

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 4550 OF 2015

Shri Mukesh Purshottam Gaikwad	}	
Chitroda, Age 36 years, Residing at	}	
Near Smasanbhumii Bypass Road,	}	
Pune. (At present Nashik Road	}	
Central Prison, Nashik)	}	Petitioner
versus		
1. The Commissioner of Police, Pune	}	
2. The State of Maharashtra	}	
(Through Addl. Chief Secretary to	}	
Government of Maharashtra, Home	}	
Department, Mantralaya, Mumbai.	}	
3. The Superintendent	}	
Nashik Road Central Prison, Nashik	}	Respondents

Mr. Udaynath Tripathi for the Petitioner

Mr. J. P. Yagnik - APP for the
Respondents.

**CORAM :- S. C. DHARMADHIKARI &
G. S. PATEL, JJ.**

DATED :- FEBRUARY 18, 2016

P.C. :-

1. This Petition under Article 226 of the Constitution of India challenges an order of preventive detention dated 29th October, 2015 issued by the 1st Respondent under Section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders, Dangerous Persons and Video

Pirates Act, 1981 (“**the MPD Act**”). The Petitioner is the detenu himself. The Petition was admitted on 24th December, 2015.

2. We have heard Mr. Tripathi, learned Counsel appearing for the Petitioner and Mr. Yagnik, learned APP. With their assistance, we have considered the material on record.

3. In our view, the Petition deserves to be allowed on a single ground. Mr. Tripathi points out that the detenu is in custody. He has been in custody for a considerable period of time, viz., from 26th August 2015 in relation to C. R. No. 64 of 2015 filed at the Mundhawa Police Station. In the grounds of detention, some details of the various criminal cases filed against the detenu have been set out. Then in paragraph 8 of the grounds of detention, the detaining authority has said that on 30th September 2015, the Petitioner/Detenu applied for bail in C. R. No. 64 of 2015 registered at the Mundhwa Police Station “under Sections 307, 354, 504, 427 of the Indian Penal Code read with section 3/25 of the Arms Act and section 37 of the Maharashtra Police Act, 1951”. On this basis, the detaining authority has opined and expressed his subjective satisfaction in these words:

“This shows your intention to secure bail and get free.”

4. Mr. Tripathi points out that this statement and paragraph does not disclose the fact that, when sought, bail was in fact refused on 19th October 2015, a good 10 days before the date of the detention order.

5. Mr. Yagnik states that the subjective satisfaction of the detaining authority is well founded. He invites our attention to the Affidavit in Reply filed by the detaining authority. At page 45 of the record, there is a mention in this Affidavit in Reply that the Petitioner-detenu was released on bail by a court on the very date that he was arrested. This, Mr. Yagnik says, corresponds to the subjective satisfaction recorded in paragraph 8 of the grounds of detention.

6. We do not think this is entirely accurate. Paragraph 8 of the grounds of detention makes a specific reference to the criminal complaint C. R. No. 64 of 2015 filed at the Mundhawa Police Station, while the reference in the Affidavit in Reply is to a totally different complaint being C. R. No. 358 of 2015 filed at the Hadapsar Police Station. No part of what is stated in this portion of the Affidavit in Reply is reflected in the grounds of detention, either in paragraph 8 thereof or elsewhere.

7. In our view, Mr. Tripathi is entirely justified in relying upon the decision of the Hon'ble Supreme Court in the case of *Champion R. Sangma vs. State of Meghalaya and Anr.*¹ In that decision, the Hon'ble Supreme Court held, referring to the decision of the Hon'ble Supreme Court in the case of *Kamarunnissa vs. Union of India and Anr.*² that even when a detenu is in custody, the order can be validly passed only on certainly well established legal principles. These have been set out in *Kamarunnisa's* case and followed consistently since. The relevant portion of the decision reads thus:-

¹ 2015 ALL MR (Cri) 3673 (SC)

² 1991 (1) SCC 128

“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* 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.”

8. As the Hon’ble Supreme Court noted, this dicta has been reiterated in subsequent judgments. It is, in our view, not necessary to multiply authorities on this aspect of the matter.

9. It is also not disputed that these principles enunciated by the Supreme Court are applicable to the MPD Act as well. We note that there are two significant omissions in the impugned order: first, the impugned order only mentions that bail was sought in the Mundhwa PS case, but does not mention that this was refused, although the order of refusal is prior to the impugned order. Second, the reference to an order of bail being granted is not to be found in the grounds of detention at all, but only in the Affidavit in Reply and that reference relates to an entirely different complaint filed at the Hadapsar Police Station. It is clear that the bail granted in the Hadapsar Police Station case was prior in point of time to the Petitioner's arrest and his subsequent denial of bail in the Mundhwa Police Station case. In paragraph 7(a) of the Petition, the Petitioner has clearly averred that he is in judicial custody since 26th August 2015, when bail was refused to him. There is no denial of this in the Affidavit in Reply of the detaining authority.

10. What is even more peculiar is that even though the Affidavit in Reply of the detaining authority is dated 13th January 2016, there is no mention even in this affidavit (let alone in the grounds of detention) of the order dated 19th October 2015 (Ex. "D" to the Petition) refusing bail in the Mundhwa PS case. Instead, in paragraph 8 of the Affidavit in Reply at page 45, it is only stated that the detenu applied for bail on 30th September 2015. It is impossible to believe that the detaining order was aware of and applied his mind to the application for bail but was unaware of and did not consider the result of that order, viz., the refusal of bail.

11. The detention order cannot be sustained.

12. The Petition is partly allowed in terms of prayer clause (b) to the limited extent of quashing and setting aside the order of detention. It is, however, clarified that our order is not to be construed as a direction for the release of the detenu. We specifically reject that portion of prayer clause (b) that seeks the release of the Petitioner. Any application by the detenu for bail shall be considered on its own merits uninfluenced by the present order, which is confined to the facts of this particular case.

(G.S.PATEL, J.)

(S.C.DHARMADHIKARI, J.)