

Hamraz Singh vs Union Territory Of Jammu & Kashmir on 23 March, 2022

Author: Mohan Lal

Bench: Mohan Lal

S. No. 01

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

WP (Crl) No. 55/2021

Reserved on: 23.02.2022
Pronounced on: 23.03.2022

Hamraz Singh

.....Petitioner(s)/Appellant(s)

Through: Mr. Rajnesh Singh Parihar, Adv.

V/s

Union Territory of Jammu & Kashmir

.....Respondent(s)

Through: Mr. Sumeet Bhatia, GA

CORAM:

HON'BLE MR. JUSTICE MOHAN LAL, JUDGE

JUDGMENT

23. 03. 2022

1. Assailing the impugned detention order bearing No. DMU/JC/542-48 dated 17.05.2021 issued by District Magistrate Udhampur and order bearing No. Home/PB-V/620 of 2021 dated 06.08.2021 whereby the detention order has been extended for further period of three months, petitioner by invoking the jurisdiction of this Court in terms of Article 226 of the Constitution of India, has questioned legality, propriety and correctness of the impugned order and has sought the indulgence of this Court for issuance of a writ of habeas corpus commanding the respondents to release petitioner from illegal detention by quashing the impugned detention order No. 01 PSA 2021 dated 17.05.2021 on the following grounds:

(i) that the essential material i.e., the copies of the FIRs alleged in the dossier of Senior Superintendent of Police Udhampur, site plans, recovery memos, statement of witnesses recorded u/s 161 Cr.P.C have not been supplied to the petitioner who has been prevented from making effective representation against the impugned detention order, as well as, the grounds of detention have not been communicated to the petitioner which is clear violation of mandate of Article 22(5) of Constitution of India

r/w Section 13 of Public Safety Act 1978;

(ii) that the impugned detention order is verbatim copy of the dossier which is totally non-application of the mind of the respondent No. 02 who has acted in a mechanical manner and has not applied his mind while passing of the detention order, as respondent No. 02 has neither reflected its own satisfaction nor has drawn its own grounds indicating that he was satisfied that the detainee was acting in any manner prejudicial and detrimental to the maintenance of public order;

(iii) that the Respondent No. 02 viz, District Magistrate, Udhampur has passed an order bearing No. DMU/JC/542-48 dated 17.05.2021 by virtue of which the detainee has been detained and lodged in Central Jail Kot-

Bhalwal for a period of (03) three months by exercising powers under Section 8 of Jammu and Kashmir Public Safety Act 1978 with amended Act of 2012, whereas, Respondent No. 02 (Detaining Authority) lacks power and jurisdiction to determine the period of detention of the detainee, such a power in terms of Section 8(4) of Jammu and Kashmir Public Safety Act 1978 belongs to the Government, the detaining authority by deciding the period of detention has violated constitutional safeguards available to the detainee under Article 22 (5) of Constitution of India which vitiates the detention order;

(iv) that the detainee at the time of his detention by Respondent No. 02 was already in custody of Police Station Rehmbal Udhampur in connection with FIR bearing No. 71/2021 registered under Section 8/21/22 of NDPS Act in which the detainee was not bailed out, respondent No. 02 - District Magistrate Udhampur did not apply his mind whether detention was necessary despite the fact the detainee was already in custody and not released on bail, there is nothing to indicate that respondent No. 02 - District Magistrate Udhampur has applied his mind to the question whether an order of detention under Jammu and Kashmir Public Safety Act 1978 was necessary, non-application of mind by respondent No. 02 vitiates whole of the proceedings under the detention Act;

2. Respondent No. 02 (District Magistrate, Udhampur) has filed counter affidavit, wherein it has been specifically pleaded, that the Senior Superintendent of Police Udhampur vide communication bearing No. Conf/2021/19415-18 dated 03.05.2021 reported that one Hamraz Singh @ Tiger caste Sikh S/o Sh. Surinder Singh R/o Barrian Tehsil and District Udhampur has become a notorious criminal/ drug peddler, whereby he has continuously shown his involvement in a number of criminal acts in relation to the Narcotic Drugs and Psychotropic Substance; that the detainee is having a long history of affiliation with drugs and drug peddlers which has a serious implication on the society as well as young generation thereby increasing drug abuse scenario crippling the mental and physical wellbeing of the youth rendering them lifeless and steadily incapacitating them making their existence a serious threat for their family and for the society around them; that the detainee has been found involved in a number of criminal cases viz FIR No. 383/2019 U/S 8/21/22 NDPS Act P/S Udhampur, FIR No. 76/2021 U/S 8/21/22/27-A/29 NDPS Act P/S Udhampur, & FIR No. 71/2021 U/S 8/21/22 NDPS Act P/S Rehmbal (Udhampur) wherein his role as a drug peddler has surfaced, the detainee is having a deep rooted nexus with the encouraging criminal minded people to

