IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

Reserved on: 19.05.2025
Pronounced on: 23.05.2025

CrlM No. 1636/2023 in CrlA(D) No. 66/2023.

Union Territory Th. Police Station Chanpora. **…Petitioner/Appellant(s)**

Through : Ms. Maha Majeed, Assisting Counsel vice Mr. Mohsin Qadri, Sr. AAG.

Vs.

Sameer Ahmad Koka. **...Respondent(s)**

Through : Mr. Javid Iqbal Wani, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE SANJAY PARIHAR, JUDGE

JUDGMENT

Sanjay Parihar-(J)

1. Appellants are aggrieved of order dated 31st July 2023 passed by the learned Special Judge (designated court under NIA) Srinagar, in case FIR 8/2022 u/s 13 ULA(P) Act of PS Chanpora. In terms of order impugned, respondent appears to have been let on bail. Appellant's claim that the order impugned is in contravention of law because the Court below has not appreciated the fact that there were sufficient evidence connecting the respondent with the commission of offense. That the Court below while deciding the bail application was required to consider the merits of the case in the manner that the respondent was working as OGW for Terrorist Organization TRF (banned organization) which has emerged to be a national security suspect. The respondent was actively involved in providing logistic support to the members of the said organization who had unleashed a spate of

terror by killing persons especially on soft targets. That the trial Court has sifted the evidence at the stage which is against law. Investigating Agency had cited Thirteen (13) prosecution witnesses who were yet to be recorded, thus there was no material before the trial Court to have allowed it to exercise discretion of bail in favour of the respondent. That the order sans reasons, thus, is required to be set-aside because the material before the trial Court was sufficient enough to dissuade it from enlarging the respondent on bail.

2. Learned counsel for the respondent argued that the trial Court has exercised jurisdiction in accordance with law because respondent had been charged only under Section 13 of the "Act" which carries punishment of Seven (7) years and since the offence falls in Chapter-III of the Act, to which Section 43-D has no application, therefore, the order under challenge has been drawn in accordance with law and no fault can be laid against the discretion exercised by the Court below.

3. On the other hand, learned counsel appearing for the petitioner claims that the Court below has failed to adopt a rational approach and judge the evidence and circumstances with the yardstick of probabilities. It has failed to consider the law on the subject and, thus, has resulted in miscarriage of justice. That the record of the trial Court would definitely convince this court, about the trial Court having landed in error in ordering release of the respondent on bail.

4. We have heard the learned counsel for the parties and perused the record of the case. At the very outset, this Court has been apprised that charge sheet, that was laid before the trial Court on 30.08.2022 against Twenty (20) accused persons including the respondent, was based upon case FIR 8/2022 registered under Sections 13, 18, 19, 39 UL(P) Act by PS Chanpora on the strength of

reliable information that one Zahid Rashid Ganie has received directions from banned organization TRF/LeT Terrorist namely Momin Gulzar, Arif Hazar alias Reyan, Jahangir Ahmad Naikoo to regenerate terrorist activities in District Srinagar and, as a sequel thereto, search of house of the said Zahid Rashid Ganie was conducted from whom a mobile phone along with anti-national posters of TRF/LeT were recovered. It is alleged that he was in contact with various other OGW's. During further investigation/interrogation, Zahid Rashid Ganie disclosed names of another five associates and one pen-drive was also recovered which contains objectionable photographs which were analyzed and sent to FSL Srinagar for expert opinion.

As against respondent, the allegations were that he was working as OGW for TRF, providing logistic support to its members for executing the terrorist acts. Accused/respondent was involved in providing a variety of logistic support to the shooter of TRF who have unleashed a spate of terror by killing persons on soft targets. These targets included street vendors, labours from outside Jammu and Kashmir working in orchards, small shops and commercial establishments, policemen who were off duty or were unarmed. The accused was playing key role in radicalizing and provoking the youth and encouraging them to indulge in numerous anti-national activities. The accused/respondent was at the forefront of numerous discretely reported subversive, anti-national and anti-social activities whereby he indulged in encouraging and instigating impressionable youth especially the minors to resort to activities directly effecting security, law and order in District Srinagar.

It is also admitted that though the respondent was challaned along with the co-accused for offences under Section 18, 18-B, 39, 40 of UA(P) Act as well as under Section 13, however, the trial Court by its order dated 29.10.2022

has already discharged him from offences under Sections 18, 18-B, 39 and 40-D and has only charged him for offence under Section 13 of the Act.

