**HIGH COURT OF JAMMU & KASHMIR AND LADAKH**
**AT SRINAGAR**

WP(Crl.) No. 103/2022

**Reserved on :17.02.2023**
**Pronounced on : 13.04.2023**

Peerzada Shah Fahad …. Petitioner/Appellant(s)

Through:- Mr. N. A. Ronga, Advocate

V/s

Union Territory of J&K & anr. …..Respondent(s)

Through:- Mr. Sajad Ashraf, GA

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

**JUDGMENT**

**BRIEF FACTS OF THE CASE**

**01.** By way of the present petition, the petitioner, who is elder brother of the detenu, seeks quashment of Order No.DMS/PSA/149/2021 dated 11.03.2022 passed by District Magistrate, Srinagar in exercise of powers under Section 8 of the Jammu & Kashmir Public Safety Act, 1978, whereby detenu, namely, *Peerzada Fahad Shah S/o Nissar Ahmed Shah R/o Dawood Colony Anchar Soura, Srinagar*, has been placed under preventive detention with a view to prevent him from indulging in the activities which are prejudicial to the maintenance of public order.

**02.** The specific case of the petitioner is that the detenu is a reputed journalist having earned a good name and fame on international level in the field of honest and fair journalism and he is a peace loving and law abiding citizen having no criminal record or any adverse record in his career. He is

polite and a hard working journalist having being contributing for the cause of justice, majesty of law, peace and prosperity in a very efficient manner.

**03.** Further specific case of the petitioner is that the allegations levelled in terms of grounds of detention against the detenu are baseless, unfounded vague and without any substance, same are refuted by the detenu as there is no iota of truth in the allegation in creating law and order problem in the society. He has never acted in any manner or behaved in any way by his writings or deeds or by using social media which would constitute any offence in terms of law or which could promote violence or lawlessness in the society at large and he never behaved or acted in any manner which could be detrimental or prejudicial to the maintenance of public order or law and order.

**04.** It is the specific stand taken by the petitioner that the detenu was arrested on 04.02.2022 by the police of Police Station Pulwama and falsely booked him in an FIR No.19/2022 under Section 13 of ULA(P), Section 124A and Section 505 IPC and consequently, an application of bail was filed before the Court of competent jurisdiction at Pulwama, who had pleased to grant bail to the detenu and when the order of the Court was served upon the police concern, they did not release him and shifted him to the Police Station Imam Sahib Shopian where on the same set of allegations, another FIR bearing No.06/2021 under offences 153 and 505 I.P.C was registered against detenu.

**05.** The case projected by the petitioner is that in aforementioned FIR, bail was also granted by the Court of competent jurisdiction and after serving the order of bail upon the concerned police, they did not release him at all, instead he was shifted to Police Station Safakadal, Srinagar where one more FIR on the same set of allegations was registered against him, in which bail

had been already granted to the detenu and during the custody in FIR No.70/2020 P/S Safakadal, Srinagar, respondent No.2 issued an order of detention No. DMS/PSA/149/2021 dated 11.03.2022 against the detenu, by virtue of which he was taken into the preventive custody. The detenu is aggrieved of the said order and challenges the constitutionality and the legality of the same.

**ARGUMENTS ON BEHALF OF THE DETENU**

**06.** Mr. N. A. Ronga, learned counsel appearing on behalf of the detenu submits that the grounds provided to the detenu on the basis of which he has been detained, are vague, non-existent and unfounded. On the perusal of the said grounds, the detenu was unable to file a meaningful and effective representation to the appropriate authority against his detention and he has not been provided a copy of dossier, material or other record including the copies of FIRs which have been referred and relied upon by the detaining authority while framing grounds of detention and passing the detention order against the detenu, as such, he has been deprived of his constitutional and legal right of making a meaningful and effective representation against his detention, therefore, the action of the respondents is contrary and against the mandate of law in terms of Article 22 (5) of the Constitution of India read with Section 13 (2) of the J&K Public Safety Act.

