

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

WRIT PETITION NO. 3977 OF 2017

Smt. Suman Sudhakar Jadhav

... Petitioner.
(Mother of Detenu)

V/s.

The Commissioner of Police Thane & Ors.

... Respondents.

Mr. Udaynath N. Tripathi, Advocate for the Petitioner.

Mrs. M. M. Deshmukh, APP for the State.

**CORAM : S. C. DHARMADHIKARI AND
SMT.BHARATI H. DANGRE, JJ.**

DATE : 20th DECEMBER, 2017

P.C. : (Per Smt.Bharati H. Dangre, J.)

1 The Petitioner, mother of detenu, who has been detained under the provisions of the 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 (hereinafter, for short, referred to as the MPDA Act, 1981), has invoked writ jurisdiction of this

court, praying for quashing and setting aside the order of detention dated 14.08.2017, issued under section 3 of the MPDA Act by Respondent No.1, and seeking release of the detenu forthwith.

2 It is the case of the Petitioner that an order of detention was passed by the Commissioner of Police, Thane on 14.08.2017, in exercise of powers conferred under subsection (2) of section 3 of the said Act, thereby directing that Shri Ganesh Sudhakar Jadhav @ Kalya Ganya (aged 33 years), resident of Lokmanya Nagar, Pada No.4, Babulal Seth Chawl, Thane West, Dist. Thane, to be detained under the provisions of the MPDA Act, 1981 with a view to prevent him from acting in any manner prejudicial to the maintenance of public order. The order of detention was served on the detenu on 14.08.2017 and the grounds of detention were also served on him. Pursuant to the said order of detention, the detenu was detained by way of preventive measure. It is this order of detention which is assailed in the present writ petition.

3 The impugned order of detention has been assailed on several grounds; the foremost being the order of detention is passed mechanically in a very casual manner, without applying judicious mind, reflecting total non-application of mind by the detaining authority. Another ground raised in the writ petition is that the detention order is based on 2 in-camera statements of witnesses 'A' and 'B', however, the grounds of detention do not give details about the names, identity and particulars of the witnesses for which the detaining authority has claimed privilege and it is contended that in absence of these details, the order of detention is illegal and bad-in-law. Another ground raised in the petition being that the detenu was already in judicial custody on 14.08.2017 when the order of detention was passed against the detenu and he was not granted bail in C.R. No. I-186 of 2017, which was relied upon by the detaining authority and while passing the order of detention, the application preferred by detenu was pending and this fact was

known to the Detaining Authority but was not taken into consideration while passing the impugned order.

Several other grounds have been raised in the petition, which pertain to the right available to the detenu before the Advisory Board, as it is alleged that the detenu could not avail opportunity of presenting his case effectively before the Advisory Board, which defeated his right guaranteed under Article 22(5) of the Constitution of India.

4 We have heard Advocate Shri U. N. Tripathi in support of the petition. On submissions being advanced, we have arrived at a conclusion that we would be required to deliberate only on one ground raised by the petitioner, namely, the ground no. (d). Ground (d) reads as follows :

“(d) The petitioner says and submits that the detenu was already in judicial custody on 14/8/2017 when the order of detention came to be passed against him. The detenu was not granted bail in C.R.No. I-186 of 2017 even though he preferred an application for bail which was pending on the day of his detention. The detenu says and submits that while recording the subjective satisfaction in paragraph 7 of the grounds of detention no satisfaction about the imminent

and real possibility of detenu's release on bail is recorded by the Detaining Authority. Such a satisfaction showing the real possibility of release is one of the vital guidelines which is mandatorily required to be mentioned as held by Hon'ble Supreme Court in several Judgments. The order of detention is illegal and bad in law for non recording the satisfaction as regards to the imminent and real responsibility of detenu's release on bail. The order of detention is illegal and bad in law, liable to be quashed and set aside.”