5. Before delineating on the merits of the case, it is felt necessary to take note of the observations of Hon'ble Supreme Court in **"Union of India vs. K Najeeb in Criminal Appeal No. 98 of 2021",** while considering various provisions of Unlawful Activities (Prevention) Act, especially as regards the rigour of Section 43-D (5), wherein it has been held that: -

> *"18. It is thus clear to us that the presence of statutory restrictions like Section 43-D (5) of UAPA per-se does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under Constitution jurisdiction can be well harmonized. Whereas at commencement of proceedings, Courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."*

6. In "**Thawha Fasal and Ors vs. Union of India (UOI) and Ors Cr. Appeal No 1302 of 2021 decided on 28.10.2021"** similar provisions came into consideration while dealing with an appeal against the order of granting bail. The relevant paras of the aforesaid judgment are reproduced as under:

> *"32. Taking the charge sheet as correct, at the highest, it can be said that the material, prima facie, establishes association of the Accused with a terrorist organisation CPI (Maoist) and their support to the organisation."*

"33. Thus, as far as the Accused No. 1 is concerned, it can be said he was found in possession of soft and hard copies of various materials concerning CPI (Maoist). He was seen present in a gathering which was a part of the protest arranged by an organisation which is allegedly having link with CPI (Maoist). As regards the Accused No. 2, minutes of the meeting of various committees of CPI (Maoist) were found. Certain banners/posters were found in the custody of the Accused No. 2 for which the offence under Section 13 has been applied of indulging in unlawful activities. As stated earlier, Sub-section (5) of Section 43-D is not applicable to the offence under Section 13."

7. In **"Satender Kumar Antil vs. Central Bureau of Investigation and Anr 2022 (10) SCC 5"**, while considering various provisions governing bail as well as issues arising in respect of an appeal in case of special acts, it was held by Hon'ble the Supreme Court as that:

"93. The rate of conviction of criminal cases in India is abysmally low. It appears to us that this factor weighs on the mind of the Court while deciding the bail applications in a negative sense. Courts tend to think that the possibility of a conviction bear nearer to rarity, bail applications will have to be decided strictly, contrary to legal principles. We cannot mix up consideration of a bail application, which is not punitive in nature with that of a possible adjudication by way of trial. On the contrary, an ultimate acquittal with continued custody would be a case of grave injustice.

94. Criminal courts in general with the trial court in particular are the guardian angels of liberty. Liberty, as embedded in the Code, has to be preserved, protected, and enforced by the criminal courts. Any conscious failure by the criminal courts would constitute an affront to liberty. It is the pious duty of the criminal courts to zealously guard and keep a consistent vision in safeguarding the constitutional values and ethos. A criminal court must uphold the constitutional thrust with responsibility mandated on them by acting akin to a high priest"

8. In the light of the aforesaid legal propositions, the case projected by the counsel for the appellant is required to be considered. At the outset, we were

apprised that respondent has been formally charged for offences under Section 13 of the Act and as regards other offences, he stands discharged, which order of discharge is also under challenge by way of separate proceedings. In that background, the matter before us only relates to whether respondent was able to persuade the Court below to exercise discretion of bail in his favour in accordance with law and whether the appellant is right in contending that given the material available on record, the respondent was not entitled to bail?

9. The Unlawful Activities Prevention Act, 1967 from its preamble discloses that this Act was made to provide for more effective prevention of certain unlawful activities of individuals and associations. With the amendment made in terms of the Act No. 35 of 2008, the "Act" was extended to deal with "terrorist activities" as well. This is because after the terrorist act of September 11, 2001, the United Nations Security Council adopted a resolution requiring all the member States to take measures to combat international terrorism and in that background the Act of 1967 was amended to incorporate various provisions relating to punishment for terrorist act besides also making provisions regarding terrorist organizations and individuals. Inasmuch as, Section 43 of the Act was amended with incorporations of Section 43-A to 43-F with a view to modify the application of certain provisions of Code (Code of Criminal Procedure) laying presumptions to offence under Section 15.

