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

CRIMINAL WRIT PETITION NO.2984 OF 2017

Gurunath Wallappa Rathod,)
Age 42 years, residing at)
Bhojappa Tanda, Dongaon Road)
Solapur.) ... Petitioner

Versus

1. The Commissioner of Police,)
Solapur.)
2. The State of Maharashtra)
(Through Addl. Chief Secretary)
to Government of Maharashtra)
Home Department, Mantralaya,)
Mumbai)
3. The Superintendent,)
Yerwada Central Prison,) ... Respondents

WITH

CRIMINAL WRIT PETITION NO.2985 OF 2017

Ramesh Rekhu Rathod,)
Age 35 years, residing at)
Bhojappa Tanda, Dongaon Road,)
Solapur.) ... Petitioner

Versus

1. The Commissioner of Police, Solapur)
2. The State of Maharashtra)
(Through Addl. Chief Secretary)
to Government of Maharashtra)
Home Department, Mantralaya,)
Mumbai)

3. The Superintendent,)
Yerwada Central Prison,)
Pune.) ... Respondents

Mr. U.N. Tripathi i/by Mr. Ujwal R. Agandurve for the Petitioners.
Ms. M.H. Mhatre, APP for the Respondent - State.

**CORAM : A.S. OKA &
RIYAZ I. CHAGLA, JJ.**

DATE : 19th SEPTEMBER, 2017

ORAL JUDGMENT (Per A.S. Oka, J.)

1 These two Petitions can be conveniently disposed of by a common order. In both these Petitions under Article 226 of the Constitution of India, there is a challenge to the orders dated 19th April, 2017 issued by the Commissioner of Police, Solapur as a Detaining Authority under Section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons and Video Pirates, Sand Smugglers and Person Engaged in Black Marketing of Essential Commodities Act, 1981 (for short “the said Act of 1981”). By the impugned orders, the petitioners in these two Petitions have been ordered to be preventively detained under the provisions of the said Act of 1981. As the allegations made against the petitioners in these two Petitions are somewhat common, we have taken up these two Petitions together for final disposal. Even the grounds of challenge are also similar.

2 Apart from usual ground that the order of detention has been passed in a casual and cavalier manner which shows non-application of mind, the main ground canvassed is on the basis of factual position that the petitioners in both the Petitions were in judicial custody on the date of passing the impugned order in connection with C.R. No.42 of 2017 registered at Salghar Wasti Police Station, Solapur. The contention raised in these two Petitions is that the subjective satisfaction which is required to be recorded by the Detaining Authority in terms of the decision of the Apex Court in the case of *Kamarunnissa v. Union of India and Another*¹ has not been recorded by the Detaining Authority and therefore, the impugned orders passed by the Detaining Authority are vitiated. Our attention is also invited to the grounds of detention in which the Detaining Authority has mentioned that bail application made by the petitioners was rejected on 30th March, 2017 and under the provisions of Section 439 of the Code of Criminal Procedure, 1973 there is a power vesting in the Court to grant bail. The submission of the learned counsel appearing for the petitioners is that merely because there is a provision in law under which the petitioners could have been enlarged on bail, it cannot be said that there was imminent possibility of the petitioners being released on bail. The learned APP appearing for the respondents invited our attention to the affidavit of the Detaining Authority. Her submission based on certain

1 (1991) 1 SCC 128

decisions is that even assuming that in the grounds of detention, the Detaining Authority has not recorded its satisfaction in terms of the decision of the Apex Court in the case of *Kamarunnissa*, such a satisfaction can be recorded in affidavit in reply filed for justifying order of preventive detention. She submitted that all documents in relation to investigation carried out by the Police in C.R.No.42 of 2017 were a part of the proposal for detention and after considering all the said documents, in the affidavit in reply, the Detaining Authority has expressed subjective satisfaction that the release of the petitioners on bail is imminent. She would, therefore, submit that there is a compliance made. Her other submission is that if the file is perused, it will show that the Detaining Authority has not acted in hurry and therefore, there is no merit in the allegations that there is a non-application of mind by the Detaining Authority. Considering the grounds raised, we had called upon the learned APP to produce the files in both the cases and accordingly, we have perused the same.

3 The material in both the files is more or less similar. Therefore, we are referring in detail to the documents on file concerning the petitioner in Writ Petition No.2984 of 2017. The first note in the file is of 5th April, 2017 which is signed by the Assistant Commissioner of Police, Zone – 2 at Solapur wherein there is a

proposal for passing an order of detention against the petitioner. In the said note, there is a reference to antecedents of the petitioner and there is a specific reference to C.R. No.42 of 2017. It refers to in-camera statements of witnesses A and B. The second note in the file is by the Deputy Commissioner of Police, Solapur. It recommends an action of passing order of preventive detention against the petitioner. On 8th April, 2017 there is a noting by Senior Inspector of Police, Crime Branch, Solapur which refers to the proposal for passing order of preventive detention. Below the said note, there is a detail handwritten note/order made by the Detaining Authority which is of 10th April, 2017. The said order/note records that the Detaining Authority has perused in-camera statements of the witnesses. He has observed that the detenu is indulging in illicit bootlegging activities like manufacturing, storing and transporting of country made liquor (hathbhatti). He has referred to the chemical analysis reports. He has noted that the petitioner (proposed detenu) has created a terror in the minds of people and even after taking preventive action earlier, he has not changed his behaviour. He has observed that due to the prejudicial activities of the petitioner, public order as well as public health is disturbed. He, therefore, proceeded to record that he was subjectively satisfied that if not prevented, the petitioner is most likely to continue in indulging in dangerous activities which are prejudicial to the

maintenance of public order. He has observed that there is no other option but to detain him under the said Act of 1981 as he is a habitual bootlegger and dangerous person within the meaning of the said Act of 1981. Below the said order/note by the Detaining Authority, on 12th April, 2017, the Senior Inspector of Police, Crime Branch, Solapur has noted that a drafts of grounds of detention both in English and Marathi have been prepared which have been submitted for approval. The Assistant Commissioner of Police (Crime) by referring to the drafts grounds of detention has stated that the same are being produced for perusal and approval. There is a further noting of 15th April, 2017 by the Deputy Commissioner of Police (Crime) by which he has recommended that the petitioner be detained under Sub-Section (1) of Section 3 of the said Act of 1981. Below the said noting of 17th April, 2017, the Detaining Authority has made following handwritten noting:

