

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

**WP(Crl) 252/2023  
CrlM(733/2023)**

**Sheikh Arshul Rashid (Age: 36 years)  
S/o Abdul Rashid  
R/o at present Karan Nagar, Srinagar, through his wife;  
Mst. Dafiq Arshul (Aged: 26 years)  
W/o Sheikh Arshul Rashid  
R/o at present Karan Nagar, Srinagar.**

**..... Petitioner(s)**

Through: Mr. B.A. Bashir, Senior Advocate with  
Ms. Falak Bashir, Advocate.

**V/s**

- 1. Union Territory of J&K through  
Principal Secretary to Govt. Home  
Department Civil Secretariat,  
Srinagar/Jammu.**
- 2. Divisional Commissioner, Kashmir,  
Srinagar.**
- 3. Deputy Commissioner, Srinagar.**
- 4. Senior Superintendent of Police,  
Srinagar.**
- 5. Mr. Showkat Ahmad, Station House  
Officer (SHO) Police Shergari, Srinagar.**

**.....Respondent(s)**

Through: Mr. Sajad Ashraf, GA.

**CORAM:**

**HON'BLE MR. JUSTICE RAHUL BHARTI, JUDGE.**

**JUDGMENT**

1. Heard the learned counsel for the parties. Perused the pleadings and the record accompanying therewith.
2. This writ petition was filed on 21<sup>st</sup> June 2023.

3. The petitioner finds himself being chased by a preventive detention order no. DIVCOM-“K”/88/2023 dated 9<sup>th</sup> June 2023 issued by the respondent no. 2-Divisional Commissioner, Kashmir by resorting to Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988.

4. As the execution of the said detention order is yet to take place, the petitioner has come forward through his wife with the present writ petition under Article 226 of the Constitution of India seeking quashment of the course of action so resorted to at the end of the Divisional Commissioner, Kashmir who is impleaded as a respondent no. 2 in the writ petition.

5. The respondent no. 2-Divisional Commissioner, Kashmir came to be served with a dossier by the respondent no. 4-Senior Superintendent of Police (SSP), Srinagar, vide a communication no. LGL/Det-PIT/2023/10329-32 dated 19<sup>th</sup> April 2023 thereby putting up a case for seeking preventive detention of the petitioner upon the premise that the petitioner's activities are found to be indulging in narcotic trade being prejudicial and adverse to the Society for which premise a registration of FIR no. 08/2023 under section 8/2023 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (NDPS Act in short) by the Police Station Shergari against the petitioner is cited.

6. Upon registration of aforesaid FIR no. 08/2023 under section 8/2022 of the NDPS Act, 1985 by the Police Station Shergari, the petitioner reportedly came to be arrested by the Police to suffer police custody followed by judicial custody. The petitioner applied for bail before the Court of learned 1<sup>st</sup> Additional Sessions Judge, Srinagar and came to be admitted to an interim bail in terms of an order dated 11<sup>th</sup> April 2023 upon the terms and conditions as set out in the bail order. This interim bail in favour of the petitioner, granted in terms of order dated 11<sup>th</sup> April 2023, came to be made absolute in terms of an order dated 25<sup>th</sup> April 2023 by the Court of learned 1<sup>st</sup> Additional Sessions Judge, Srinagar.

7. From the aforesaid situation relatable to FIR no. 08/2023 and the arrest of the petitioner, an aspect comes out to be taken notice of that after the petitioner had come to be admitted to an interim bail in terms of said

order dated 11<sup>th</sup> April 2023, the respondent no. 4-Senior Superintendent of Police, Srinagar came forward with first dossier related communication dated 19<sup>th</sup> April 2023 served to the respondent no. 2-Divisional Commissioner, Kashmir.

8. There is no escape and denial to the fact that in his dossier dated 19<sup>th</sup> April 2023, the respondent no. 4-Senior Superintendent of Police did not mention the fact of the petitioner having been admitted to interim bail in terms of an order dated 11<sup>th</sup> April 2023. This Court is making this observation on the basis of the fact that in his detention order read with grounds of detention passed and issued the respondent no. 2-Divisional Commissioner, Kashmir it has nowhere been adverted or suggested that the petitioner stood admitted to interim bail. Obviously the respondent no. 2-Divisional Commissioner, Kashmir was supposed not to know about the fact of interim bail of the petitioner when the respondent no. 4-Senior Superintendent of Police, Srinagar himself was not putting the requisite fact for information of the respondent no. 2-Divisional Commissioner, Kashmir and that is the reason in his detention order and the grounds of detention, the respondent no. 2-Divisional Commissioner, Kashmir has no clue about the fact of the petitioner having been admitted to interim bail.