commit illegal sale/purchase of narcotic contraband among innocent youth of the town, and the criminal activities of the detainee are highly prejudicial to the maintenance of public law, order and tranquility; that in order to stop the detainee from indulging in criminal activities, his detention under the provisions of PSA has become imperative and he has been detained under Public Safety Act vide Order No. 01-PSA-2021 dated 17.05.2021 issued under endorsement No. DMU/JC/542-48 dated 17.05.2021; that the copy of the detention order alongwith grounds of detention and material were forwarded to Senior Superintendent of Police Udhampur for execution with a direction to serve its copy to the detainee and also read over and explain the order and grounds of detention to the detainee in the language he understands, and more so, the detainee was also informed that he can make a representation against the detention order if he desires so; that the drug peddler has become a serious problem which has deteriorated lives of millions of drug addicts, the detainee was detrimental to the maintenance of peace and public order, the detainee being a notorious drug peddler was not likely to desist from his criminal activities which were prejudicial to the maintenance of peace and public order in District Udhampur, the application of normal law was ineffective to deter the detainee from carrying out his inimical designs and criminal activities, therefore, his detention under Public Safety Act 1978 was necessary; that the detainee was already in judicial remand in District Jail Udhampur and had applied for bail and there was every likelihood that he will manage to get bail order from the learned Court in his favour, the detention order and other relevant materials were examined and considered by the Government and the detention was extended for (03) three months vide Govt. of Union Territory of J&K Order No. Home/PB-V/620 of 2021 dated 06.08.2021 which clearly shows that all the prescribed norms/procedures have been followed in accordance with provisions of Public Safety Act 1978.

3. Respondent No. 03 (SSP Udhampur) in her counter affidavit, has specifically contended, that the detainee has been detained under Public Safety Act 1978 vide District Magistrate Udhampur's Order No. 01-PSA- 2021 dated 17.05.2021 issued under endorsement No. DMU/JC/542-48 dated 17.05.2021 on the grounds, that the detainee was first arrested in the year 2019 for his involvement in illegal transportation and selling of narcotic drugs where under case FIR No. 383/2019 U/Ss 8/21/22 under NDPS Act was registered at P/S Udhampur and after investigation challan was produced in the Court of Law; that the detainee is also found involved in two (02) numbers of criminal cases registered at P/S Udhampur and P/S Rehambal which pertain to illegal possession and trafficking of Narcotic/Psychotropic Drugs; that the detainee is habitual drug peddler and the future of youngsters was in danger if his criminal activities were not curtailed; that the detention of the subject under Public Safety Act was ordered on the basis of material facts and evidences collected by investigating agency; that the detention order issued by District Magistrate, Udhampur which was executed through Sr. Superintendent of Police Udhampur and the detainee is presently lying in Central Jail Kot Bhalwal, Jammu; that the detention order alongwith grounds of detention and other material have been read over and explained to the detainee in the language he understands and further the detainee was informed that he can make representation against the detention order if he desires so; that the grounds of detention and other relevant material thereof were examined and considered by Government and detention order was further extended for (03) three months vide Govt. of Union Territory of J&K order No. Home/PB-V/620 of 2021 dated 06.08.2021 which clearly shows that all the prescribed norms/procedures have been followed in accordance with the provisions of Public Safety Act; that the detainee was detrimental to the

maintenance of peace and public order, as the detenue being a notorious drug peddler was not likely to desist from his criminal activities which were prejudicial to the maintenance of peace and public order in District Udhampur, his detention under preventive Section of Law under Public Safety Act became necessary.

4. In response to the counter affidavits filed by Respondents No. 02 and 03, petitioner has filed a rejoinder wherein he has vehemently contended, that the three (03) FIRs registered against him bearing FIR No. 383/2019, FIR No. 71/2021 & FIR No. 76/2021 are false and frivolous, more so, he has been deprived from appropriate remedies against the detention order by not providing him the whole material in time nor he was informed to make representation which is evident from the counter affidavit filed by the respondents which do not speak about any date and time; that the grounds of detention are verbatim copy of the dossier and there is non- application of mind on the part of detaining authority; that the charges leveled against the detenue in the FIRs so far have not been proved yet in the Court of Law and the detainee is not bailed out in FIR No. 71/2021, and so far as FIR No. 76/2021 is concerned, the same is evident from the FIR itself that it is registered against three persons namely Rakesh Kumar @ Raju, Kewal Krishan @ Billa and Girdhari Lal and there is no mention of the detainee in the FIR; that neither any charge sheet has been presented nor was the detainee arrested in FIR 76/2021, there was no bail application pending at the time when the detention order was passed, the detention is unconstitutional, illegal and bad in law, the detention order has been passed in breach of mandate of law as the detaining authority has not followed the constitutional and statutory procedural safeguards; that as it is admitted by the respondents in the counter affidavits that the detainee was already in judicial custody in District Jail Udhampur and there was likelihood that he would get bail, such contention is totally unsustainable in the eyes of law and never gives the respondents any occasion to pass the detention order because the detainee was already in jail in connection with false and frivolous FIR No. 71/2021.