“DFA appd(.) pl. put up final draft of grounds for detention(.) Detention order, committal order be put up at earliest(.)”

4 On 19th April, 2017 the Detaining Authority in his handwriting has made following note :-

“Appd(.) DFA signed(.), final order, detention order signed”.

5 Perusal of the file reveals that in none of the notings which were put up before the Detaining Authority on 10th April, 2017 it is noted that the petitioner was in judicial custody in connection with C.R. No.42 of 2017. There is a handwritten order/note signed by the Detaining Authority on 10th April, 2017 which runs into three pages. The said handwritten note/order which records subjective satisfaction does not show that the Detaining Authority was aware that the petitioner was in judicial custody on the date on which the proposal was moved and on the date on which he has passed the order dated 10th April, 2017. Moreover, the file shows that the Detaining Authority has passed the said order recording subjective satisfaction on 10th April, 2017 without dictating or drafting the grounds of detention. In fact, noting dated 12th April, 2017 made by the Senior Inspector of Police (Crime Branch) shows that it was the said officer who prepared the draft grounds of detention both in English and Marathi which were put up before the Detaining Authority for signatures. The learned APP on instructions states that "DFA" means a draft. Even noting dated 17th April, 2017 made by the Detaining Authority shows that the Detaining Authority did not himself prepare or dictate grounds of detention but the Detaining Authority approved the draft prepared by the Senior Inspector of Police, Crime Branch.

6 As far as petitioner in Writ Petition No.2985 of 2017 is concerned, file noting is more or less similar except the difference of dates. A detailed order/ noting running into three pages recording the subjective satisfaction has been made by the Detaining Authority in this case on 11th April, 2017. Notings made by various Police Officers prior to the said handwritten order by the Detaining Authorities do not specifically mention that the petitioner was in judicial custody in connection with C.R.No.42 of 2017. The order dated 11th April, 2017 passed by the Detaining Authority shows that when the said order was made, the Detaining Authority was not aware of the fact that the petitioner was in judicial custody on that day. As noted earlier subjective satisfaction is recorded under the order dated 11th April, 2017 which shows that the Detaining Authority was not made aware of the fact that the petitioner was in judicial custody on that date.

7 In the grounds of detention, the Detaining Authority has mentioned that the applications made by the petitioner for grant of bail have been rejected. There is no subjective satisfaction recorded on the basis of material on record that there was a distinct possibility of the petitioners being released on bail or that the release on bail was imminent. All that the Detaining Authority has observed is that

notwithstanding the rejection of the earlier bail application, under Section 439 of the Code of Criminal Procedure, 1973 bail can be granted to the petitioners. Merely because there is a provision of law empowering the Court to grant bail, it cannot be said that in each case there will be a distinct possibility of bail being granted. Therefore, in the present case, at least two tests laid down in the case of *Kamarunnissa* are not satisfied.

8 Apart from the aforesaid grounds, there is something which goes to the root of the matter. The Detaining Authority himself did not formulate grounds of detention and that the grounds were formulated by the Senior Inspector of Police of Crime Branch after the Detaining Authority passed a long order recording subjective satisfaction that there is necessity to detain the petitioners preventively under the said Act of 1981.

9 Under the circumstances, the impugned orders are vitiated and there is infringement of fundamental rights guaranteed under Article 21 and 22 of the Constitution of India. We may note here that during last few weeks, we have noticed that some of the Senior Police Officers who are acting as Detaining Authority lack knowledge of law relating to preventive detention and therefore, they have committed

gross errors. We, therefore, propose to direct the office of the Public Prosecutor to forward a copy of this judgment to the Principal Secretary of the Home Department to enable the State Government to take a decision of giving proper training to the Police Officers who are acting as Detaining Authorities under the various statutes.

10 Accordingly, the Petitions must succeed and we pass the following order :-

ORDER

(i) Rule issued in Writ Petition No.2984 of 2017 is made absolute in terms of prayer clause (b) which reads thus :-

“(b) That the order of detention bearing No.05/CB/BL-DP/17 dated 19.04.2017 under Section 3 of M.P.D.A. Act 1981 by the Respondent No.1 against the detenu, be quashed and set aside and on quashing the said order of detention, the detenu be released forthwith.”

(ii) Rule issued in Writ Petition No.2985 of 2017 is made absolute in terms of prayer clause (b) which reads thus :-

“(b) That the order of detention bearing No.06/CB/BL-DP/17 dated 19.04.2017 under Section 3 of M.P.D.A. Act 1981 by the Respondent No.1 against the detenu, be quashed and set aside and on quashing the said order of detention, the detenu be released forthwith.”

(iii) All concerned to act upon an authenticated copy of
operative part of this judgment and order.

(RIYAZ I. CHAGLA, J)

(A.S. OKA, J)