

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
CRIMINAL WRIT PETITION NO.27 OF 2016

Mujammil @ Murgya Sabbir Mokashi,
age: 32 years, residing at 326,
Ghorpade Peth, Pune (Now detained
at Central Prison at Aurangabad).

Petitioner

Versus

1 The Commissioner of Police,
Pune City.

2 The State of Maharashtra
(through Additional Chief
Secretary to Government of
Maharashtra, Mantralaya,
Home Department, Mantralaya,
Mumbai).

3 The Superintendent,
Aurangabad Central Prison,
Aurangabad.

Respondents

Mr.U.N.Tripathi, advocate holding for Shri R.D.Sanap, advocate for
the petitioner.
Mr.S.J.Salgare, A.P.P. for Respondents.

**CORAM : R.M.BORDE &
K.L.WADANE, JJ.**

**Reserved on : 05th April, 2016
Pronounced on : 21st April, 2016.**

JUDGMENT (Per R.M.Borde, J.):

1 Heard. Rule. Rule made returnable forthwith and
heard finally by consent of learned Counsel for respective parties.

2 The petitioner is assailing order of detention issued by the Commissioner of Police, Pune City on 26.09.2015 under the provisions of Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons and Video Pirates Act, 1981 (hereinafter referred to as, 'M.P.D.A. Act').

3 The grounds of detention have been communicated to the petitioner on 26.09.2015. The list of offences within the period of five years and the preventive actions taken against the petitioner from time to time, are recorded in paragraph no.3 of the communication. The petitioner is stated to have been involved in nine offences during the period of preceding five years, whereas, preventive action has been taken against him in respect of two offences.

4 The representation tendered by petitioner objecting to the order of detention has been turned down by the Government and order to that effect has been issued on 05.11.2015. Petitioner has objected to the order of detention mainly on the ground that the detenu was already in custody since 12.09.2015 in C.R. No.208/2015 registered against him under the provisions of Sections 386, 387, 452 of Indian Penal Code and as such, it was impermissible to pass an order of detention while petitioner was already in custody. According to the petitioner, there is absence of consideration by the authority of the fact that the detenu is already in custody while issuance of order of detention and that no satisfaction of the detaining authority is recorded to the effect that there is imminent and real possibility of detenu's release on bail. According to the petitioner, the detaining authority cannot detain a

person while he was already in custody unless necessary requirements of law are followed and observance of the guidelines laid down by the Supreme Court, in that regard, is a necessary precondition.

5 Learned Counsel appearing for the petitioner, placing reliance on the judgment of the Supreme Court in the matter of **Kamarunnissa Vs. Union of India & another**, reported in AIR 1991 SC 1640, strenuously contended that the preconditions laid down by the Supreme Court in the judgment have not been observed. The order of detention shall not be issued to pre-empt or circumvent enlargement on bail in the cases which are essentially criminal in nature and can be dealt with under the ordinary law. Reliance is placed on paragraph no.13 of the judgment, which reads thus:

“13 From the catena of decisions referred to above, it seems clear to us that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question it before a higher Court. What this court stated in the case of Ramesh Yadav, (AIR 1986 SC 315) (supra) was that

ordinarily a detention order should not be passed merely to pre-empt or circumvent enlargement on bail in cases which are essentially criminal in nature and can be dealt with under the ordinary law. It seems to us well settled that even in a case where a person is in custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive detention. This seems to be quite clear from the case law discussed above and there is no need to refer to the High Court decisions to which our attention was drawn since they do not hold otherwise. We, therefore, find it difficult to accept the contention of the counsel for the petitioners that there was no valid and compelling reason for passing the impugned orders of detention because the detenus were in custody.”

6 A similar proposition has been laid down in the matter of **Dharmendra Suganchand Chelawat and another Vs. Union of India and others**, reported in AIR 1990 SC 1196. In the matter of **Dharmendra**, application for bail, tendered by the detenu for his release from custody, was rejected a few days prior to issuance of order of detention. As such, there was no apprehension that the detenu was likely to be released from the custody nor there was substance in the ground of detention to support the contention that the detenu would be released from custody. Therefore, the order of detention was quashed and set aside. The Supreme Court, while dealing with the matter, has placed reliance on the judgment in the matter **Dulal Roy Vs. District Magistrate, Burdwan**, reported in AIR 1975 SC 1508, wherein it has been held that,

“if a person was serving a long time of

imprisonment or was in jail custody as an undertrial and there was no immediate or early prospect of his being released on bail or otherwise, the authority would not legitimately be satisfied on the basis of his past history or antecedents that he was likely to indulge in similar prejudicial activities after his release in the distant or indefinite future.”

