
(2023) 01 BOM CK 0104

Bombay High Court

Case No: Criminal Writ Petition No. 2091 Of 2022

Nitin Baban Pawar

APPELLANT

Vs

Commissioner Of
Police, Thane And
Others

RESPONDENT

Date of Decision: Jan. 27, 2023

Acts Referred:

- Indian Penal Code, 1860 - Section 307, 323, 325, 504
- Arms Act, 1959 - Section 4, 25
- Maharashtra Police Act, 1951 - Section 37(1), 135

Citation: (2023) 01 BOM CK 0104

Hon'ble Judges: A.S. Gadkari, J; Prakash D. Naik, J

Bench: Division Bench

Advocate: Jayashree Tripathi, S.D. Shinde

Final Decision: Allowed

Judgement

Prakash D. Naik, J

1. Petitioner has challenged the Order of Detention dated 19th May, 2022 issued by Commissioner of Police, Thane under the provisions of

Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons, Video Pirates, Sand Smugglers and

persons engaged in Black-marketing of Essential Commodities Act, 1981 (for short $\hat{A}\hat{\phi}\hat{a},\neg\hat{E}\hat{o}M.P.D.A. Act\hat{A}\hat{\phi}\hat{a},\neg\hat{a},\hat{\phi}$). The Petitioner was served upon the

Order of Detention, grounds of detention and the documents relied upon by the Detaining Authority while issuing the Order of Detention.

2. Learned Advocate Ms. Tripathi appearing for the Petitioner submitted that, the Detaining Authority was aware that the Petitioner is already in

judicial custody without availing bail in C.R. No. I-89/2022 registered with Kalwa Police Station for offence under Section 307, 325, 323, 504 r/w

Sections 4 and 25 of the Arms Act, r/w Sections 37(1) and 135 of Maharashtra Police Act. In camera statements were recorded while the Petitioner

was in custody. The Detaining Authority has not disclosed any possibility of release on bail. The bail application preferred by the Petitioner was

pending before the Court. The Detaining Authority has not disclosed any cogent material and facts which necessitated the making of the Detention

Order. The valid Detention Order can only be passed against the detenu if the Detaining Authority is subjectively satisfied that there is real or

imminent possibility of detenu being released on bail based on cogent material and that it is absolute imperative to pass a valid detention Order against

the detenu while he is in custody. The Detaining Authority is duty bound to express his satisfaction in the ground of detention as to the imminent

possibility of detenu's release on bail, which is not done in this case. The satisfaction of the Detaining Authority is vitiated as it is not based on any

cogent material whatsoever.

3. Learned Advocate for the Petitioner has relied upon the following decisions :

1. Ramesh Yadav V/s. District Magistrate, Etah and Others, (1985) 4 SCC 232.

2. Kamarunnissa V/s. Union of India and another, (1991) 1 SCC 128.

3. Abdul Razak Abdul Wahab Sheikh V/s. S.N. Sinha, Commissioner of Police, Ahmedabad and another, (1989) 2 SCC 222.

4. Binod Singh V/s. District Magistrate, Dhanbad, Bihar and another, (1986) 4 SCC 416.

5. A. Shanthi (SMT) V/s. Govt. of T. N. and Others, (2006) 9 SCC 711.

6. Smt. Suman Sudhakar Jadhav V/s. The Commissioner of Police Thane & Ors., delivered by this Court in Criminal Writ Petition No. 3977 of 2017

dated 20th December, 2017.

7. Shri. Manmoorat R. Pandey V/s. The Commissioner of Police, Thane and Ors., delivered by this Court in Criminal Writ Petition No.1001 of 2022

dated 4th August, 2022.

8. Dharmendra Sughand Chelawat V/s. Union of Indian and Ors., AIR 1990 SC 1196.

9. Ahmedhussain Shaikhhussain @Ahmed Kalio V/s. Commissioner of Police, Ahmedabad And Another, (1989) 4 SCC 751.

4. Learned APP submitted that the Detaining Authority was aware about the fact that the Petitioner was in custody at the time of issuance of Order

of Detention. In the grounds of detention it is stated that the Petitioner is in custody in connection with C.R. No. I-89/2022 and he has preferred an

application for bail before the Court which is pending and he is in jail. It is also stated that considering Petitioner's Modus Operandi, criminal

tendencies and inclinations reflected in the offences committed by him, the Detaining Authority is satisfied that after granting bail, he being a free

person and in the event of he being at large, he being a criminal, is likely to indulge in activities prejudicial to the maintenance of public order, peace

and tranquility in future and that with a view to prevent him from acting in such a prejudicial manner in future, it is extremely necessary to detain him

under the said Act.