**07.** Learned counsel appearing on behalf of the detenu further submits that the detaining authority has not been made aware or has not shown his awareness as to what has happened to the FIR's referred in the grounds of detention and the detenu was already in custody in FIR No.70/2020 P/S Safakadal for the offences under Sections 147, 307, 501, 505 109 I.P.C and 13

U.A. (P) Act, and bail was not granted in the said FIR by any Court of law and there was no reason for the respondents to detain the detenu under ]&K Public Safety Act as there were no compelling reasons for the respondents to detain him in terms of the impugned order.

**08.** Learned counsel appearing on behalf of the detenu has vehemently argued that no compelling reasons have been given or shown by the detaining authority/respondent No.2 while passing the impugned order against the detenu when he was already detained in terms of FIR No.70/2020 registered with Police Station Safakadal for the offences under Sections 147, 307, 501, 505, 109 I.P.C and 13 U.A. (P) Act in which no bail has been granted to the detenu. It was lawful for the respondents to ensure the rejection of bail in the Court of law by contesting the application for the grant of bail instead of taking recourse to the impugned order.

**09.** Learned counsel has argued that the detenu has not been informed by the respondents by any way or means about his right of representing against his detention before the competent authority. Learned counsel for the detenu has further argued that he has neither been given the copies of FIRs nor he has been provided the report of investigation, including copies of the statement of witnesses appeared against him during the course of the investigation of the above mentioned FIRs which again deprived the detenu from making a meaningful and effective representation against his detention.

**10.** Lastly, learned counsel appearing on behalf of the detenu has argued that all the allegations levelled against the detenu in terms of grounds of detention are denied by him as the same are bundle of lies, fabricated, malicious, unfounded, manipulated and baseless because there is no iota of

truth in the said allegation as the detenu is a peace loving and law abiding citizen of a high repute, who has never committed any such act or behaved in any such manner which would constitute any offence in terms of law. Learned counsel further stated that the impugned order passed against the detenu is unconstitutional, unwarranted, illegal and arbitrary and the same has been passed by the respondents with a sole aim and objective to deter the detenu rather to prevent him from performing his professional duties as a journalist of high repute, otherwise he had not committed any offence at all for which the respondents have detained him. The detenu is a pious and God fearing person, who has never indulged himself with any kind of activity which would constitute any offence in terms of law and he has no affiliation with any person or group of persons in the country or outside the country, who are creating any law and order problem or any anti-national problem to the state, as such, all allegations leveled in the grounds of detention are false and frivolous.

**ARGUMENTS ON BEHALF OF THE RESPONDENTS**

**11.** *Per contra*, Mr. Sajjad Ashraf, learned Government Advocate appearing on behalf of the respondents, submits that the purpose of preventive detention is detaining a person and 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 likelihood of detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. The Hon'ble Supreme Court in '***Haradhan Saha V. State of W.B (1975) 3 SCC 198'***, pointed out that 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 prosecution in a court of law and a detention order under the Act. Learned Government Advocate further submits that one is a punitive action and the other is a preventive act. In one case, a person is punished for his guilt and the standard is proof, beyond reasonable doubt, whereas in preventive detention, a man is prevented from doing something, which is necessary for reasons mentioned in the Act, to prevent him. An eminent thinker and author, Sophocles, had to say: "**Law can never be enforced unless fear supports them.**" This statement though is very old but has its relevance even today. However, every right-thinking citizen is duty bound to show stem to law for having an orderly, civilized and peaceful society. It has to be kept in mind that law is antagonistic to any type of disarray. It is completely intolerant of anarchy. If anyone flouts law, he has to face the ire of law, contingent on the concept of proportionality that the law recognizes.

**12.** Learned Government Advocate further submits that Article 22(5) of the Constitution of India and Section 13 of J&K Public Safety Act, 1978, guarantee safeguard to detenu to be informed, as soon as may be, of grounds on which order of detention is made, which led to the subjective satisfaction of detaining authority and also to be afforded earliest opportunity of making representation against order of detention. In terms of the provisions of the Act, a detenu is to be furnished with sufficient particulars to enable him to make a representation, which on being considered, may obtain relief to him. Not only this, the order of detention along with the material and representation, if any, filed by the detenu is examined thoroughly by the Advisory Board constituted under section 15 of the Act and it is only after the

opinion of the said Board that the order of detention is confirmed by the Government.