5. Mr. Rajnesh Singh Parihar, learned counsel appearing for the petitioner has forcefully argued, and has sought the setting aside/quashment of detention order bearing No. DMU/JC/542-48 dated 17.05.2021 passed by District Magistrate Udhampur on the following counts:

(i) It is argued, that the detenue/petitioner has not been supplied with whole of the detention material viz; the copies of dossier, copies of FIRs registered against the petitioner, site plans, recovery memos, statement of witnesses recorded U/S 161 Cr.P.C to enable the petitioner to make effective representation against the impugned detention order, detenue has a right to make representation to the detaining authority so long as order of detention has not been approved by the State Government and consequently non-supplying of such material/non-communication of the fact to the detenue that he has a right to make representation to the detaining authority would constitute infraction of the valuable constitutional right guaranteed to the detenue under Article 22(5) of Constitution of India r/w Section 13 of Public Safety Act 1978 and such failure would make order of detention invalid. To buttress his arguments, learned counsel has relied upon the decisions reported in, (i) AIR 2000 SC 2504 (State of Maharashtra & Ors. v. Santosh Shankar Acharya), and (ii) LPA No. 137/2020 (Saboor-ul-Haq Malla v.

Union Territory of JK & Anr.) decided by the Division Bench of Hon'ble High Court of J&K on 18.12.2020;

(ii) It is argued, that the grounds of impugned detention order is verbatim copy of the dossier and no other material has been considered by the detaining authority which speaks volumes about the non-application of mind on the part of the detaining authority which does not justify the preventive detention and the detention order requires quashment. To support his arguments, learned counsel has relied upon the rulings reported in, (i) WP (Crl) No. 54/2020 (Balbir Chand - Petitioner vs. UT of J&K and others - Respondents), (ii) Naba Lone vs. District Magistrate (1988 SLJ

300), (iii) Noor-ud-Din Shah vs. State of J&k and Ors (1989 SLJ, 1), and (iv) Jai Singh and Ors. vs. State of Jammu and Kashmir (AIR 1985 SC 764);

(iii) It is argued, that the impugned detention order has been passed by respondent No. 02 (District Magistrate Udhampur) wherein it has been specifically reflected that the detainee has been directed to be detained and lodged in Kot Bhalwal Jail Jammu for a period of three (03) months; it is more so argued, that the detaining authority lacks the jurisdiction and power to determine the period of detention of detainee as such power in terms of Section 8 (4) of Jammu and Kashmir Public Safety Act 1978 belongs to the Government, the fixing of period of detention in the initial order by respondent No. 02 itself is contrary to the scheme of the Act, the detaining authority by deciding on the period of detention has violated the statutory safeguards available to the detainee under Article 22 (5) of Constitution of India, and such an order cannot be supported, which vitiates the detention order. To support his arguments, learned counsel has relied upon the rulings viz; (i) Petn. No. 308 of 1951 D/d 10.12.1951 SUPREME COURT OF INDIA (Makhan Singh Tarsikka - Petitioner versus State of Punjab - Respondent), (ii) HCP No. 04 of 2011 D/d 20.07.2011 (Abdul Noorani - Appellant versus State of J&K and Ors. - Respondents),

(iii) HCP No. 295 of 2010 D/d 08.02.2011 (Gh. Mohd. Payer - Appellant versus State & Anr. - Respondent) and (iv) HCP No. 270 of 2009 D/d 30.04.2010 (Jahangir Ahmad Khan - Petitioner versus State & Ors. - Respondents).

(iv) It is argued, that petitioner/detainee was already in custody in FIR No. 71/2021 U/S 8/21/22 of NDPS Act of P/S Rehemal Udhampur, the District Magistrate Udhampur (Respondent No. 02) did not apply his mind whether detention order was necessary despite the fact that the detainee was already in custody, non- application of mind on the part of detaining authority makes the detention order invalid and unsustainable in the eyes of law. Reliance has been placed on (i) Writ Petition (Criminal) Nos. 1571-1577 of 1984 D/d 24.01.1985 (Jai Singh - Petitioners versus State of Jammu and Kashmir - Respondents), (ii) HC (W) No. 03 of 2006 D/d 23.05.2006 (Jan Mohd. - Appellant versus State & Ors.) & (iii) HCP No. 173 of 2002 D/d 08.05.2003 (Khan Mushtaq Ahmad - Appellant versus State of J&K - Respondent)

6. Mr. Sumeet Bhatia, learned GA, appearing on behalf of respondents, has reiterated the grounds reflected in the detention order and has sought the affirmation of the impugned detention order by vehemently projecting the arguments, that the petitioner/detainee has been indicted in three (03)

