

**IN THE HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

Through Video Conferencing

**EMG-WP (CrI) No. 22-A/2020
EMG-CrIM No. 09-A/2020**

Reserved on: 18.05.2020

Pronounced on: 20.05.2020

Ab. Hamid Rather

.....Petitioner

Through: Mr Imtiyaz Ahmad Sofi, Advocate

V/s

Union Territory of J&K and Ors.

.....Respondent(s)

Through: Mr Asif Maqbool, Dy. AG with
Mr. Syed Iram, Assisting counsel

CORAM:

HON'BLE MR JUSTICE ALI MOHAMMAD MAGREY, JUDGE

*Whether approved for reporting? **Yes/NO***

JUDGEMENT

1. Challenge in this petition is thrown by the detenu through his wife Mst. Zahida Begum to Order No. DIVCOM- "K"/ 130/2020 dated 14th of March, 2020, passed by the Divisional Commissioner Kashmir– respondent no.2 herein (for short "*detaining authority*"), placing under preventive detention *Ab. Hamid Rather S/o Gh. Mohammad Rather R/o Amargarh Tehsil Tarathpora, District Kupwara* (for brevity the "detenu") on the grounds detailed out in the petition and seeks its quashment.
Brief facts of the case are summarized as under:
2. The detenu came to be arrested by the Police personal of Police Station, Vilgam from his home during the intervening night of 14/15 March, 2020. The detenu was detained in the Police Station and on 15.03.2020 he was shifted and lodged in District Jail Baramulla under the garb of the order of

detention bearing No. Divcom-K/130/2020 dated 14.03.2020 passed by respondent No. 2 under garb of Section 3 of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988.

3. The petitioner-detenu has challenged the order of detention on the following grounds:

“a) that no compelling reason or circumstance was disclosed in the order or grounds of detention to take the *detenu* in preventive detention, moreso in view of the fact that as on the date of passing of the aforesaid order of detention, the *detenu* was already in custody;

b) that the *detenu* has not been provided the material forming basis of the detention order, to make an effective representation against his detention order;

c) that the detenu has not been informed that he can make a representation against his detention order nor the respondents disclosed to him before which authority of Government the detenu can make the representation.

d) that the detention order has been passed in violation of the constitutional safeguards as provided in Article-22 (5) of the Constitution of India and provisions of J&K Public Safety Act 1987”

4. Mr. I. Sofi, learned counsel appearing for the detenu has invited the attention of this Court to the detention order to the extent that the detaining authority has while ordering the detention of detenu, shown his activities as prejudicial for maintenance of public order. Learned counsel has submitted that the petitioner is detained in terms of provisions of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988, in terms whereof the detention can be only made for preventing the detenu from indulging in activities of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988, meaning thereby that the order amounts to non-application of mind. Mr. I. Sofi learned counsel for the petitioner while strengthening his argument referred to and relied upon the Judgment of Hon’ble Supreme Court reported in (2009) 11 SCC 438 titled Tahira Haris vs. Government of Karnataka and 2018 (12) SCC 150 titled Sama Aruna Vs. State of Telengana.
5. Notice was issued to respondents. They appeared through their learned counsel and filed counter affidavit wherein they submitted that the detention order is well founded in fact and law and seeks dismissal of the Habeas Corpus Petition.

6. Heard learned counsel for the petitioner as well as the learned counsel for the respondents, perused the writ records.
7. Learned counsel for petitioner has submitted that the grounds taken in the detention order and the material referred to and relied upon has no relevance because the detenu was enlarged on bail by the competent court of law and was arrested after one year and slapped under Public Safety Act. Since the detenu is already facing trial before the competent court of law, therefore, there is no possibility that the detenu be implicated in the activities prejudicial to the maintenance of public order. It is submitted that in absence of material the detention order is passed on mere *ipsidixit* of detaining authority, therefore, the detention order is bad in law. Petitioner has in order to strengthening his submission referred to and relied upon **(2006) 2 Supreme Court Cases 664 titled T. V Sravanan Alias S.A.R Prasana v. State through Secretary and anr.**
8. The only precious and valuable right guaranteed to a detenu is of making an effective representation against the order of detention. Such an effective representation can only be made by a detenu when he is supplied the relevant grounds of detention, including the materials considered by the detaining authority for arriving at the requisite subjective satisfaction to pass the detention order. Since the material is not supplied to the detenu, the right of the detenu to file such representation is impinged upon and the detention order is resultantly vitiated. Judgements on this point, both of the Supreme Court and of various High Courts, including our own High Court, are galore. I may refer to one such judgment of the Supreme Court herein. ***In Ibrahim Ahmad Batti v. State of Gujarat, (1982) 3 SCC 440, the Apex Court, relying on its earlier judgments in Khudiram Das v State of W. B., (1975) 2 SCR 81; Icchu Devi Choraria v. Union of India, (1980) 4 SCC 531, in paragraph 10 of the judgment, has held as under:***

“Two propositions having a bearing on the points at issue in the case before us, clearly emerge from the aforesaid resume of decided cases: (a) *all documents, statements and other materials* incorporated in the grounds by reference and which had influenced the mind of the detaining authority in arriving at the requisite subjective satisfaction must be furnished to the detenu alongwith the grounds or in any event not later than 5 days ordinarily and in exceptional circumstances and for reasons to be recorded in writing not later than 15 days

from the date of his detention, and (b) all such material must be furnished to him in a script or language which he understands and failure to do either of the two things would amount to a breach of the two duties cast on the detaining authority under Article 22(5) of the Constitution”.

9. In *Khudiram case* (supra), the Apex Court has explained what is meant by ‘grounds on which the order is made’ in context of the duties cast upon the detaining authority and the corresponding rights accruing to the detenu under Article 22(5).
10. In *Smt. Icchu Devi Case* (supra), the Supreme Court has taken the view that documents, statements and other materials referred to or relied upon in the grounds of detention by the detaining authority in arriving at its subjective satisfaction get incorporated and become part of the grounds of detention by reference and the right of the detenu to be supplied copies of such documents, statements and other materials flows directly as a necessary corollary from the right conferred on the detenu to be afforded the earliest opportunity of making a representation against the detention, because unless the former right is available the latter cannot be meaningfully exercised.
11. Examining the present case on the touch stone of the above settled position of law, there are specific averments made in the petition that the detenu was not supplied the materials relied upon by the detaining authority. It is stated that the detenu was provided material in the shape of grounds of detention. No other material / documents, as referred to in the order of detention and the grounds, are shown to have been supplied to the detenu. On these counts alone, in view of the above settled position of law, the detention of the detenu is vitiated, the detenu having been prevented from making an effective and purposeful representation against the order of detention.
12. Accordingly, the detention order No. DIVCOM- “K”/ 130/2020 dated 14th of March, 2020, passed by Divisional Commissioner Kashmir– respondent no. 2 is quashed and the detenu, *Ab. Hamid Rather s/o Ghulam Mohammad Rather R/o Amargarh, Tehsil Tarathpora, District Kupwara*, is directed to be released from preventive custody forthwith.
13. The petition stands accordingly disposed of.

14. Registrar Judicial to send a copy of this order to Jail Superintendent Baramulla for compliance by e-mail with copy to learned counsel for petitioner as also to learned counsel for respondents.

(Ali Mohammad Magrey)

Judge

Srinagar

20.05.2020

“Ayaz/TF Mohammad Yasin Dar”

- i. Whether the order is speaking: Yes/No
ii. Whether the order is non-speaking : Yes/No.