**13.** Mr. Ashraf, learned GA has argued that from perusal of the dossiers/detention orders and also the Court orders passed in detention matters depicts that where individual liberty comes into conflict with an interest of the security of the State or public order then the liberty of the individual must give way to the larger interest of the nation.

**14.** Learned counsel appearing on behalf of the respondents submits that the detenu came to be detained under the provisions of the Act of 1978 validly and legally by virtue of detention order and all statutory requirements and Constitutional guarantees have been fulfilled and complied with by the Detaining Authority, indisputably keeping in mind the very object of law of preventive detention being not punitive, but only preventive. It is trite law being settled in the case of preventive detention that no offence is to be proved nor is any charge formulated but the justification of such detention is suspension of reasonability and there is no criminal conviction which can only be warranted by legal evidence. It is reiterated at the cost of repetition that the Detaining Authority has passed order of detention after deriving subjective satisfaction in the matter. He further submits that the grounds of detention, order of detention, as well as entire material relied upon by the detaining authority have been furnished to the detenu well within statutory period provided under Section 13 of the Act.

**15.** It is vehemently argued by the counsel for the respondents that in compliance to District Magistrate's detention order, the warrant was, accordingly, executed by Executing Officer and detenu was handed over to

Superintendent District Jail Kupwara for lodgment. The contents of the detention order/warrant and the grounds of detention were read over and explained to the detenu in the language which he fully understood and in lieu whereof, the detenu subscribed his signatures on the Execution report/order and the detenu was also well informed about his right of making of representation to the detaining authority or to Government against his detention. The detenu despite having received the aforesaid entire material has not so far chosen to make any representation against his detention and the detenu was initially ordered to be lodged in District Jail Kupwara by the Detaining Authority where the detenu was handed over the order of detention, ground of detention and all other material relied upon by the authority while detaining the detenu and the said order was approved by the Government vide Order No. Home/PB-V/349 of 2022 dated 19.03.2022 and thereafter confirmed by Government vide Order No. Home/PB-V/941 of 2022 dated 09.05.2022.

**16.** It is argued by the learned GA that the detention of the detenu came to be extended for further period on the basis of recommendations of Special DGP CID and in this regard, Order No. Home/PB-V/2179 of 2022 dated 13.09.2022 and Order No. Home/PB-V/3077 of 2022 dated 12.12.2022 were issued by the Government and the respondents in the process have complied with all statutory, constitutional provisions and followed all requisite formalities and have not violated any of them, as such, the order impugned has been issued validly and legally.

**17.** It is further argued by the learned GA that in terms of Section 10-A of the Act, a detention order passed under section 8 of the Act, which has

been made on two or more grounds, shall be deemed to have been made separately on each of such grounds and shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are vague, non-existent, not relevant or not proximately connected with such a person.

**18.** Learned Government Advocate has vehemently argued that as the detenu has no right to challenge his detention for having not ostensibly chosen to file a representation against his detention before the competent authority and he has not intentionally and willfully availed the alternate and efficacious remedy, as such is estopped to challenge his preventive detention and the activities of the detenu have been found prejudicial to the maintenance of public order. Accordingly, police recommended his preventive detention and in this behalf submitted dossier supported by relevant material to the District Magistrate where the record/material was examined and after finding the preventive detention of the detenu necessary, the impugned order was passed with the sole aim and object to deter the detenu from acting in any manner which is prejudicial to the maintenance of public order.

