

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

CRIMINAL WRIT PETITION NO. 1543 OF 2018

Ganesh Subhash Masurkar	]	... Petitioner (Detenu)
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Versus

1. The Commissioner of Police, Pune.	]]	
2. The State of Maharashtra (Through Addl. Chief Secretary to Government of Maharashtra Mantralaya, Home Department Mantralaya, Mumbai)	]]]]]	
3. The Superintendent Kolhapur Central Prison, Kalamba, Kolhapur.	]]]	
4. The Secretary Advisory Board for M.P.D.A. Activities C/o. Home Department Mantralaya, Mumbai – 400 032.	]]]]	..Respondents

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Mr. Udaynath N. Tripathi for the Petitioner.

Mr. J.P. Yagnik, Addl. Public Prosecutor, for the Respondent-State.

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**CORAM : S.C. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.**

DATE : MAY 04, 2018.

JUDGMENT – (Per : Prakash D. Naik, J.) :-

1. The Petitioner has invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India challenging the order of detention dated 06.11.2017 issued by the Respondent No. 1 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 (hereinafter referred to as M.P.D.A. Act for short).

2. The Petitioner was served the grounds of detention dated 06.11.2017 formulated by the detaining authority on the basis of which the order of detention was issued against the Petitioner. The grounds of detention refer to the list of offences and preventive action taken against the Petitioner. It is also stated that the detaining authority has considered the offences mentioned at Sr. No. 5 of the chart incorporated in paragraph 3 of the grounds of detention. The offences at Sr. No. 5 of the said chart to C.R. No. 124 of 2017 registered with Sahakarnagar Police Station on 22.04.2017 for offences under Section 307, 336, 323, 504, 506(2), 34 of IPC and under the provisions of Arms Act as well as 37(1)/135 of the Maharashtra Police Act, 1951. The grounds also referred to the statements of 3 witnesses viz witness A, B and C whose statements were recorded in-

camera. The said witnesses have referred to the incidents dated 18.05.2017, 1.06.2017 and 4.06.2017 respectively. It is further stated that the Petitioner is habitual and dangerous criminal involved in serious crimes. In paragraph 7 it is stated that, the detaining authority is subjectively satisfied that the Petitioner is a 'dangerous person' as defined in the Section 2 (b-1) of the said Act. He has unleashed a reign of terror and have become a perpetual danger to the society at large in the area of Sahakarnagar Police Station in Pune city. The people there are experiencing a sense of insecurity and are living under shadow of fear. In paragraph 8 of the grounds of detention, it is stated that on the basis of the material placed before the detaining authority she is subjectively satisfied that the detenu is acting in a manner prejudicial to the maintenance of public order.

3. Mr. Tripathi, the learned Counsel for the Petitioner urged that the order of detention and the grounds of detention suffers from non-application of mind of the detaining authority. It is submitted that the detaining authority has referred to and relied upon the Criminal case registered vide C.R. No. 124 of 2017, wherein the Petitioner preferred his application for Bail on 10.08.2017 and the said bail application was rejected by the Session's Court, Pune on 12.09.2017 and thereafter, the Petitioner has not preferred any bail application before the Court. There

was no cogent material before the detaining authority to come to the conclusion that the Petitioner will be released on bail in the near future. Particularly, taking a note of the observation made by the Session's Court while rejecting the bail application of the Petitioner. There was no imminent/real possibility of Petitioner being released on bail and hence, the conclusion drawn by the detaining authority is erroneous which shows non-application of mind. Thus, the impugned order of detention is illegal, bad in law, and liable to be set aside. The said ground is raised as ground 5(e) in the Petition which is as follows;

“e. The Petitioner says and submits that the detaining authority has referred to and relied on one criminal case vide C.R. No. 124 of 2017 wherein the Petitioner preferred an application for bail on 10.08.2017 and the said application was rejected by the Hon'ble Sessions Court, Pune on 12.09.2017 and thereafter the Petitioner has never preferred any bail application before Hon'ble High Court. It is therefore there is no cogent material before the detaining authority to come to the conclusion that the Petitioner will be released on bail in near future particularly taking a note of observation by Ld. Sessions Court Pune while rejecting the Bail application of the Petitioner. Under the circumstances since there is no imminent/real possibility of release on bail the conclusion is erroneous and it is only an *ipse dixit* of the authority. This shows non application of mind of the detaining authority. The order of detention is illegal and bad in law, liable to be

quashed and set aside.”

