
(2012) 05 J&K CK 0017
In the Jammu And Kashmir High Court
Case No : HCP No. 386 of 2011

Mohammad Abbas Dar

APPELLANT

Vs

State and others

RESPONDENT

Date of Decision : 18-05-2012

Acts Referred:

Constitution of India, 1950 — Article 22(5)
Criminal Procedure Code, 1973 (CrPC) — Section 161
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 37
Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 —
Section 3, 3(1), 3(2)

Citation : (2012) 05 J&K CK 0017

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Advocate : S.M.S. Geelani, for the Appellant; Shah Amir, for the Respondent

Final Decision : Allowed

Judgement

Hasnain Massodi, Judge

1. Challenge to order No.DIVCOM-'K'/20/2011 dated 31.10.2011, whereby Divisional Commissioner, Kashmir (hereinafter referred to as

Detaining Authority) has in exercise of powers u/s 3, J&K Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988,

ordered preventive detention of Shri Mohammad Abass Dar son of Mohammed Subhan Dar resident of Panzgam Tehsil Awantipora District

Pulwama (hereinafter called as detenue), is destined to succeed for the following reasons:

The detention order makes mention of material record such as 'dossier and other connected documents' relied upon by the Detaining Authority

while making detention order. The detention order also makes reference to a

communication received from Superintendent of Police, Awantipora.

The detention record reveals that none of the documents referred to in the detention order was ever supplied to detainee. The endorsement on the

reverse of detention order made by the Executing Officer SI Reyaz Ahmad No.7149/NGO, P/S Awantipora, at the time of execution of detention

order, does not make a reference to the documents in question and does not record that such documents were supplied to detainee at the time of

execution of detention order or immediately thereafter. The grounds of detention make reference to case - FIR No.176/2011 u/s 18 NDPS Act of

Police Station Awantipora, to have been registered against the detainee. The involvement of detainee in the aforementioned case appears to have

heavily weighed with the detaining authority while making detention order. The record does not indicate that copies of aforementioned First

Information Report, statements recorded u/s 161 Cr.P.C. and other material collected in connection with investigation of aforesaid case, were ever

supplied to detainee. The material, mentioned above, thus assumes significance in the facts and circumstances of the case. It needs no emphasis that

the detainee cannot be expected to make a meaningful exercise of his Constitutional and Statutory rights guaranteed under Article 22 (5),

Constitution of India and Section 3(2) J&K Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, (for short 'Act')

unless and until the material on which the detention order is based, is supplied to detainee. It is only after the detainee has all said material available,

that the detainee can make an effort to convince detaining authority and thereafter Government, that their apprehension as regards activities of the

detainee are baseless and misplaced. If the detainee is not supplied material, on which detention order is based, the detainee cannot be in a position

to make an effective representation against his detention order. The failure on the part of detaining authority to supply material relied at the time of

making detention order to detainee, renders detention order illegal and unsustainable.

The detention order on the face of it does not indicate proper application of mind on part of the Detaining Authority. The detention order in the

present case has been made to prevent the detainee from committing any of the acts within the meaning of 'illicit traffic' and 'maintenance of public

order'. A bare look at Section 3 of the Act reveals that the Detaining Authority is empowered to make an order of detention to prevent a person

'from committing any of the acts' within the meaning of 'illicit traffic' as defined in Clause (c) of Section (2). The detaining authority in the present

case by mentioning two distinct terms i.e., 'illicit traffic' as well as 'maintenance of public order' has depicted total non- application of mind. It

appears that the detaining authority has not been itself satisfied whether the activities of the detainee were coming within the meaning of 'licit traffic' r

maintenance of public order. It needs no emphasis that illicit traffic nd maintenance of public order, are two different concepts that may in a very

small number of cases overlap. While Section 3(1) of the Act defines the expression with a view to preventing him from committing any of the acts

within the meaning of 'illicit traffic', the definition of expression maintenance of public order is not given in the Act. The detaining authority in effect

has ordered preventive detention of the detainee on a ground not within the purview of Section 3 of the Act.

2. The grounds of detention, after detailing alleged activities of the detainee and alleging that the detainee indulged in dealing with illegal trade of

narcotic drugs, make a pointed reference to case FIR No.89/2011 u/s 18, NDPS Act, of Police Station Awantipora. It is insisted that with a view

to prevent detainee from further committing any offence under the provisions of illicit trafficking in narcotic drugs and psychotropic substance, the

Detaining Authority felt persuaded to order preventive detention of detainee. The Detaining Authority failed to appreciate that embargo/ restrictions

on right to get the bail u/s 37 NDPS Act was attracted in the present case as the contraband alleged to have been recovered was of commercial

quantity and there was, therefore, no likelihood of the detainee being admitted to bail.

3. In *Amritlal and others Vs. Union Government* (2001) SCC 341), it has been held that where a person already in custody is placed under

preventive detention, the detaining authority must, before making such detention order, be satisfied on the basis of available cogent material about

likelihood of the detainee being released on bail and in absence of such satisfaction the detention order cannot be passed.

5. In *Sayed Abdul Ala versus Union of India & Ors* AIR 2007 SCW 6974, where detention order was made on an identical ground, it has

been held:-

In cases where the detenu is in custody, the detaining authority not only should be aware of the said fact but there should be some material on

record to justify that he may be released on bail having regard to the restriction imposed on the power of the Court, as it may not arrive at the

conclusion that there existed reasonable grounds for believing that he was not guilty of such offence and that the detenu could not indulge in similar

activity, if set at liberty.

The Court laid down following the principles to guide Court while arriving at a decision that the order of detention can be validly passed despite the

detenue being in custody:-

(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.

5 In the present case as already pointed out, there was no material before the Detaining Authority to satisfy itself that there was likelihood of the

detnue being released on bail. The material available before the Detaining Authority on the other hand ought to have led the Detaining Authority to

the opposite conclusion. The order, in the circumstances, suffers from non-application of mind.

6 Viewed thus, the petition is allowed and detention order No.DIVCOM-K/20/2011 dated 31.10.2011, passed by the Divisional Commissioner,

Kashmir respondent No. 2, directing detention of Shri Mohammad Abass Dar son of Mohammed Subhan Dar resident of Panzgam Tehsil

Awantipora District Pulwama, quashed.

7. The respondents, in view of quashment of detention order, are stripped of any authority to detain the detenue under order No.DIVCOM-

K/20/2011 dated 31.10.2011. Resultantly, the respondents are directed to release the detenue from preventive detention, ordered vide order

No.DIVCOM-K/20/2011 dated 31.10.2011. Detention record be returned to counsel for respondents. Disposed of.