FIRs viz; FIR No. 383/2019 U/Ss 8/21/22 of NDPS Act P/S Udhampur, FIR No. 76/2021 U/Ss 8/21/22-27A/29 of NDPS Act P/S Udhampur and FIR No. 71/2021 U/Ss 8/21/22 of NDPS Act P/S Rehambal Udhampur, petitioner/detenué is a notorious criminal/drug peddler and has been continuously involved in number of criminal cases and transportation of drugs consignment and is a threat to the life and liberty of people of District Udhampur. It is argued, that the criminal activities of the subject are prejudicial to the safety and security of the public in general as a result maintenance of public order has become very difficult, the people of the area are feeling highly insecure and are under severe pressure and threat by the criminal activities of the subject, the detenué being a notorious drug peddler was not likely to desist from his criminal activities which are prejudicial to the maintenance of peace and public order in District Udhampur, and as application of normal laws has been ineffective, the detenué has been detained under preventive custody of Public Safety Act and is lodged in Central Jail Kot Bhalwal Jammu. To support his arguments, learned counsel has relied upon the judgments viz; (i) WP (Crl) 597/2019 decided on 30.09.2020 Jammu & Kashmir High Court (Srinagar Bench) [Riyaz Ahmad Bhat - Petitioner versus State of J&K & Ors.], (ii) WP (Crl) 28/2021 decided on 03.12.2021 Jammu and Kashmir High Court (Jammu Bench) [Yudhvir Singh - Petitioner versus Union Territory of J&K & Ors. - Respondents].

7. I have heard learned counsel for the petitioner and learned GA for respondents. I have also perused the contents of the petition, counter affidavits filed by the respondents and the record made available by the respondents.

8. The first argument canvassed by learned counsel for the petitioner is, that the detenué/petitioner has not been supplied with whole of the detention material viz; the copies of dossier, copies of FIRs registered against the petitioner, site plans, recovery memos, statement of witnesses recorded U/S 161 Cr.P.C to enable the petitioner to make effective representation against the impugned detention order, detenué has a right to make representation to the detaining authority so long as order of detention has not been approved by the State Government and consequently non-supplying of such material/non-communication of the fact to the detenué that he has a right to make representation to the detaining authority would constitute infraction of the valuable constitutional right guaranteed to the detenué under Article 22(5) of Constitution of India r/w Section 13 of Public Safety Act 1978 and such failure would make order of detention invalid.

In AIR 2000 SC 2504, (State of Maharashtra and Ors. - Appellants v. Santosh Shankar Acharya - Respondent) relied upon by learned counsel for the petitioner, Hon'ble Supreme Court while quashing the detention order on the ground that the detenué was not supplied the copies of the material from which the detention order was made, there was non-communication of the fact to the detenué that he could make representation to the detaining authority so long as the order of detention has not been approved by the state government amounted to denial of representation to the detenué and infraction of a valuable constitutional right guaranteed to the detenué under Article 22 (5) of Constitution of India, in Para (8) of the judgment held as under:

8. "If the contention of Mr. Deshpande to the effect that the moment an order of detention issued by an order under sub-

section (2) of Section 3 of the Act is communicated to the State Government under sub-section (3) of the said Section thereof the State Government becomes the detaining authority, and therefore, the power under Section 21 of the Bombay General Clauses Act cannot be exercised by the said detaining authority is correct, then it has to be found out as to under which contingency Section 14 of the Maharashtra Act would apply. To our query neither Mr. Deshpande nor Mrs. Ramani, learned counsel appearing for the State Government could indicate any situation when such power could be exercised. It is too well known a principle of construction of statutes that the legislature engrafted every part of a statute for a purpose and the legislative intention is that every part of the statute should be given effect. The legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. We are cognizant of the principle *ex majori cautela* but it is difficult for us to apply the said principle to Section 14 of the Maharashtra Act and even hold the same to be tautologous in as much as it has never been shown as to what was the necessity for the legislature to protect the power under Section 21 of the Bombay General Clauses Act, to an order of detention made under the Maharashtra Act. The only logical and harmonious construction of the provisions would be that in a case where an order of detention is issued by an officer under sub-section (2) of Section 3 of the Act, notwithstanding the fact that he is required to forthwith report the factum of detention together with the grounds and materials to the State Government and notwithstanding the fact that the Act itself specifically provides for making a representation to the State Government under Section 8(1), the said detaining authority continues to be the detaining authority until the order of detention issued by him is approved by the State Government within a period of 12 days from the date of issuance of detention order. Consequently, until the said detention order is approved by the State Government the detaining authority can entertain a representation from a detenu and in exercise of his power under the provisions of Section 21 of Bombay General Clauses Act could amend, vary or rescind the order, as is provided under Section 14 of the Maharashtra Act. Such a construction of powers would give a full play to the provisions of Section 8 (1) as well as Section 14 and also Section 3 of the Maharashtra Act. This being the position, non-communication of the fact to the detenu that he could make a representation to the detaining authority so long as the order of detention has not been approved by the State Government in a case where an order of detention is issued by an officer other than the State Government under sub-section (2) of Section 3 of the Maharashtra Act would constitute an infraction of a valuable right of the detenu under Article 22(5) of the Constitution and the ratio of the Constitution Bench decision of this Court in Kamlesh Kumars case (supra) would apply notwithstanding the fact that in Kamlesh Kumars case (supra) the Court was dealing with an order of detention issued under the provisions of COFEPOSA".