5. Learned APP has also relied upon the Affidavit-in-reply filed by the Detaining Authority wherein it is stated that the Detaining Authority was

aware that the detenu was in judicial custody when the Order of Detention was issued against him and this awareness as well as the satisfaction of

the Detaining Authority that the detenu may be granted bail and that the likelihood of the detenu being indulging in activities prejudicial to maintenance

of public order after released on bail is reflected in the grounds of detention. The Detaining Authority had reason to believe that the detenu may be

granted bail under the normal law of the land. The bail application was pending and investigation was in progress. There was every possibility of

detenu being released on bail.

6. From the factual analysis it is evident that the Petitioner was arrested on 18th March, 2022 in C.R. No.I-89/2022 registered with Kalwa Police

Station for offence under Sections 307, 323, 325 and 504 of Indian Penal Code (for short IPC) r/w Sections 4, 25 of Arms Act r/w Sections

37(1) and 135 of Maharashtra Police Act. Petitioner preferred an application for bail which was pending before the concerned Court and the

Petitioner continued to be in custody. The impugned Order of Detention was issued on 19th May, 2022.

7. In the case of Ramesh Yadav V/s. District Magistrate, Etah and Others (supra) Court has observed that the Order of Detention was issued as the

Detaining Authority was apprehensive that in case the detenu was released on bail he would again carry activities in the area. If the apprehension of

the Detaining Authority was true, the bail application had to be opposed and in case bail was granted, challenge against that Order in the higher forum

had to be raised. Merely on the ground that accused in detention as an under trial prisoner was likely to get bail an Order of Detention under the

National Security Act should not ordinarily be passed.

8. In the case of Kamarunnissa V/s. Union of India and another and connected petitions (Supra), it was observed that even in the case of person in

custody a Detention Order can validly be passed (i) if the authority passing the Order is aware of the fact that he is actually in custody; (ii) if he has

reason to believe on the basis of reliable material placed before him that there is a real possibility of he being released on bail and on being so released

he would in all probability indulge in prejudicial activity; (iii) If it is felt essential to detain him to prevent him from so doing him.

9. In the case of Binod Singh V/s. District Magistrate, Dhanbad, Bihar and another (Supra), it was held that there must be awareness of the facts

necessitating preventive custody of a person for social defense. If a man is in custody and there is no imminent possibility of he being released, the

power of preventive detention should not be exercised. Detenu was in jail. There was no indication that this factor or the question that the said detenu

might be released or that there was such possibility of his release, was taken into consideration by the Detaining Authority properly and seriously

before the service of the Order. A bald statement is merely an ipse dixit of the officer. If there were cogent material for thinking that the detenu might

be released then these should have been made apparent.

10. In the case of A. Shanthi (SMT) V/s. Govt. of T. N. and Others (Supra), it was observed that there was no cogent material before the Detaining

Authority on the basis of which the Detaining Authority could be satisfied that the detenu was likely to be released on bail. The inference has to be

drawn from the available material on record. In the absence of such material on record the mere ipse dixit of the Detaining Authority is not sufficient

to sustain the Order of Detention.

11. This Court in the case of Smt. Suman Sudhakar Jadhav V/s. The Commissioner of Police Thane & Ors. (Supra), has dealt with the submission

that the detenu is already in custody and there was no necessity of issuing detention order. The Detaining Authority had arrived at conclusion that the

detenu is violent and terrorizing character in the concerned area and indulged in various criminal activities. He was arrested and remanded to custody.