9. Perusal of the impugned order further reflects that after his dossier communication dated 19<sup>th</sup> April 2023, the respondent no. 4- Senior Superintendent of Police, Srinagar came forward with a second dossier related communication no. LGL/Det-PSA/2023/11408-10 dated 1<sup>st</sup> May 2023 to the respondent no. 2-Divisional Commissioner, Kashmir.

10. This second time communication from the respondent no. 4-Senior Superintendent of Police, Srinagar is post the admission of the petitioner to regular bail by the order dated 25<sup>th</sup> April 2023 passed by the Court of learned 1<sup>st</sup> Additional Sessions Judge, Srinagar. Even this second time communication of respondent no. 4-Senior Superintendent of Police, Srinagar seems to be keeping the fact of the petitioner having been admitted to interim and absolute bail unannounced to the respondent no. 2-Divisional Commissioner, Kashmir otherwise the respondent no. 2-Divisional Commissioner, Kashmir would not have missed a mention of the said aspect

of the petitioner having been admitted to an interim and regular bail in the impugned order of detention read with grounds of detention.

11. By the time the impugned order of detention dated 9<sup>th</sup> June 2023 came to be passed by the respondent no. 2-Divisional Commissioner, Kashmir against the petitioner, the petitioner stood enlarged on regular bail by the Court of learned 1<sup>st</sup> Additional Sessions Judge, Srinagar in terms of an order dated 25<sup>th</sup> April 2023 and this aspect is missing from the notice of the respondent no. 2-Divisional Commissioner, Kashmir.

12. The petitioner in his writ petition has assailed the impugned order of detention by terming it as an abuse of process of law at the ends of the respondents. In order to salvage the maintainability of the writ petition at the pre-execution stage of the preventive detention order, the petitioner has drawn reliance from the judgments of the Hon'ble Supreme Court of India in the case of **Additional Secretary to Government of India & Ors vs Alka Subhas Gadia & Anr-1992 Supp (1) SCC 496; Deepak Bajaj vs State of Maharashtra & Anr-2009 AIR SC 628.**

13. Counter affidavit to the writ petition came to be submitted by the respondents in October 2023. This counter affidavit has been submitted by the respondent no. 2-Divisional Commissioner, Kashmir. A perusal of the counter affidavit reflects that there is no mention of the fact attending the release of the petitioner on bail and its non-disclosure by the respondent no. 4-Senior Superintendent of Police, Srinagar to the respondent no. 2-Divisional Commissioner, Kashmir. Just by reference to the recitals made in the grounds of the detention that the petitioner was a drug addict, main peddler, clandestinely dealing in illegal business of narcotics as being part of active member of a drug mafia the petitioner has been subjected to suffer loss of his personal liberty by the respondent no. 2-Divisional Commissioner, Kashmir.

14. Bad projection of character and conduct of the petitioner as made by the respondent no. 2-Divisional Commissioner, Kashmir in his grounds of detention read with the impugned order of detention is surely not forthcoming from the personal knowledge and information of the respondent no. 2-Divisional Commissioner, Kashmir but is being sourced to the dossier

communication submitted by the respondent no. 4-Senior Superintendent of Police, Srinagar.

15. The only factual content of the dossier is registration of FIR no. 08/2023 under section 8/2022 of the NDPS Act, 1985. Without anything else in terms of the antecedents of the petitioner being provided and divulged for the notice and information of the respondent no. 2-Divisional Commissioner, Kashmir to enable him to draw a sound subjective satisfaction with respect to the state and propensity of the activities of the petitioner, the respondent no. 4-SSP Srinagar had only one FIR no. 08/2023 at his service to characterise the petitioner in every possible bad shade meaning thus if this sole FIR would not have been there, the respondent no. 4-SSP Srinagar would have nothing at his command to sponsor a case for seeking deprivation of the personal liberty of the petitioner by exploit of preventive detention jurisdiction. It is here the impugned order of detention read with its grounds of detention passed and issued by the respondent no. 2-Divisional Commissioner, Kashmir gets tainted, when relatable to said sole FIR implicating the petitioner, the fact of the grant of interim and regular bail in favour of the petitioner was kept withheld by the respondent no. 4-SSP Srinagar.