4. Reliance is placed upon the decision of the Supreme Court in the case of *Dharmendra Suganchand Chelawat and Anr Vs. Union of India*¹ and the decision of this Court delivered in Criminal Writ Petition No. 28 of 2008 in the case of *Sagar Sunil Gaikwad Vs. Commissioner of Police and Ors.*

5. Learned Additional Public Prosecutor Shri. yagnik submitted that there is no discrepancy in the subjective satisfaction recorded by the detaining authority. He submitted that the order of detention is based on C.R. No. 124 of 2017 registered with Sahakarnagar Police Station and the statements of 2 witnesses recorded in-camera. He pointed out the averments in paragraph 4.1 of the grounds of detention wherein, it is stated that the Petitioner was arrested in connection with C.R. No. 124 of 2017 on 09.06.2017 and he was produced before the Court on 10.06.2017. He was remanded to Police custody till 13.06.2017. Petitioner was again produced before the Court on 13.06.2017 and was remanded to magisterial custody till 27.06.2017. It is further stated that the charge sheet of the said offence was submitted to the Court of J.M.F.C., Pune on 21.07.2017. Presently, the said case is pending. The Petitioner applied for bail before

1 AIR 1990 SC 1196

the Court at Pune on 10.08.2017 and the said application was rejected by the Court at Pune. The Petitioner is in magisterial custody at Yerwada Jail, Pune. Mr. Yagnik further pointed out the contents of paragraph 8 of the grounds of detention and submitted that the detaining authority was aware that the Petitioner was in custody at the time when the order of detention was issued and the said awareness is reflected in the said paragraph. It is submitted that the detaining authority has recorded her subjective satisfaction that the Petitioner is acting in a manner prejudicial to the maintenance of public order and presently, he is in jail in connection with C.R. No. 124 of 2017. It is further mentioned that the detaining authority is aware that the Petitioner had applied for bail and the said application was rejected by the concerned Court at Pune. Mr. Yagnik submitted that the compelling reason to issue order of detention is reflected in the said paragraph since it has been categorically stated by the detaining authority that the Petitioner can apply for bail in higher Court or before the same Court if circumstances are changed and there is likelihood of the Petitioner getting bail in the said offence, as the offence is not compulsorily punishable with death sentence and now the charge sheet of the said offence has been submitted to the Court. It is also stated that in view of desperate tendencies and inclinations reflected in the offence committed by the Petitioner as well as the incidents referred in the in-camera statements,

the detaining authority is further satisfied that after availing bail facility and becoming a free person, the Petitioner is likely to revert to similar activities which are prejudicial to the maintenance of public order in future and hence, it is necessary to detain him under the said Act to prevent him from acting in such prejudicial manner in future. Mr. Yagnik submitted that this subjective satisfaction recorded by the detaining authority justifies the order of detention. He submitted that the order of detention is valid even if a person is in custody at the time of issuance of order of detention and what is required in law is that the detaining authority should show its awareness to the said fact and should express compelling necessity for issuing such order although, the person continues to be in detention. Mr. yagnik therefore submitted that the grounds of detention clarifies the said requirements and thus there is no illegality in the order of detention. Mr. yagnik placed reliance on the judgment of the Supreme Court in the case of *Senthamilselvi Vs. State of T.N. and Anr.*¹

6. We have thoughtfully considered the submissions advanced by both the sides. The admitted facts emanating from the documents on record are that the Petitioner was arrested in connection with C.R. No. 124 of 2017 registered with Sahakarnagar Police Station for offences under Section 307, 336, 323, 504, 506(2), 34 of IPC read with 4/25 of the Arms

¹ (2006) 5 SCC 676

Act and Section 37(1)/135 of the Maharashtra Police Act, 1951. He was arrested on 09.06.2017 and was produced before the Competent Court on 10.06.2017 thereafter, he was remanded to custody from time to time and the charge sheet was filed on completing the investigation on 21.07.2017. Thereafter, the Petitioner preferred an application for bail before the concerned Court on 10.08.2017 which was rejected on 12.09.2017. The order of detention was issued on 06.11.2017. In the grounds of detention, it is stated that the bail application has been rejected by the concerned Court, but the Petitioner may apply for bail in higher Court or before the same Court, if circumstances are changed. There is likelihood of the Petitioner getting bail in the said offence as the same is not compulsorily punishable with death. The submissions of the learned Counsel for the Petitioner is that there was no cogent material before the detaining authority to come to the conclusion that the Petitioner will be released on bail in near future particularly, taking note of observation by Session's Court, Pune while rejecting bail applications of the Petitioner.