He preferred an application for bail which was pending before the Court. The Detaining Authority had stated that, Detaining Authority was aware of

the fact that the detenu was in custody and his application for bail was pending. After scrutinizing the factual aspects of the case, this Court had

observed that the Detaining Authority has grossly failed to record any satisfaction that there was reliable material before authority on the basis of

which it would have reason to believe that the detenu is likely to be released on bail. Though the Detaining Authority raises an apprehension that in

case if the detenu is released on bail, he may engage in similar activities, the possibility and likelihood of he being released on bail, do not precede the

said apprehension. It was also observed that the Order which did not spell out the reasons required in support of it, cannot be explained through an

affidavit. The Detaining Authority has failed to record the satisfaction on which the Detention Order could have been sustained.

12. In the case of Dharmendra Sughand Chelawat V/s. Union of Indian and Ors. (Supra), it was observed that the Detention Order can be validly

passed against a person in custody and for that purpose it is necessary that the ground of detention must show that Detaining Authority was aware of

the fact that the detenu is already in detention and there were compelling reasons justifying such detention despite the fact that the detenu is already in

detention. The expression compelling reasons in the context of making an Order of Detention of a person already in custody implies that there must be

cogent material before the Detaining Authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the

near future, (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge

in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities. In the case of Ahmedhussain

Shaikhhussain @Ahmed Kalio V/s. Commissioner of Police, Ahmedabad And Another (Supra), it was held that the Detaining Authority must disclose

in a case where the detenu is already in jail that there is cogent and relevant material constituting fresh facts to necessitate making of an Order of

Detention. Learned APP has relied upon the decision of this Court in the case of Mujammil @ Murgya Sabbir Mokashi V/s. The Commissioner of

Police, Pune & Ors., 2016 ALL MR (Cri) 2185, in the said decision it was observed that the Detaining Authority was aware of fact that the detenu

was in jail and applied for bail. The Detaining Authority recorded its satisfaction that after availing bail facility and becoming a free detenu is likely to

reverted back to similar activities which are prejudicial to the maintenance of public order.

13. From the factual analysis of the present case it is apparent that the Petitioner was arrested in C.R. No. I-89/2022 and was in custody. He

preferred an application for bail which was pending. The Detaining Authority was aware that the Petitioner was in custody. The subjective

satisfaction of Detaining Authority records that the Detaining Authority is satisfied that after grant of bail and in the event the Petitioner being at large,

he is likely to indulge in activities prejudicial to the maintenance of public order. This is not sufficient requirement to issue the Order of Detention while

the detenu is in custody. There is no debate that even in case a person is in custody a Detention Order can validly be passed. The Detaining Authority

should have reason to believe on the basis of reliable material placed before him, that there is a real possibility of the detenu being released on bail and

that being so released he would in all probability indulge in prejudicial activity and it is essential to detain him to prevent him on so doing. The

satisfaction of the Detaining Authority does not reflect on the reliable material placed before him to arrive at such conclusion. It is not made apparent

that there was cogent material to arrive at the conclusion that the detenu might be released on bail. In the affidavit in reply the Detaining Authority has

stated that the Detaining Authority had reason to believe that the detenu may be granted bail under normal law of the land. The bail application was

pending as the investigation was in progress and there was every possibility of detenu being released on bail cannot be ruled out which may further

result into again continuation of the detenu in prejudicial activities in future. These assertions were lacking in the subjective satisfaction of the

Detaining Authority. There was no cogent material before Detaining Authority on the basis of which the Detaining Authority was satisfied that the

detenu was likely to be released on bail. No such inference could be drawn from the available material on record. Mere ipse dixit of the Detaining

Authority is not sufficient to sustain the Order of Detention. The Detaining Authority has failed to record any satisfaction that there was reliable

material before the authority on the basis of which there was reason to believe that the detenu is likely to be released on bail.

14. Considering the aforesaid circumstances, the impugned Order of Detention would not sustain and deserves to be quashed and set aside.

ORDER

- i. Criminal Writ Petition No. 2091 of 2022 is allowed.
- ii. Rule is made absolute.
- iii. Order of Detention dated 19th May, 2022, bearing No.TC/PD/DO/MPDA/10/2022 issued by Respondent No.1 is quashed and set aside.
- iv. Petitioner/Detenu be released from jail forthwith, unless required in any other case.