**19.** Learned GA further argued that the averments raised in the petition are legally misconceived, untenable and without any merit, therefore, deserves to be rejected by this Court and the grounds of detention are precise, proximate, pertinent and relevant as there is no vagueness or staleness in the grounds of detention coupled with definite indications, as to the impact thereof which has been precisely stated in the grounds of detention. He further submits that the incidents clearly substantiate the subjective satisfaction arrived at by the answering respondents and the detention of the detenu has been passed in accordance with the provisions of PSA and the grounds of

detention give the complete picture of the activities of the detenu, which on the face of it, were highly prejudicial to the maintenance of maintenance of public order and respondents had no option but to detain the detenu under the provisions of PSA. Learned counsel further submits that even grant of bail in criminal offence cannot debar the detaining authority to order preventive detention of an individual when preventive detention of such individual is found necessitated, as is the case in respect of the Petitioner/detenu.

**20.** Lastly, it is argued by learned counsel for the respondents that the detenu was found involved in various anti-national nefarious activities and was, accordingly, detained under J&K PSA 1978 and the detenu was prevented from conducting anti national/ nefarious activities which are prejudicial to the maintenance of public order and the said detenu has a criminal bent of mind which is evident from his conduct over a period of time and has been found indulging in anti-national /nefarious activities in order to disturb the public peace and order, prejudicial to the maintenance of public order, for which, sufficient material was received to detain the detenu under J&K PSA 1978. He has further argued that all the material was provided to the detenu and detention order has been issued with due application of mind as the grounds of detention are sufficiently connected with the activities of detenu which on the face of it are highly prejudicial to the maintenance of public order. The Police Security agencies were the only law enforcing agencies who keep all the records of the anti-social, anti-national, & criminal activities of miscreants. Accordingly, the detaining authority agreed upon the material provided by the security agencies as sufficient grounds for his detention were available on record.

**LEGAL ANALYSIS**

**21.** Heard learned counsel for the parties at length and perused the record which has been supplied to this Court by learned Government Advocate appearing on behalf of the respondents. Before adverting to the case at hand, it is incumbent upon the Court to draw attention towards the fact that the right to life and liberty is one of the most cherished rights enjoyed by citizen and the State is duty bound to protect this precious right in the light of the cherished constitutional freedom.

**22.** Coming to the rival contention that has been raised by the parties, the primary contention is with respect to "**whether the relevant material has been provided to the detenu by the detaining authority or not**." On careful analysis of the record, it is evident that the relevant material i.e., dossier has not been provided to the detenu. The execution report reads that he has been provided with order of detention, grounds of detention and copies of FIRs against him. **The non-supplying of the dossier is one of the main lacunae in the detention of the detenu.**

**23.** Thus, the legal question that arises from this factual position is **"whether non-supply of dossier to the detenu vitiates the detention order and renders the order bad in law?"**

> "It is a settled position of law that non supply of dossier and other relevant material to the detenu prevents him from making an effective representation before the relevant authorities. I am fortified in my view by the following judgments."

**24.** In **Gulzar Ahmad Sheikh Vs. Union Territory of J&K bearing WP (Crl) No. 139 of 2021, decided on 21.05.2022,** this Court has held as under:

*"12. Respondents have, therefore, failed to supply the dossier, FIR and other record of the case, based whereupon the order of detention had been passed to detain the detenue. The detenue has thus, been prevented from making an effective and meaningful representation in accordance with law and his rights under Article 22 of the Constitution of India, again lending substance to the challenge to the detention order.*

*13. So far as the contours of this requirement and sufficient compliance thereof is concerned, reliance can be placed on the judgment of the Supreme Court reported as AIR 1999 SC 3051 Sophia Gulam Mohd. Bham, vs. State of Maharashtra'. Paras 12, 13, and 14 of the same read as under:*

*12. The detenu was thus informed that he has a right not only to make a representation to the Detaining Authority against the order of detention but also to the State Government and the Central Government.*

*13. Now, an effective representation can be made against the order of detention only when copies of the material documents which were considered and relied upon by the Detaining Authority in forming his opinion that the detention of Bham Faisal Gulam Mohammed was necessary, were supplied to him. It is only when he has looked into those documents, read and understood their contents that it can be said that the detenu can make an effective representation to the Detaining Authority, State or Central Government, as laid down in Article 22 (5) of the Constitution which provides as under: "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."*