7 The Supreme Court has reiterated similar view in the matter of **Sanjay Kumar Aggarwal Vs. Union of India**, reported in 1990 (3) SCC 309. In paragraph 9 of the judgment, referring to the decision in the matter of **Ramesh Yadav Vs. District Magistrate, Etah**, reported in (AIR 1986 SC 315), it is observed thus:

“Merely on the ground that an 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. 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.”

It is further observed that:

“Whether the detention of the said person would be necessary after he is released from jail, and if the authority is bona fide satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released. The antecedent history and the past conduct on which the order of detention would be based would, in such a case, be proximate in point of time and would have a rational connection with the conclusion drawn by the authority that the detention of the person, after his release is necessary”

8 Learned Counsel for the petitioner has also placed reliance on the judgment delivered by the Division Bench of this Court in the matter of **Ashish s/o Robert Felix Vs. The Commissioner of Police, Nagpur City & others** (Criminal Writ Petition No.390 of 2014, decided on July 30, 2014).

9 Referring to the judgment of the Supreme Court in the matter of **Huidrom Konungjao Singh Vs. State of Manipur & others**, reported in (2012) 7 SCC 181, it is contended that there is no prohibition in law to pass the detention order in respect of a person who is already in custody in respect of criminal case. However, if the detention order is challenged, the detaining authority has to satisfy the Court about following facts:

- (i) The authority was fully aware of the fact that the detenu was actually in custody.
- (ii) There was reliable material before the said authority on the basis of which it could have reasons to believe that there was real possibility of his release on bail and further on being released he would probably indulge in activities which are prejudicial to public order.
- (iii) In view of the above, the authority felt it necessary to prevent him from indulging in such activities and therefore, detention order was necessary.

10 Reliance is also placed on the judgment of the Supreme Court in the matter of **Champion R. Sangma Vs. State of Meghalaya & another**, reported in 2015 ALL MR (Cri) 3673 (SC). The principle laid down in the matter of **Kamarunnissa** has been re-stated in this judgment. It is also observed that, no satisfaction has been recorded by the detaining authority that there was reliable material before the authority on the basis of which it would have reasons to believe that there was a real possibility of his being released on bail. It was also not mentioned that as to whether any bail application was moved by the accused or not. The order was also conspicuously silent on the aspect, whether there was any probability of indulging in prejudicial activity if the petitioner would have been released on bail.

11 In the instant matter, however, in paragraph no.8 of the order, it is specifically recorded thus:

8 I have carefully gone through the material placed before me and I am subjectively satisfied that you are acting in a manner prejudicial to the maintenance of public order. As you have applied for bail, this shows your intention to secure bail and get free. In view of your tendencies and inclinations reflected in the offences committed by you as stated above, I am further satisfied that after availing bail facility and becoming a free person, again you are likely to revert to similar activities. There are prejudicial to the maintenance of public order in future and it is necessary to detain you under the said Act to prevent you from acting in such prejudicial manner in future.

12 It is, thus, clear that the detaining authority was

aware of the fact that the detenu was already in jail and had applied for bail, which shows his intention to secure bail and get free. The detaining authority has also recorded its satisfaction that after availing bail facility and on becoming free, the detenu is likely to revert back to similar activities and those would be prejudicial to maintenance of public order.

13 A reference can be made to the judgment of the Supreme Court in the matter of **Rekha Vs. State of Tamil Nadu & another**, reported in (2011) 5 SCC 244, wherein it has been recorded by the Supreme Court in paragraph no.27 of the judgment, thus:

27 In our opinion, there is a real possibility of release of a person on bail who is already in custody *provided he has moved a bail application which is pending*. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed.”

14 Since the petitioner, in the instant matter, has tendered an application for securing his release on bail and since the application was pending on the date of issuance of order of

detention, there was surely a likelihood of petitioner securing bail and getting free. This apprehension has been taken care of while issuing order of detention, which specifically records that the petitioner is likely to secure bail and after his release, he may indulge in similar activities which would be prejudicial to the maintenance of public order.

15 In view of the reasons recorded above, we are satisfied that no case is made out by the petitioner for quashing and setting aside the order of detention. The order, that has been issued by the detaining authority, is legal, proper and in observance of principles laid down by the Supreme Court, referred to above.

16 Writ Petition, being devoid of substance, stands dismissed. Rule discharged.

K.L.WADANE
JUDGE

adb/crwp271616

R.M.BORDE
JUDGE