is a punitive action and the other is a preventive act. In one case a person is punished on proof of his guilt and the standard is proof beyond the reasonable doubt, whereas in the other a person is detained with a view to prevent him from doing such act(s) as may be specified in the Act authorizing preventive detention.

17. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive

> ***detention, may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution. (See : Haradhan Saha v. The State of W.B. and others, 1974 Cri.L.J.1479]***

61. In view of the aforesaid settled legal position with regard to the Preventive Detention laws, the preventive detention is not a punishment for past actions but a measure to prevent future offenses based on the likelihood of indulging in the offences again. In contrast, a criminal conviction addresses an act already committed, determined through trial and legal evidence. Unlike criminal prosecution, which is punitive and requires proof beyond a reasonable doubt, preventive detention aims to stop specific acts without proving guilt, as authorized by the Act.

Conclusion

62. Considering the observations made by this Court and also the formulation and the determination of the above mentioned questions, the arguments presented, and the analysis of the facts discussed above, including the petitioner's past conduct and history of involvement in unlawful activities, it becomes clear that the actions of the petitioner pose a continued threat to public safety, national security, and the rule of law. Therefore, in light of these factors, and also considering the continued observation and monitoring of the detenu after being released on bail have revealed his ongoing involvement in criminal activities. This persistent participation in unlawful actions justifies the preventive detention order, as it poses an imminent threat to public

safety, health, societal welfare, and national security. Given that regular law has proven insufficient to prevent the drug trafficker from engaging in such activities, the detention order was issued. In light of these factors, the detention order passed by the detaining authority is upheld.

63. For the foregoing reasons, I do not find any merit in this petition. The same is, accordingly, ***dismissed.***

64. The detention record be returned to the learned counsel for the respondents.

(WASIM SADIQ NARGAL)
JUDGE

SRINAGAR:
22.11.2024
"*Gh. Nabi/Secy"*

Whether the judgment is speaking? Yes/No
Whether the judgment is reportable? Yes/No