In LPA No 137/2020 (Saboor-ul-Haq Malla v. Union Territory of JK & Anr.) relied upon by learned counsel for the petitioner decided by Division Bench of High Court of J&K on 18.12.2020, Hon'ble High Court of J&K while quashing the detention order on the ground that the detenu was not communicated the grounds of detention, in paras 15, 16, 17 & 18 held as under:

15. "From a reading of the said decision, it is abundantly clear that non-

communication of the fact that the detenu can make a representation to the Detaining Authority, till the detention order is not approved by the Government, would constitute an infraction of a valuable

Constitutional right guaranteed under Article 22(5) of the Constitution of India as also of the right under Section 13 of the Jammu and Kashmir Public Safety Act, 1978. Failure of such noncommunication would invalidate the order of detention".

16. "The plea of the learned counsel for the respondents, that the detenu could make a representation to the State Government and that such an opportunity had been provided, would be of no consequence for the simple reason that the Government's approval of the detention order came later i.e., on 28.12.2016 whereas, the detention order was executed upon the detenu on 24.12.2016 and between that date and 28.12.2016 he had a right to make a representation to the Detaining Authority i.e., the District Magistrate, Baramulla, to revoke the detention order. That opportunity not having been given, vitiated the detention order. In other words, the detention order stood vitiated and invalidated on 22.12.2016 itself".

17. "In view of the foregoing, we need not to consider any of the other pleas sought to be raised by the learned counsel for the appellant, inasmuch as the detention order has been invalidated because of non-

communication of the fact that the detenu could make a representation to the Detaining Authority. The detention order having become invalid, the detenu is liable to be released forthwith insofar as this detention order is concerned".

18. "The appeal is allowed. The impugned order is set aside."

Ratios of the judgments (supra) make the legal proposition abundantly clear, that non-supply of the essential documents/copies of the material on which detention order is passed against the detenu and failure of non- communication to the detenu that he has right to make representation before the detaining authority so long as the order of detention has not been approved by the State Government amounts to infraction of constitutional right of the detenu guaranteed under Article 22 (5) of Constitution of India r/w Section 13 of J&K Public Safety Act 1978 which invalidates the order of detention. Applying the ratios of the judgments (supra) to the facts of the case in hand, it is unambiguously reiterated here, that the detention record depicts, that only photocopies of FIRs registered against detenu have been provided to him, while the other copies of material/documents relied by the detaining authority viz; copies of recovery memos, copies of site plans, copies of statement of prosecution witnesses recorded u/s 161 Cr.P.C have not been provided to the detenu. Law is well settled, that the non-supplying of whole of the detention material debars the petitioner from making effective representation against the impugned detention order, more so, the detention order does not demonstrates that the detenu has been informed about his right to make representation to the detaining authority, which is an infraction of the valuable constitutional right guaranteed to the detenu under Article 22 (5) of Constitution of India r/w Section 13 of J&K Public Safety Act 1978, and such a failure on part of detaining authority, makes the detention order invalid, unsustainable under law and liable to be quashed.

9. The 2nd argument urged by learned counsel for the petitioner is, that the detention order is a verbatim copy of the dossier and no other material has been considered by the detaining authority

which speaks volumes about the non-application of mind by the detaining authority whereby the detention order is liable to be quashed.

In WP (Crl) No. 54/2020 decided by Hon'ble J&K High Court, His Lordships Hon'ble Mr. Justice Tashi Rabstan while relying upon the judgments of (i) Naba Lone v. District Magistrate 1988 SLJ 300, (ii) Noor-ud-Din Shah v. State of J&K & Ors. 1989 SLJ, 1 and

(iii) Jai Singh & Ors. v. State of Jammu & Kashmir AIR 1985 SC 764, and while observing that if the detention order is verbatim copy of the dossier, it speaks about non-application of mind by the detaining authority, in para 13 of the judgment held as under:

13. "Applying the settled legal position to the facts of the present case, I find that the order impugned cannot stand as it is based on grounds of detention, which is only verbatim copy of police dossier. The order of detention, for the reasons, exhibit total non-

application of mind on the part of detaining authority and therefore, the petition is allowed and the detention order No. PSA/104 dated 16.10.2020 passed by the District Magistrate, Kathua-respondent No. 2 directing the detention of Balbir Chand S/o Rana R/o Chack Drab Khan, Tehsil and District Kathua is quashed.

Respondents are directed to release the detainee forthwith, provided he is not required in connection with any other case".

Ratio of the judgment (supra) makes it manifestly clear, that when the grounds of detention supplied to the detainee is a verbatim copy of the police dossier, it shows total non-application of mind on the part of the detaining authority, the liberty of a subject is a serious matter and it is not to be trifled with in this casual, indifferent and routine manner, which vitiates the detention order. Applying the ratio of the judgment (supra) to the facts of the case in hand, the detention record depicts, that the detention order is the verbatim copy of the dossier supplied to respondent No. 02 by respondent No. 03. In addition to the dossier, no other material has been considered by respondent No. 02 while issuing the detention order against the petitioner, which speaks volumes about non-application of mind on part of the detaining authority which invalidates and vitiates the impugned detention order.