7. The M.P.D.A. Act has been enacted to provide for preventive detention of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons, Video Pirates, Sand Smugglers and Persons engaged in Black-Marketing of Essential Commodities for preventing them from indulging in a dangerous activity prejudicial to the maintenance of public order. The preventive

detention order can be made in terms of sub-section (1) of Section 3 of M.P.D.A. Act of satisfaction with respect to any person from acting in any manner prejudicial to the maintenance of public order. In this case the activities of the Petitioner-detenu are said to be violent in character and it is alleged that he has created a reign of terror and have become a perpetual danger to the lives and properties of people. He is habitually committing offences under chapter XVI and XVII of Indian Penal Code. Several cases registered against him which are pending in Court. It is also stated that the Petitioner is a dangerous person as defined under the M.P.D.A. Act. In view of that nobody dares to complain against him openly, due to fear of retaliation. The statement of residents were recorded in-camera with an assurance that their names would not be disclosed and they would not be summoned to give evidence against the detenu in any Court or before any open forum.

8. On reading the satisfaction recorded in paragraph 8 of the grounds of detention it is clear that the detaining authority is aware that the detenu is presently in jail and his bail application has been rejected by the Court. However, the detaining authority has stated that he can apply for bail in higher Court or before the same Court, if the circumstances are changed. It is also stated that there is likelihood of the detenu getting bail as the offence is not compulsorily punishable with death sentence and now

the charge sheet has been filed in the Court. We do not see how when such punishments are awarded or severe punishments are not awarded, necessarily every criminal as of right is entitled to bail. The detaining authority states that there is possibility of detenu getting bail in case he prefers such application and in the event he avails the bail facility, he will revert to the similar activities which are prejudicial to the maintenance of public order.

9. In the affidavit in reply submitted by the detaining authority, it is stated that the subjective satisfaction has been recorded in paragraph 8 of the grounds of detention and considering the tendencies and inclination of the detenu to indulge into criminal activities repeatedly, there was reasonable apprehension that the detenu could apply for bail in higher Court or in the same Court in case of change in circumstances. In case he avails of the bail facility he is likely to revert to the similar activities which are prejudicial to the maintenance of public orders.

10. We have perused the copy of the application for bail preferred by the Petitioner and the order dated 12.09.2017 passed by the Additional Session's Judge, Pune rejecting the said application. The said documents were placed for consideration by learned Additional Public Prosecutor. It is pertinent to note that the said documents forms the part of the list of

documents which were placed before the detaining authority. The application for bail was preferred on 10.08.2017. The Petitioner had agitated several grounds on merits of the case and had prayed for bail. While, passing the order rejecting the application for bail the Session's Court has observed that the application was opposed by the state on the ground that the offence is of serious nature and if the accused is released on bail, he may pressurize the witnesses and tamper with the evidence. There are 8 body offences against the Applicant (Petitioner). Learned Session's Judge perused the charge sheet and heard both the sides and after considering several decisions relied upon by the Advocate for the Petitioner in support of his bail application, rejected the same. It was observed by the Court that after the accused being released on bail he has committed offences like 302 and 307 of IPC while on bail. He had actively participated in the offence with his brothers and others and, if he is released on bail he will commit similar offences again when Court grants bail in any offence, there is in built condition that accused shall not commit offence while he is on bail, however, the said accused/Petitioner is committing offences one after another during his release on bail. Hence, the application was rejected. Despite said observations, in the impugned order, the detaining authority has recorded the satisfaction that he can apply for bail before higher Court or before the same Court and there is

likelihood of he being released on bail as the offence is not compulsorily punishable with death and the charge sheet has been filed before the Court. The aforesaid application for bail was rejected after the charge sheet was filed. There is no reference to the date of the order in the grounds of detention. The record does not indicate that the Petitioner preferred another application for bail till the order of detention was issued on 06.11.2017. The satisfaction of the detaining authority is therefore, vague and is not based on any cogent material.