*14. The above will show that when a person is detained in pursuance of an order made for preventive detention, he has to be provided the grounds on which the order was made. He has also to be afforded the earliest opportunity of making a representation against that order. Both the requirements have to be complied with by the authorities making the order of detention. These are the rights guaranteed to the person detained by this clause of Article 22 and if any of the rights is violated, in the sense that either the grounds are not communicated or opportunity of making a representation is not afforded at the earliest, the detention order would become bad. The use of the words "as soon as may be" indicate a positive action on the part of the Detaining Authority in supplying the grounds of detention. There should not be any delay in supplying the grounds on which the order of detention was based to the detenu. The use of the words "earliest opportunity" also carries the same philosophy that there should not be any delay in affording an adequate opportunity to the detenu of making a representation against the order of detention. 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 detenu 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 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."*

*14. In view of the legal position, as stated above and in particular having regard to the fact that an order of preventive detention against a person passed at a time when that person is already in the custody of the Authorities for commission of an act under substantive law, is illegal unless there is possibility of immediate release of the person*

*from custody in the substantive offence and there are compelling reasons for passing of the order of preventive detention. Such a situation is required to be reflected in the order of detention or the grounds of detention formulated by the detaining authority. Not furnishing of whole of the material, on which the detention order has been based, to the detenue has also made him disabled to make an effective and meaningful representation against the detention order, vitiates the same which is not sustainable. The impugned order is, therefore, liable to be quashed on these counts alone.*

***25.*** In **Khalid Nazir Wagay Vs. Union Territory of J&K & Ors. WP(Crl) 132/2022, decided on 09/02/2023,** this Court has held as under **:**

*"9) Thus, contention of the petitioner that whole of the material relied upon by the detaining authority, while framing the grounds of detention has not been supplied to him, appears to be well-founded. Rather the record produced by the respondents corroborates the fact that whole of the material relied upon by the detaining authority and transmitted to him by the concerned sponsoring agency has not been furnished to the detenue. Obviously, the petitioner has been hampered by non-supply of these vital documents in making an effective representation before the Advisory Board, as a result whereof his case has been considered by the Advisory Board in the absence of his representation, as is clear from the detention record. Thus, vital safeguards against arbitrary use of law of preventive detention have been observed in breach by the respondents in this case rendering the impugned order of detention unsustainable in law. 10) It needs no emphasis that the detenue cannot be expected to make an effective and purposeful representation which is his constitutional right guaranteed under Article 22(5) of the Constitution of India, unless and until the material, on which the detention is based, is supplied to the detenue. The failure on the part of detaining authority to supply the material renders the*

*detention order illegal and unsustainable. While holding so, I am fortified by the judgments rendered in Sophia Ghulam Mohd. Bham V. State of Maharashtra and others (AIR 1999 SC 3051), Thahira Haris Etc. Etc. V. Government of Karnataka & Ors. (AIR 2009 SC 2184), Ram Krishan Bhardwaj v. State of Delhi, AIR 1953 SC 318, Shalini Soni v. Union of India, (1980) 4 SC 544, and Nazeer Ahmad Sheikh vs. Additional Chief Secretary Home, 1999 SLJ 241".*

***26.*** In **Icchu Devi Choraria vs Union of India** reported as **(1980) 4 SCC 531,** the Hon'ble 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. The right of the detenu to be supplied, copies of such documents, statements and other materials flow 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 meaningful.

Thus, I hold that non-supply of dossier and the relevant material vitiates the detention order and cannot sustain the test of law and is liable to be quashed.