The learned counsel appearing for the Petitioner elucidated the said ground and would argue that the detenu was already in custody on the date on which the order of detention was passed. He placed reliance on the judgment of the Hon'ble Apex Court in the case of **Kamarunnissa vs. Union of India & Anr.**, reported in 1991 (1) SCC 128 to buttress his submission that even when the detenu is in custody, the order can be validly passed only on certainly well established legal principles. He placed reliance on paragraph 13 of the said judgment of the Apex Court. At this stage, we feel it appropriate to reproduce said paragraph 13 on which the learned counsel has placed heavy reliance.

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.”

He also placed reliance on the judgment of this court in **writ petition no. 4550 of 2015** (Shri Mukesh Purshottam Gaikwad Chitroda vs. the Commissioner of Police Pune & Ors.,) decided on 18th February, 2017.

5 On hearing the learned counsel for the petitioner we are impressed by his argument in support of ground “d” and the reasons for such an impression are culled out in the subsequent paragraphs below. We find that this writ petition filed by the petitioner deserves to be allowed only on this solitary ground and, therefore, we do not advert to other grounds raised in the writ petition.

Perusal of the order of detention reveals that the detaining authority arrived at a conclusion that the detenu is a violent and terrorizing criminal character in the area of Vartaknagar, Naupada, Shreenagar Police Station, Thane and has indulged in various criminal activities since 2007

including the attempt to commit murder, abduction, hurt, grievous hurt, robbery, preparation for dacoity, threatening, extortion, kidnapping, criminal intimidation etc., and also indulged himself in illegal possession of weapons under the Arms Act. The detaining authority relied upon the offences registered against the detenu since the year 2012 and also referred to various preventive measures initiated against the detenu to prevent him from indulging in such activities. The detaining authority noticed the criminal activities of the detenu and his tendency to commit such acts and as such relied upon the CR No. I-68 of 2017 under section 392, 506 of the Indian Penal Code, registered against the detenu and his associates with the Vartaknagar Police Station on 01.03.2017. The detaining authority also refers to CR No.II-27 of 2017, registered under section 506(2), read with section 34 of the Indian Penal Code at Vartaknagar Police Station against the detenu in relation to the incident which had occurred/took place on 01.03.2017. The detaining authority further relies on 3rd Crime vide C.R. No. I-186 of 2017, registered under

sections 326, 365, 394, r/w. 34 of the Indian Penal Code on 07.06.2017, on a complaint made by one Shri Sanny Ranglal Roy. The detaining authority makes a reference to the said CR and mentions in the detention order that in relation to the said Crime/CR, the detenu was arrested on 29.07.2017 and produced before the Judicial Magistrate, First Class, 2nd Court, Thane on the same date. The detaining authority also sets out in the order of detention that the court ordered the police custody of the detenu till 31.07.2017 and there was seizure of weapons from the detenu, who was an accused in the said C.R.. The detaining authority further mentions that the detenu was produced before the Judicial Magistrate, First Class, 2nd Court, Thane on 31.07.2017 and was remanded to the judicial custody till 11.08.2017 and thereafter, the detenu had made an application before the Judicial Magistrate, First Class, 2nd Court, Thane, seeking his release on bail on 31.07.2017 and the application is pending in the said court and the detenu is in judicial custody.

It is this observation of the detaining authority on which ground no.(d), raised in the petition, rests upon. The detaining authority is aware of the fact that the detenu was arrested in relation to C.R.No. I-186 of 2017 and he was produced before the Judicial Magistrate, First Class, 2nd Court, Thane and remanded to judicial custody till 11.08.2017. The detaining authority is also alive to the factum of an application made by the detenu before the Judicial Magistrate, seeking release on 31.07.2017 and about the pendency of this application.