10. The 3rd argument portrayed by learned counsel for petitioner is, that the impugned detention order has been passed by respondent No. 02 (District Magistrate Udhampur) wherein it has been specifically reflected that the detainee has been directed to be detained and lodged in Kot Bhalwal Jail Jammu for a period of three (03) months; it is more so argued, that the detaining authority lacks the jurisdiction and power to determine the period of detention of detainee as such power in terms of Section 8 (4) of Jammu and Kashmir Public Safety Act 1978 belongs to the Government, the fixing of period of detention in the initial order by respondent No. 02 itself is contrary to the scheme of the Act, the detaining authority by deciding on the period of detention has violated the statutory safeguards available to the detainee under Article 22 (5) of Constitution of India, and such

an order cannot be supported, which vitiates the detention order.

In Petn. No. 308 of 1951 D/d 10.12.1951 (Makhan Singh Tarsikka - Petitioner versus State of Punjab - Respondent) relied by learned counsel for petitioner, Hon'ble Supreme Court of India (Large Bench) while appreciating the provisions of Sections 3 (1), 9 and 11, Public Safety, Preventive Detention Act 1950, held, that the fixing of period of detention in the initial order itself by the Magistrate is contrary to the scheme of the Act and such order cannot be supported.

In HCP No. 4 of 2021 D/d 20.07.2011 (Abdul Noorani - Appellant versus State of J&K), relied by learned counsel for petitioner, Hon'ble High Court of J&K while holding that the detaining authority lacks power and jurisdiction to determine the period of detention of the detenu, in para 01 of the case law held as under:

1. "Challenge to order No.PSA/2010/27 dated 07.01.2010, (herein after "detention order") whereby District Magistrate, Udhampur

- respondent No. 2 herein, has placed one Shri Abdul Noorani son of Mohd Hussain Bakerwal resident of Palie Basantgarh, Tehsil Ramnagar, District Udhampur (herein after referred to as "detenu") under preventive detention, is bound to succeed for the reason that the detaining authority has directed preventive detention of the detenu for a period of two years. The detaining authority having regard to his status in the administrative set up is expected to know that the detaining authority lacks power and jurisdiction to determine the period of detention of the detenu. Such a power in terms of Section 8 (4), J&K Public Safety Act 1978, belongs to the Government. The detaining authority by deciding on period of detention has violated Constitutional safeguards available to the detenu under Article 22(5), Constitution of India. It needs no emphasis that once detenu is made aware that his period of detention is decided at the outset and he is directed to be detained for the maximum term of detention provided under section 18 of Act, the detenu would feel dissuaded from representing against his detention".

In HCP No. 295 of 2010 D/d 08.02.2011 (Gh. Mohd. Payer versus State & Anr.), relied by learned counsel for petitioner, Hon'ble High Court of J&K while observing that the District Magistrate has no power to fix the period of detention which is beyond his scope and non- application of mind on his part whereby detention order becomes invalid, in para 06 & 07 held as under:-

6. "Contents of the order impugned are suggestive of the fact that the Detaining Authority (respondent No. 02) has in huff recorded the order. In the order respondent No. 02 has recorded that he has gone through the contents of the dossier which shows that he has not gone through the material forming base for such dossier. Furthermore, it is recorded that the detenu be detained and lodged in Kotbhalwal Jail for a period of one year".

7. "District Magistrate has no power to fix the period of detention. Section 8 of the Jammu & Kashmir Safety Act (hereinafter referred to as "the Act") empowers Divisional Commissioner and the District Magistrate to pass the order of detention.

The said power is controlled by Section 8(4) of the Act which provides that when an order is made, the said officers have to forthwith report the fact to the Government together with the grounds on which the order has been made. It further provides that no such order shall remain in force for more than 12 days unless, in the meantime, it is approved by the Government. When the Government approves the order within four weeks from the date of detention, the Government shall place before the Advisory Board the grounds on which the order has been made, representation if any, made by the person effected and the report of the officer made under sub-section 4 of Section 8 as required in terms of Section 15 of the Act. On receipt of the report in favour of detention, the Government has to confirm the detention as required in terms of Section 17(1) of the Act. It is only thereafter the Government has to fix the period of detention as envisaged by Section 18 of the Act".

In HCP 270 of 2009 D/d 30.04.2010 (Jahangir Ahmad Khan -- Petitioner versus State & Ors. - Respondent), relied by learned counsel for petitioner, Hon'ble High Court of J&K while observing that the District Magistrate while issuing the impugned order has himself fixed the period of detention of twenty-four (24) months which is absolutely impermissible, in Head Note of the case law, and in para 06 of the judgment held as under:-

Jammu and Kashmir Public Safety Act, 1978, Section 3 - Preventive detention - Solitary instance of theft of vehicle made the basis for passing order of detention - District Magistrate while issuing the impugned order himself fixed the period of detention as 24 months which is absolutely impermissible - The period of detention has to be fixed by the Government on confirming the action of District Magistrate - It was a case of non-application of mind on part of District Magistrate - Detention order quashed.