***27.*** While perusing the record supplied to this Court, it has come to the notice of this Court that in para-2 of the grounds of detention, it has been stated that "a number of incidents have been cited wherein the detenu indulged in inciting violence, thereby leading to **disturbance in public order**. However, in para-5 of the grounds of detention, it has been stated that "whereas, the SSP Srinagar has reported in the dossier that being a head of

"kashmirwalla" online news portal, you are continuously propagating stories which are ***"against the interest and security of the nation".***

***28.*** The legal question, in this context, that arises for this Court's consideration is thus **"Whether the concepts of "public order" and "security of state" are distinct and separate and whether they can be used interchangeably?"**

***29.*** As has been said by the Hon'ble Supreme Court in **G. M. Shah vs. State of J&K** reported as **AIR 1980 SC 494,** the expressions *"**law and order**", "**Public order**"* and *"**security of the State**"* are distinct concepts, though not always separate. While every breach of peace may amount to disturbance of law and order, every such breach does not amount to disturbance of public order and every public disorder may not prejudicially affect the *"**security of the State***.

***30.*** The abovementioned position was recently reiterated by a coordinate bench of the High Court of Jammu & Kashmir and Ladakh in the case titled **Javid Ahmad Mir V UT of J&K and Anr. WP (Crl) No. 151 of 2021, decided on 28.04.2022,** wherein it was held that:

> *"11. In the present case, detaining authority has made use of both expressions "prejudicial to maintenance of public order" as well as "prejudicial to security of the State". Impugned detention order, made on the basis of grounds of detention using both expressions by the detaining authority to place the detenu under preventive detention, in view of above discussion and well settled law, is held illegal and consequently impugned order is vitiated."*

**31.** In **Dr. Ram ManohaL Lohia v. State of Bihar and others, 1966 AIR SC 740**, it has been held by the Supreme Court as under: -

"***That any contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. It was observed that offences against "law and order", "public order" and "security of the State" are demarcated on the basis of the gravity. It is the degree of disturbance and its affect upon the life of the community in a locality which determines whether the disturbance amounts only to breach of law and order though in the grounds of detention, the detaining authority had stated that by committing this offence in public, the detenu created a sense of alarm, scare and a feeling of insecurity in the minds of the public of the area and thereby acted in a manner prejudicial to the maintenance of public order which affected the even tempo of life of the community. It was held that mere citation of these words in the order of detention was more in the nature of a ritual rather than with any significance to the content of the matter***."

**32.** In **Mallada K Sri Ram v. State of Telangana,** reported in **2022 SCC online SC 424,** the Hon'ble Apex Court has considered the distinction between "law and order" and "public order" and observed as under:-

"12. The distinction between a disturbance to law and order and a disturbance to public order has been clearly settled by a Constitution Bench in Ram Manohar Lohia v. State of Bihar. **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 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."

"15. A mere apprehension of a breach of law and order is not sufficient to meet the standard of adversely affecting the "maintenance of public order". in this case, the apprehension of a disturbance to public order owing to a crime that was reported over seven months prior to the detention order has no basis in fact. The apprehension of an adverse impact to public order is a mere surmise of the detaining authority, especially when there have been no reports of unrest since the detenu was released on bail on 8 January 2021 and detained with effect from 26 June 2021. The nature of the allegations against the detenu are grave. However, the personal liberty of an accused cannot be sacrificed on the altar of preventive detention merely because a person is implicated in a criminal proceeding. The powers of preventive detention are exceptional and even draconian. Tracing their origin to the colonial era, they have been continued with strict constitutional safeguards against abuse. Article 22 of the Constitution was specifically inserted and extensively debated in the Constituent Assembly to ensure that the exceptional powers of, preventive detention do not devolve into a draconian and arbitrary exercise of state authority. The case at hand is a clear example of non-application of mind to material circumstances having a bearing on the subjective satisfaction of the detaining authority. The two FIRs which were registered against the detenu are capable of being dealt by the ordinary course of criminal law."

**33.** In the light of the aforesaid discussion, I conclude that since the detaining authority has used both the expressions "Public Order" and "Security of the State" with a wavering mind and uncertainty and accordingly, the detention order gets vitiated and cannot sustain the test of law and is liable to be quashed.