10. Here, the respondent, though initially was accused for offences under Section 18, 18-B, 39, 40 of the Act, however, for those offences, he is stated to have been discharged and formally charged only for offence under Section 13, which offence falls under Chapter-III of the Act and is punishable with imprisonment for a term which may extend to Seven (7) years and shall also be liable to fine which offence has been made cognizable. However, towards this

Section, the embargo on grant of bail, as laid under Section 43-D(5), is not applicable since Section 43-D only applies to offences punishable under Chapter-IV and VI of the Act. Once that is the case, with the embargo not being applicable, then in terms of Sub-section (6) of Section 43-D, the restriction on granting of bail specified in Sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail. This provision, thus clearly lays that though offence under Section 13 does not fall within the purview of Section 43-D (5), however, in matters arising for granting of bail thereto, the conditions laid in the Code are to be taken care of. Whereas, under the Code (Code of Criminal Procedure), the embargo is only with regard to offences carrying punishment of death or imprisonment of life, of course, there are exceptions thereto where the accused is lunatic or is a woman.

11. In the aforesaid background, neither under the Code nor under the ULAP Act was there any legal bar on the trial Court in exercising discretion of bail in favour of the respondent. Once that is the case, then the next question to be answered is whether, on the available material trial court was right in exercising discretion for grant of bail to the respondent.

12. Learned Counsel for the appellant though has contended that respondent was providing logistic support to the terrorists belonging to banned organisation, however, when asked to specify the nature of accusations made against the respondent, the learned counsel could not lay hands on any material to warrant a view that the respondent had any direct nexus with the terrorists of TRF. It was alleged that respondent was playing key role in radicalizing and provoking the youth and encouraging them to indulge in numerous anti-national activities, however, towards this also, it is not discernible from the

pleadings given by the appellant as to what was the exact role played by the respondent in order to attract unlawful activity on his part.

13. Even if the contentions raised by the learned counsel for the appellant are to be upheld, that would mean that the association of the respondent in providing logistic support to the terrorists and playing key role in radicalizing and provoking the youth to indulge in anti-national activities would come within the purview of being grave accusations and can be regarded as one of the considerations before the Court for deciding the issue of bail. As is by now legally affirmed by a catena of authorities that a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine cannot be arrested by the Police Officer only on his satisfaction that such person had committed the offence punishable as aforesaid. Police Officer before arrest, in such cases, has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence or for proper investigation of case. The respondent herein after having been arrested in the aforesaid FIR has been put to investigation and as is discernable from the record of the trial court respondent came to be arrested on 18.03.2022, who was put to questioning as regards his association with the members of the banned organisation and the support provided by him. However, nothing incriminating has been recovered at his instance. He continued to remain in custody until bailed out in terms of the order impugned dated 31.07.2023 so much so, even the bail application was made as late as on 22.06.2022.

14. Whereas, the trial Court has bailed him out only after perusing the material before it as well as upon hearing the prosecution on the issue of charge/discharge. Since the FIR is of the year 2022, so given the offence

charged being under section 13 of ULAP and having regard to the mandate of Section 43-(D)(5), the bail plea of the respondent was required to be considered by the trial court in accordance with the Section 437/438 of the Code. Though the accusations were grave in nature, however, there being no past history of the respondent having indulged in such activity inasmuch as the case having proceeded to the stage of trial, the learned trial court after considering the material before it has rightly exercised jurisdiction of granting bail to the respondent. Because the continuous detention of respondent from the date of his arrest until the date of consideration of bail application, being in the nature of long incarceration, would have amounted to pre-trial punishment. It was submitted that in terms of Section 43-E there is a presumption of the commission of such offence, however, reliance on this provision is uncalled for because that is applicable only if the offences fall under Section 15 of the Act.

15. It was further argued that while considering bail application, Special Judge has sifted the evidence led by the prosecution, thereby prejudicing it in trial, that submission too is laid for the sake of filing of this appeal. Because the respondent was bailed out at a time when the stage of charge/discharge was over and trial was yet to commence. There was no question of the Trial Court having sifted the evidence because the matter was yet to proceed to trial.

16. Looking from all angles, there is no merit in the appeal because learned counsel for the appellant has not been able to persuade us, on any tangible grounds, that the order impugned has caused any kind of prejudice to the prosecution or that it is perverse. Respondent is presumed to be innocent until proven guilty and if the offence alleged to have been committed by him is punishable with Seven (7) years, he was entitled to be bailed out. The order of bail has been passed after hearing the prosecution and no exception could be

taken to the fact that merely because respondent has been rounded up in an offence under Unlawful Activities (Prevention) Act, bail is to be denied. In that background, the trial Court has exercised discretion in accordance with law and we do not see any reasons to interfere with it.

17. Resultantly, the appeal being meritless is, dismissed upholding the order of granting bail.

(SANJAY PARIHAR) JUDGE **(SANJEEV KUMAR) JUDGE**

SRINAGAR:
23.05.2025
"SHAHID"

Whether approved for reporting? Yes