16. What was the mindset operating at the end of the respondent no. 4-SSP Srinagar in keeping the respondent no. 2-Divisional Commissioner, Kashmir, misinformed or half informed is for the respondent no. 4-SSP Srinagar to have accounted for but the same has not been done leaving this Court to make a safe inference that by non-disclosure of said fact of grant of bail to the petitioner vis-à-vis said FIR no. 08/2023, the respondent no. 4-SSP Srinagar insured that the respondent no. 2-Divisional Commissioner, Kashmir, has no occasion to reflect upon that if the petitioner has been bailed out by a court order with respect to his arrest in reference to said FIR then how plausible and prudent would it be to subject the petitioner to suffer loss of personal liberty by preventive detention resort. It is here that the respondent no. 4-SSP Srinagar got the process vitiated by his own act of omission and commission and made the respondent no. 2-Divisional Commissioner, Kashmir to fall prey to his desired dictation. If the fact of grant of bail would have been referred to in the detention order and the

grounds of detention by the respondent no. 2-Divisional Commissioner Kashmir, then this court would have been in a position to examine the detention order of the petitioner from point and perspective of fullness of facts vis-à-vis the subjective satisfaction of the respondent no. 2-Divisional Commissioner, Kashmir but the case position is contrary and thus a seriously flawed detention order cannot be allowed to have the credit that the petitioner shall first suffer detention and then only the petitioner can come to seek restoration of his personal liberty by a writ petition filed afresh.

17. The legal and factual scenario of the present case is well served by a judgment of the Hon'ble Supreme Court of India in the case of **Sushanta Kumar Banik vs State of Tripura & Ors, 2022 SCC Online SC 1333**. In this case the Hon'ble Supreme Court of India has considered legality and validity of the preventive detention of a detenu under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 in the light of the two tests namely (i) Delay in passing the order of detention and (ii) non reporting of vital associate facts by sponsoring authority for the due notice of the detention ordering authority. In this case also fact of grant of bail by criminal court in favour of the detenu with respect to two FIRs registered under the NDPS Act 1985 were not apprised to the detention ordering authority and the preventive detention was held to be bad. Para 27 and 28 of the judgment sums up the position and same is reproduced as under:

**“27. It is clear to our mind that in the case on hand at the time when the detaining authority passed the detention order, this vital fact, namely, that the appellant detenu had been released on bail by the Special Court, Tripura despite the rigours of Section 37 of the NDPS Act, 1985, had not been brought to the notice and on the other hand, this fact was withheld and the detaining authority was given to understand that the trial of those criminal cases was pending.**

**28. The preventive detention is a serious invasion of personal liberty and the normal methods open to a person charged with commission of any offence to disprove the charge or to prove his innocence at the trial are not available to the person preventively detained and, therefore, in prevention detention jurisprudence whatever little safeguards the Constitution and the enactments authorizing such detention provide assume utmost importance and must be strictly adhered to.”**

18. The present case is a clear cut case of the preventive detention being intended to be slapped against the petitioner upon an edited version of facts relevant to the formation of subjective satisfaction of the respondent no. 2-Divisional Commissioner, Kashmir and thus self invites a constitutional censure from the Court which is custodian and guardian of fundamental rights of the citizens of India for which an illegality and invasion qua fundamental right enjoyment cannot be allowed the benefit of running its course and then to be set right.

19. Thus, this writ petition is allowed and the impugned order of detention no. DIVCOM-“K”/88/2023 dated 9<sup>th</sup> June 2023 passed by the respondent no. 2-Divisional Commissioner, Kashmir with respect to the petitioner is hereby quashed.

20. Writ petition **disposed** of along with connected CrIM.

**(Rahul Bharti)**  
**Judge**

**SRINAGAR:**

**30.10.2023**

“Hamid”

- i. *Whether the judgment is reportable?* Yes/No  
ii. *Whether the judgment is speaking?* Yes/No