**34.** From bare perusal of the writ petition, it is emphatically clear that the petitioner has specifically pleaded in ground B of the grounds of challenge that the detenu has not been provided the copy of the dossier material or other record including the copy of FIR which have been referred and relied upon by the detaining authority while framing the grounds of detention and passing the detention order against the detenu and thus, the detenu has been deprived of his constitutional and legal right of making a meaningful and effective representation against his detention. The respondents have filed detailed reply and perusal whereof reveals that there is no specific denial by the respondents to the aforesaid averments of the detenu.

**35.** It is worthwhile to mention that, while perusing the grounds of detention prepared by D.M, Srinagar, on the basis of dossier submitted by the district police, Srinagar, in **Para:2**, it reflects that the activities of the detenu leads to the disturbance of the **public order.**

However, in the concluding part of the grounds of detention it has been reflected that: -

**"Whereas your activities are prejudicial to the security and sovereignty of the country."** The detaining authority's opposition to the grounds of detention, demonstrates that they did not carefully evaluate and apply their thoughts while passing the detention order.

With a view to appreciate the aforesaid legal proposition, it would be apt to reproduce the provisions of Public Safety Act which provides as under :

**8. Detention of certain persons.** — (1) The Government may—

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to–

(i) the security of the State or the maintenance of the public order; or

(ii) [Omitted.]

(a-1) if satisfied with respect to any person that with a view to preventing him from–

(i) smuggling [timber or liquor]; or
(ii) abetting the smuggling of [timber or liquor]; or
(iii) engaging in transporting or concealing or keeping smuggled timber; or
(iv) dealing the smuggled timber otherwise than by engaging in transporting or concealing or keeping in smuggled timber [or liquor]; or
(v) harbouring persons engaged in smuggling of timber [or liquor] or abetting the smuggling of timber 3[or liquor]; or]

(b) if satisfied with respect of such person who is—

(i) a foreigner within the meaning of the Foreigners Act,

(ii) a person residing in the area of the State under the occupation of Pakistan,

that with a view to regulating his continued presence in the State or with a view to making arrangements for his expulsion from the State,

it is necessary so to do, make an order directing that such person be detained.

(2) Any of the following officers, namely:—

(i) Divisional Commissioners,

(ii) District Magistrate,

may, if satisfied as provided in sub-clauses (i) and (ii) of clause [(a) or (a-1) of sub-section (1), exercise the powers conferred by the said sub-section.

(3) For the purposes of sub-section (1), —

[(a) Omitted.]

(b) "acting in any manner prejudicial to the maintenance of public order" means—

(i) promoting, propagating or attempting to create, feelings of enmity or hatred or disharmony on ground of religion, race, caste, community, or region;

(ii) making preparations for using, or attempting to use, or using, or instigating, inciting, provoking or otherwise abetting the use of force where such preparation, using, attempting, instigating, inciting, provoking or abetting, disturbs or is likely to disturb public order;

(iii) attempting to commit, or committing, or instigating, inciting, provoking or otherwise abetting the commission of, mischief within the meaning of section 425 of the Ranbir Penal Code where the commission of such mischief disturbs, or is likely to disturb public order;

(iv) attempting to commit, or committing, or instigating, inciting, provoking or otherwise abetting the commission of an offence punishable with death or imprisonment for life or imprisonment of a term extending to seven years or more, where the commission of such offences disturbs, or is likely to disturb public order;

[(c)"smuggling" in relation to timber means possessing or carrying of illicit timber and includes any act which will render the timber liable to confiscation under Forest Act, Samvat 1987 or under the Jammu and Kashmir Excise Act, 1958, as the case may be;]

[(d)"timber" means timber of Fir, Kail, Chir or Deodar tree whether in logs or cut up in pieces but does not include firewood;]

[(e) "Liquor" includes all alcoholic beverages including beer;]

[(f) "person" shall not include a citizen of India who has not

attained the age of eighteen years for being detained under clauses (a) and (a-1) thereof].

(4) When any order is made under this section by an officer mentioned in sub-section (2), he shall forthwith report the fact to the Government together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless in the meantime it has been approved by the Government.