6. "The District Magistrate while issuing the order impugned has himself fixed the period of detention as 24 months which is absolutely impermissible because the period of detention has to be fixed by the Government on confirming the action of the District Magistrate. It also shows the non-application of mind on the part of District Magistrate".

Ratios of the judgments (supra) relied by learned counsel for petitioner, make the legal proposition manifestly clear, that the detaining authority viz; the District Magistrate lacks power and jurisdiction to determine the period of detention of the detainee and such power is vested with the Government in terms of Section 8 (4) of Public Safety Act 1978. Ratios of the judgments (supra) squarely apply to the facts of the case in hand. It is apt to reiterate here, that the impugned detention order bearing No. 01/PSA/2021 dated 17.05.2021 issued by Respondent No. 02 (District Magistrate Udhampur) in it's fourth para categorically reflects that under Section 8 of Public Safety Act 1978, District Magistrate Udhampur has directed the detention of the detainee/petitioner to be lodged in Kot Bhalwal Jail Jammu for a period of three (03) months. Law is well settled that the

District Magistrate has no power vested in him/her to fix the period of detention, which is absolutely impermissible, because the period of detention has to be fixed by the Government on confirming the action of District Magistrate, and such an action of District Magistrate shows non-application of mind on his part which vitiates the detention order.

11. The 4th argument canvassed by learned counsel for the petitioner is, that petitioner/detenu was already in custody in FIR No. 71/2021 U/Ss 8/21/22 of NDPS Act of P/S Rehembal Udhampur, the District Magistrate Udhampur (Respondent No. 02) did not apply his mind whether detention order was necessary despite the fact that the detenu was already in custody, non-application of mind on the part of detaining authority makes the detention order invalid and unsustainable in the eyes of law.

In WP (Criminal) Nos. 1571-1577 of 1984 decided on 24.01.1985 (Jai Singh - Petitioner versus State of Jammu and Kashmir - Respondent), Hon'ble Supreme Court while observing that where the detenu was already in custody in connection with a criminal case, the District Magistrate did not apply its mind whether detention was necessary, in Head Note of the case law held as under:-

Jammu and Kashmir Public Safety Act, (6 of 1978), Section 8 - Order of detention of detenu- Detenu already in custody in connection with a criminal case - The District Magistrate did not apply his mind whether detention was necessary despite the fact that detenu was already in custody - Detention held invalid.

In HC (W) 3 of 2006 D/d 23.05.2006 (Jan Mohd - Appellant versus. State & Ors. - Respondents), Hon'ble High Court of J&K while observing that when the petitioner was already arrested and there was no scope for the detenu to be enlarged on bail, the detention order is liable to be quashed, in para 12, 13 and 14 held as under:-

12. "There being no material on records of the District Magistrate to record the aforesaid finding constrains me to hold that the satisfaction recorded by the learned District Magistrate, Rajouri, that in the event of release of the detenu on bail or otherwise, he was likely to indulge in such activities, was unfounded and on the basis of such finding the petitioner detenu, who was already in custody in case F.I.R No. 82/2005, could not have been detained in preventive custody because in case of any detenu who is already in custody some material was required to be there before the District Magistrate to come to the conclusion that the detenu was likely to be released on bail and that while on bail he was again likely to indulge in such activities which would be prejudicial to the security of the State".

13. "For all what has been said above, I do not find any material on records to support detention order No. 09/2005 dated 6.12.2005, issued by the District Magistrate, Rajouri, for the detention of the petitioner".

14. "While allowing this petition, I would, therefore, quash detention order No. 09/2005 dated 6.12.2005, issued by the District Magistrate, Rajouri and direct

release of the detainee/petitioner from preventive custody. The release of the detainee from preventive custody would not, however, come in the way of respondents to keep the petitioner in custody, if it was, otherwise warranted under law or was pursuant to the orders of the competent Court.

In HCP No. 173 of 2002 D/d 08.05.2003 (Khan Mushtaq Ahmad - Appellant versus State of J&K - Respondent), Hon'ble High Court of J&K while quashing the detention order on the ground that the detainee was already in custody arrested U/S 7/25 of the Arms Act 1959 had neither applied for bail nor released on bail in the pending case, in para 05 of the judgment held as under:-

05. "On admitted facts, the detainee was arrested in FIR 294/2001, offence u/s 7/25 Indian Arms Act, Police Station Bandipora and had not applied for bail in the said pending FIR. In the absence of submission of an application, seeking bail in the court competent to take cognizance of the bail application, the assumption of the detaining authority, that the detainee was likely to be released on bail and in the event of his being released on bail, the detainee would indulge in activities prejudicial to the security of the state, seems to have been made without application of mind. In the present case, no bail application is shown to have been submitted and the accused is not shown to have been released on bail by any court in the FIR 294/2001. The detaining authority has not shown awareness of this fact in the order of detention, therefore, the order of detention has obviously been passed, without application of mind and is liable to be quashed. Habeas Corpus petition is accordingly allowed and order of detention No. 127 of 2001 dated 22.12.2001 is quashed. The detainee Mushtaq Ahmad Khan S/o Ghulam Rasool Khan R/o Nowpora Bandipora, shall be released forthwith, unless required in any other case".