6 The law of preventive detention is a preventive enactment and it provides for prevention of a persons from indulging into dangerous activities of slumlords, bootleggers, drug-offenders, dangerous persons, video pirates, sand smugglers and persons engaged in black-marketing of essential commodities and prevention of such dangerous activities prejudicial to the maintenance of public order. The purpose of preventive detention is not to punish a person for some acts

which he has done but to prevent him from indulging in illegal activity prejudicial to the interest of the State, including public order. The Law of Preventive Detention arms the State with pre-cautionary action and must be seen as such. Seriously speaking, preventive detention is not a Regulation, it is something more serious as it acts as an exception to the rights conferred under Article 21 and 22 (5) of the Constitution of India and deprive a person of liberty. But it is accepted as necessary evil to protect danger to the community. The justification of such detention is suspicion and reasonability and the law of preventive detention is therefore required to be strictly construed and the procedure to be meticulously complied with. The preventive detention being "jurisdiction of suspicion" and the compulsion of value of freedom of an orderly society might compel curtailment of individual's personal liberty. The Indian Constitution cherishes the personal liberty, being sacrosanct and the authority is expected to follow the procedure prescribed by law, the detaining authority's satisfaction must be based on proper appreciation of

facts about likelihood of detenu's release on bail and necessity of his detention to prevent him from indulging in prejudicial activities in light of his antecedent, activities and its proximity. Preventive detention being necessary to prevent a detenu from acting in any manner prejudicial to public order, it is ordinarily needed when a detenu is already in custody. The detention could only be ordered in case the detaining authority is reasonably satisfied with the cogent material that there is likelihood of his release and in view of his release he is likely to indulge again into such activities. But when the detenu is already in custody, the anticipation and apprehension of indulging into prejudicial activities gets wiped out and the powers is to be exercised in a very cautious manner.

It is the potentiality of commission of crime of the detainee which prompts the detaining authority to invoke provisions of the enactment and preventively detain such a dangerous person, whose tendency and inclination is reflected from his past record and it is the determining factor for the detaining authority to detain such a person. It is the

potentiality of the commission of offences on the basis of which the order of detention is to be passed.

7 The detenu in the present case has been detained and has been clamped as dangerous person as defined under section 2(b) of the MPDA Act, 1981. A dangerous person is a person who either by himself or as a member or leader of a gang, habitually commits, or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Indian Penal Code or any of the offences punishable under Chapter V of the Arms Act, 1959. In a contingency where the detenu is already in judicial custody and he was not granted bail, there is no justification for the detaining authority to arrive at a conclusion that such a detenu would indulge himself into criminal activity without being released on bail. The detaining authority has to arrive at a conclusion based on the material placed before him that such a detenu, who was earlier subjected to custody and released on bail has mis-used his liberty and indulged himself into an

activity of the nature which forces the detaining authority to preventively detain him. The detaining authority would be required to form a satisfaction about the real possibility of the detenu being released on bail. The issue that even when the detenu is in custody, the order of detention can be validly passed on certainly well established legal principles is no more res-integra. In the light of catena of the decisions the principles culled out leads to a proposition of law that even in case of a person in custody, a detention order can be passed, if the authority passing the order, is aware of the fact that such a detenu is actually in custody and that he has reason to believe on the reliable material placed before him namely - (a) there is real possibility of he being released on bail, (b) that on detenu, so released, he would act or probably indulged in prejudicial activities and (c) it is essential to detain him to prevent him so doing.

8 While testing the arguments of the learned counsel for the petitioner, we have carefully perused the order of

detention. The order of detention satisfies the first element, mentioned above, namely the detaining authority being aware that the detenu is actually in custody, we tried to search out the second preposition, reproduced above, as to whether the detaining authority in the impugned order has expressed real possibility of the detenu being released on bail and on being so released, whether he would in all probability indulge in prejudicial activity. The impugned order in paragraph -7 makes the following reading :