**36.** From the perusal of the aforesaid statutory provision, it is emphatically clear that maintenance of **public order** and **Security and Sovereignty of the country** are two distinct expressions and have different connotations and are demarcated on the basis of gravity and cannot be used simultaneously which clearly proves beyond any shadow of doubt that the detaining authority has not applied its mind while passing the order of detention. Accordingly, the order impugned gets vitiated and liable to be set aside.

From the perusal of grounds of detention, it is manifestly clear that the same are vague and bald assertions without any specific details with the result that the detenu was unable to file a meaningful and effective representations. Besides the specific averment of the detenu that he has not been provided copy of the dossier and other relevant material including copies of FIRs which have been referred and relied by the detaining authority while framing grounds of detention and passing the detention order against the detenu, has not been specifically denied by the respondents and is also borne from the record. The action of the respondents as such is violative of Article

22(5) of the Constitution of India read with Section 13(2) of the Public Safety Act.

**37.** Reliance is placed in case titled **Thahira Haris vs. Govt. Of Karnataka, reported in 2009 11 SCC 438, wherein,** the Hon'ble Supreme Court has held as under**:**

> ***"11. More than half a century ago, the Constitution Bench of this Court has interpreted Article 22(5) of the Constitution in Dr. Ram Krishan Bhardwaj v. The State of Delhi and Ors. 1953 SCR 708 observed as under:***
>
> ***"5.....Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court. In this case, the petitioner has the right, under article 22(5), as interpreted by this Court by majority, to be furnished with particulars of the grounds of his detention "sufficient to enable him to make a representation which on being considered may give relief to him." We are of opinion that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under clause (6) of article 22. That not having been done in regard to the ground mentioned in sub-paragraph (e) of paragraph 2 of the statement of grounds, the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of article 21. The petitioner is therefore entitled to be released and we accordingly direct him to be set at liberty forthwith."***
>
> ***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."***

**38.** Perusal of the detention record further reveals that the concerned who has executed the document has not sworn in affidavit in that behalf and as such, the procedural requirement as envisaged under law has not been followed by the respondents. The Hon'ble Supreme Court in **Abdul latief Wahab Sheikh Vs. B. K. Jha, reported in 1987 (2) SCC 22** has made it clear that it is only the procedural requirements, which are the only safeguards available to detenu, that is to be followed and complied with as the Court is not expected to go behind the subjective satisfaction of detaining authority. In the present case, the procedural requirement, as discussed and noted above, have not been followed and complied with by respondents in letter and spirit and as a corollary thereof, petition is required to be allowed and the detention order is liable to be quashed.

**39.** That no compelling reasons have been given or shown by the detaining authority while passing the impugned order against the detenu when he was already in custody in pursuance of FIR 70/2020 in which no bail has been granted. In absence of any compelling reasons, the order of detention cannot sustain the test of law.

**40.** Reliance is placed on the judgment passed by the Hon'ble Division Bench of this Court in **Umar Yousaf Naik vs State of J&K & anr. (LPA No. 216/2019) decided on 29.01.2021** 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."***

**41.** I am fortified with the view taken by this Court in **Mohammad Maqbool Beigh Vs. State of J&K**, reported as **2007 (I) SLJ 89** wherein it has been held 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 detenu."***
>
> ***"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."***

**CONCLUSION**

**42.** Thus, in light of the what has been stated hereinabove coupled with the settled legal position, Order No.DMS/PSA/149/2021 dated 11.03.2022 passed by District Magistrate, Srinagar is hereby quashed and the detenu namely **Peerzada Fahad Shah S/o Peerzada Nissar Ahmed Shah R/o Dawood Colony Anchar Soura, Srinagar**, is ordered to be set at liberty forthwith if not required in any other case.

**43.** Registry is directed to hand over the record of the case to the learned counsel for the respondents against proper receipt.

**(Wasim Sadiq Nargal)**
**Judge**

**JAMMU**
**13.04.2023**
***RAM MURTI***

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