Ratios of the judgments (supra) relied by learned counsel for the petitioner settles the legal controversy, that when the detainee is already in custody in a criminal case and is not released on bail, the District Magistrate cannot assume that the detainee was likely to be released on bail and in the event of his being released on bail, the detainee will indulge in activities prejudicial to the security of State, such satisfaction seems to have been made without application of mind, whereby the detention order is liable to be quashed. Ratios of the judgments (supra) squarely apply to the facts of the case in hand. Record reveals that detainee/petitioner was already in custody in FIR No. 71/2021 for commission of offences U/S 8/21/22 NDPS Act of P/S Rehambal Udhampur and was not bailed out. The detention order bearing No. 01/PSA/2021 dated 17.05.2021 does not reflect that the District Magistrate has applied its mind whether the detention of the petitioner was necessary despite the fact that he was already in detention. Non-application of mind on the part of the detaining authority makes the detention order impermissible, invalid and unsustainable in the eyes of law, as the detention order does not reflect that the detainee was likely to be released on bail, and while on bail he was again likely to indulge in such criminal activities which would be prejudicial to the security of the State.

12. In view of the settled position of law as discussed above, it is apt to reiterate here, that detention record submitted by learned GA reveals that the detainee/petitioner has been provided only the

copies of FIRs registered against him. Record further reveals that against the detenue/petitioner as many as 03 FIRs viz; FIR No. 383/2019 U/Ss 8/21/22 NDPS Act P/S Udhampur, FIR No. 76/2021 U/Ss 8/21/22/27- A/29 NDPS Act P/S Udhampur, and FIR 71/2021 U/Ss 8/21/22 NDPS Act of P/S Rehembal (Udhampur) have been registered. The other material/documents of detention order viz; site plans, recovery memos, statement of witnesses recorded U/S 161 Cr.P.C to enable the petitioner to make effective representation against the impugned detention order have not been supplied to the detenue/petitioner, failure whereof on the part of detaining authority, has violated petitioner's right to make representation against his detention under Article 22 (5) of Constitution of India r/w Section 13 of J&K Public Safety Act 1978 vitiating the detention order. In depth perusal of the detention record further demonstrates, that the detention order issued by Respondent No. 02 is the verbatim copy of the dossier supplied by Respondent No. 03 (SSP Udhampur) which further speaks volumes about the non-application of mind on part of the detaining authority, which does not justify the preventive detention, and in view of the settled position of law discussed above, the detention order is invalid and requires its quashment. It is noteworthy to mention here, that the impugned detention order reflects that the petitioner/detenue has been detained by respondent No. 02 for a period of three (03) months. In view of the settled legal position discussed above, the detaining authority (Respondent No. 02) lacks the power and jurisdiction to determine the period of detention which power in terms of Section 8 (4) of J&K Public Safety Act 1978 belongs to the Government, and the detaining authority viz; respondent No. 02 by deciding the period of detention in the impugned detention order has violated the constitutional safeguards available to the petitioner/detenue under Article 22 (5) of Constitution of India r/w Section 13 of J&K Public Safety Act, which vitiates whole of the detention proceedings/order. Law is no longer res-integra, that when the detenue is already in custody in connection with a criminal case and there was no scope for the detenue to be released on bail, issuance of detention order depicts non-application of mind on the part of detaining authority. In the case in hand, as already stated, petitioner/detenue was in custody in case FIR No. 71/2021 U/Ss 8/21/22 NDPS Act of P/S Rehembal (Udhampur). The impugned detention order does not reflect that District Magistrate Udhampur has recorded satisfaction on the basis of some material that in the event of release of the detenue on bail or otherwise, he was likely to indulge in such activities which would be prejudicial to the maintenance of public order, therefore, there is non-application of the mind on the part of respondent No. 02 while passing the detention order, which violates the provision of law and makes the detention order invalid and liable to be quashed.

13. For all what has been said above, I do not find any material on record to support detention order No. DMU/JC/542-48 dated 17.05.2021 issued by District Magistrate Udhampur r/w Order bearing No. Home/PB-V/620 of 2021 dated 06.08.2021 for detention of the petitioner. While allowing this petition, I, therefore, quash detention order No. DMU/JC/542-48 dated 17.05.2021 issued by District Magistrate Udhampur r/w Order bearing No. Home/PB-V/620 of 2021 dated 06.08.2021, and direct the release of detenue/petitioner namely Hamraz Singh S/o Surinder Singh Age 27 Years R/o Barrian Tehsil and District Udhampur from preventive custody unless required in any other case. The case laws referred to me by learned counsel for the respondents are distinguishable and inapplicable to the facts and circumstances of the case in hand.

14. Disposed of accordingly.

(MOHAN LAL) JUDGE JAMMU 23.03.2022 "Amir"