7. 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. I have also perused in camera statements recorded by the Senior Police Inspector Vartaknagar Police Station, duly verified by the Asstt. Commissioner of Police, Vartaknagar Division and I am subjectively satisfied that the "in-camera" statements recorded are true and reasonable. I am aware that you are in jail in Vartaknagar Police Station C.R.No. I 186/2017 u/s 326, 365, 394, 34 of IPC and you had made an application for your bail in this case. On going

through your past record it is seen that, after your release on bail you immediately engage yourself in similar offences. I am sure that after your release on bail in this case too, there is possibility of your committing similar crimes. However, in view of your tendency and inclination reflected in the offences committed by you, as stated hereinabove, I am further satisfied that you have no respect to the existing law of the land and that being a violent criminal character, you are likely to revert to similar activities purely for sake of pecuniary benefits and further to create your criminal awe, thereby causing further disturbance to the maintenance of public order in above mentioned area of Vartaknagar, Police Station, Thane under Thane Police Commissionerate. It is, therefore, necessary to detain you under the provisions of In Pursuance of section 8 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders and Dangerous Persons and Video Pirates Sand Smugglers and Persons Engaged in Black Marketing of Essential Commodities Act, 1981, (Mah.Act No. LV of 1981), to prevent you from acting in similar prejudicial manner, in future.”

9 In the instant case, though the grounds of detention record the factum of the detenu being in custody the detaining authority has grossly failed to record any satisfaction that there was reliable materials before authority on basis of which it would have reasons to believe the applicant is likely to be released on bail when the detaining authority was aware that he was in jail in relation to C.R.No.I-186/2017 and he has made application for grant of bail. Order is conspicuously silent on this aspect. Though the detaining authority in the impugned order merely 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 this apprehension. In the affidavit filed by the detaining authority, the detaining authority has tried to justify the order of detention by attempting to advance this apprehension. In the affidavit filed by the detaining authority, in paragraph 11, the following statement is made;

“It is submitted that I was aware that the detenu was in judicial custody in CR No. I 186/2017 on 14/8/2017, when the Order of Detention was issued

against him and this awareness is reflected at para 7 in the grounds of detention. However, I being the Detaining Authority had reason to believe that the detenu may be released on bail under the normal law of the land. It is respectfully submitted that the considerations which weigh on the mind of the Hon'ble Court while granting bail and the considerations which weigh on the mind of the Detaining Authority while issuing the Order of Detention are entirely different. It is stated that CR No. I-186 of 2017 was registered under Sections 326, 365, 394, 34 of Indian Penal Code, the detenu had preferred an application for bail in the said CR, however, his application was pending on day of issuance of the Order of Detention. It is stated that the detenu while in custody had preferred an application for bail hence the possibility of his being released on bail could not be ruled out. In view of the tendencies and inclinations reflected in the offences committed by the detenu, I being the Detaining Authority was further satisfied that after the detenu has availed of the bail facility and in the event that he is a free person the detenu was likely to revert to similar activities prejudicial to the maintenance of Public Order.”

However, it is settled position of law that in order which did not spell out the reasons required in support of it, cannot be explained through an affidavit and moreover the law of preventive detention being unique, and required to be strictly construed in and requires subjective satisfaction being reached on basis of cogent material that the detenu needs to be

detained, we expect the detaining authority to comply with the requirements both procedural and substantive in a more strict manner. The detaining authority has failed to record the satisfaction in the order of detention on which he could have validly sustained the detention order and the said ingredients being missed out by the detaining authority, the detention order is not sustainable and is liable to be quashed. We thus hold that impugned order suffer from material illegality and non-application of mind and is vitiated on the said grounds.

10 The petition is allowed in the light of aforesaid discussion and hence the following order :

(a) The writ petition is allowed in terms of prayer clause (b).

(b) The detention order dated 14/8/2017 issued by respondent no.1 is quashed and set aside. We direct that the detenu Ganesh Sudhakar Jadhav @ Kalya Ganya, r/o Lokmanya Nagar, Pada No.4, Babulal Seth Chawl, Near

Naresh Kirana Stores, Thane West, District Thane be released forthwith, if he is not required in any other case. Rule is accordingly made absolute.

(SMT.BHARATI H.DANGRE,J.) (S.C.DHARMADHIKARI,J.)

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