11. If, no bail application is pending there is no likelihood of the person in custody being released on bail and hence, the detention order would be illegal. The satisfaction of the detaining authority, in the present case records that the offence is not compulsorily punishable with death and therefore he is likely to be released on bail. The satisfaction and apprehension is absurd, illogical and untenable in law. In the absence of compelling necessity to detain the satisfaction is mere ipse dixit and cannot be relied upon and the bald statement of the detaining authority would not suffice. There is no reliable material on which the apprehension is expressed that there is possibility of detenu being enlarged on bail. It is pertinent to note that there were antecedents against the detenu which were considered by the Court while rejecting the application for bail. In such circumstances, the details are required to be spelt out and the same

are not forthcoming. The detenue did not prefer any application for bail after his application was rejected by the Session's Court until the order of detention was issued.

12. In the case of ***Dharmendra Chellawat*** the Supreme Court has observed in paragraph 19 as follows.

“19. The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (I) the detaining authority was aware of the fact that the detenu is already in detention and (ii) 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 for 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 and (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 paragraph 21 of the said decision it was observed that the grounds of detention do not show that the detaining authority apprehended that the further remand would not be granted by the Court and the detenue would be released from custody on that date. Nor is there any material in the grounds of detention which may lend support to such apprehension. On the other hand the Bail application moved by the

detenues had been rejected by the Session's Court, a few days prior to the passing of the order of detention. Similar issue was dealt with by this Court in the case of **Sagar Gaikwad (Supra)**. This Court has analyzed the ratio laid down in various decisions of Supreme Court on the issue and set aside the order of detention on the ground that, if the detention order has to be passed when the detenu is in custody, the details prescribed under law ought to be present in the detention order itself. The subjective satisfaction reflected in the said grounds does not make any reference to any details. The Court has also taken into consideration the observations made in the decision in the case of **Senthamilselvi (Supra)**.

13. In the case of **Senthamilselvi (Supra)** which is relied by Mr. Yagnik one of the ground was that the detenu had not filed any application for bail and the detaining authority could not have inferred that there was possibility of his being released on bail. In paragraph 10 of the said decision the Hon'ble Supreme Court held as under.

“10. It was also submitted that since the detenu had not filed any bail application, the detaining authority could not have inferred that there was possibility of his being released on bail. Strong reliance is placed on several decisions of this Court. It has to be noted that whether prayer for bail would be accepted depends on circumstances of each case and no hard-and-fast rule can be applied. The only requirement is that the detaining authority should be aware that the detenu is already in custody and is likely to be released on bail. The conclusion that the detenu may be

released on bail cannot be ipse dixit of the detaining authority. On the basis of materials before him, the detaining authority came to the conclusion that there is likelihood of the detenu being released on bail. That is his subjective satisfaction based on materials. Normally, such satisfaction is not to be interfered with. On the facts of the case, the detaining authority has indicated as to why he was of the opinion that there is likelihood of detenu being released on bail. It has been clearly stated that in similar cases orders granting bail are passed by various courts. The appellant has not disputed correctness of this statement. Strong reliance was placed by learned counsel for the appellant on Rajesh Gulati V. Govt. of NCT of Delhi¹. The Factual scenario in that case was entirely different. In fact, five bail applications filed had been already rejected. In that background this Court observed that it was not a "normal" case. The High Court was justified in rejecting the stand of the appellant."

Thus, it was emphasized that the detenu may not be enlarged and may be in custody when the detention order is made. He may not have also applied for bail, but still a detention order can be made, provided, there is material before the detaining authority to come to the conclusion that there is likelihood of the detenu being released on bail and that on being released on bail he is likely to resume or revert back to his criminal activities. Such material is lacking in the present case and factually the application for bail preferred by detenu was rejected.

14. In the facts and circumstances of this case the detaining authority should have recorded a satisfaction that there is a real possibility

¹ (2002) 7 SCC 129 : 2002 SCC (Cri) 1627

of the detenu being enlarged on bail that possibility should be indicated with reference to cogent and satisfactory material. The impugned order of detention therefore cannot be sustained.

15. In view of the discussion in the foregoing paragraphs, the writ petition succeeds. Rule is made absolute in terms of prayer clause (b). The order of detention dated 06.11.2017, issued under Section 3 of the M.P.D.A. Act, is quashed and set aside. The detenu is directed to be released forthwith, if not required in any other case. In the light of the satisfaction reached by us that the order of detention is vitiated, as pointed out in terms of Ground (e) of para 5, running pages 8 and 9 of the paper-book. We have not allowed Mr. Tripathi to raise the other grounds of challenge. The Petition stands disposed off.

(PRAKASH D. NAIK, J.)

(S.C.DHARMADHIKARI, J.)