

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

WRIT PETITION NO.1739 OF 2018

Nikki @ Kawa s/o Suresh Khare
Age 30 years, R/o Hudko Colony,
LIG – 24/174, Ahuja Nagar Police Station,
Jaripatka, Nagpur city.

... Petitioner

V/s.

1. The Commissioner of Police,
Nagpur.

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

3. The Superintendent,
Nashik Road, Central Prison,
Nagpur.

4. The Secretary,
Advisory Board for M.P.D.A.Act,
C/o. Home Department,
Mantralaya, Mumbai – 400032.

... Respondents

Mr.U.N.Tripathi with Ms.Jayshree Tripathi for the Petitioner.
Ms.M.H.Mhatre, APP for the Respondent/State.

**CORAM : S.C.DHARMADHIKARI &
SMT. BHARATI H.DANGRE, JJ.
DATE : JUNE 20, 2018.**

ORAL JUDGEMENT (PER SMT. BHARATI H.DANGRE, J.):

1. The Petitioner, is aggrieved by an order of detention passed

by the Commissioner of Police, Nagpur City on 29th January 2018, thereby detaining him in exercise of powers conferred by subsection 1 of section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders and Dangerous Persons Act, 1981 and he has invoked the jurisdiction of this court praying for quashing and setting aside the said order. The Petitioner has prayed for his release forthwith.

2. The Commissioner of Police, Nagpur City has passed an order on 29th January 2018, being satisfied that the detenu Nikki @ Kawa son of Suresh Khare, President of Ahuja Nagar, Jaripataka, Nagpur City is acting in a manner prejudicial to the maintenance of public order and in order to prevent him from indulging into such activities, he is directed to be detained under the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders and Dangerous Persons Act, 1981. The said order of detention was served on the Petitioner-detenu on 29th January 2018, alongwith the grounds of detention communicated in pursuance of section 8 of the M.P.D.A. Act, 1981. The grounds of detention state that the detenu is a

weapon wielding dangerous desperado of violent character indulging in terrorizing activities and the criminal activities of the detenu has created a reign of terror in the society. It further states that the detenu has become a perpetual danger to the lives and properties of people residing in the jurisdiction of police station, Jaripataka of Nagpur city. It then make a reference to various activities of the detenu, that the detenu in form of offences registered against him and punishable under Chapter XVI and Chapter XVII of the Indian Penal Code and under Chapter V of the Indian Arms Act. The grounds conclude that he is a 'dangerous person' as defined under section 2(b-1) of the Act. The ground of detention then make reference to the list of past offences in which the detenu is arrayed as an accused and the preventive action initiated against him in the past. Then there is a reference to C.R.No.625 of 2017 registered with Jaripataka police station and two in-camera statements of witness (A) and (B). Based on the aforesaid material placed before the detaining authority, the grounds of detention proceed to state that detaining authority is subjectively satisfied about the activities of the detenu being prejudicial to the maintenance of

the public order and likelihood of the detenu indulging into such activities in future and hence he has exercised the powers, thereby detaining the detenu under the provisions of the M.P.D.A. Act, 1981.

The grounds further mention that the grounds of detention have been communicated to the detenu so as to enable him to make a representation to the State Government against the order of detention. It is also further stated that the petitioner is at liberty to make a representation to the Advisory Board, which shall afford an opportunity, of hearing in person to the detenu, if he so desires.

3. The order of detention is assailed on various grounds, and though six grounds are enumerated in the body of petition, the counsel for petitioner would restrict his argument to ground (b) and ground (d) read with ground (i) and (h). Therefore, we only reproduced the said grounds as raised in the petition:-

“(b) The Petitioner says and submits that the detaining authority has not clearly mentioned in para 1 of the grounds of detention as to which are the paragraphs of the grounds of detention relied on /considered by him for passing the order of

detention. It is therefore all paragraphs are to be treated as grounds. It is further pertinent to note in para 9 of the grounds of detention that the detaining authority hereby communicates to the Petitioner the grounds on which the detention order has been passed by him and all copies of documents placed before him are enclosed. It is therefore, material of all paragraphs are grounds. It is further to be noted that in para 3.1 it is clearly stated that since the offences are referred to as mentioned above relevant documents and crime chart of the same are enclosed herewith in order to enable the detenu to make an effective representation. If that be so, para 3.1 discloses 12 registered criminal case against the Petitioner are mentioned in the table of cases where only names of Police Station, sections of law, dates of offences, C.C Nos and status of the case are mentioned, whereas no details of these cases are supplied to the Petitioner even though their F.I.R. copies are only placed and no other details. It is therefore grounds are not communicated.”

“(h) The Petitioner says and submits that in the representation of the detenu dated 28.03.2018, a specific request was made to supply certain vital documents and some information to the detenu to

enable him to make effective representation at the earliest. The State Government has not yet supplied the documents demanded for nor information asked for to the detenu so far thereby the right of the representation guaranteed under Article 22(5) of the Constitution of India is violated. The order of detention is illegal and bad in law, liable to be quashed and set aside.”

The said ground (d) raised in the petition is also supported by the ground No.i which reads thus :-

“(i) The Petitioner says and submits that the detaining authority has referred to in paragraph 3.1 of the grounds of detention 12 criminal cases as shown in the chart of cases from the year 2013 to 2017, which are stated to have been considered by the said authority and few relevant documents only are placed before the detaining authority and supplied to the detenu in order to enable him to make effective representation, thereby it is clear that these 12 cases are considered along with their documents placed before the detaining authority. The index of the compilation shows that there are in all 65 documents running into about 86 pages which are considered by the detaining authority as such, the detaining authority has taken into consideration extraneous material which has

influenced the mind of the detaining authority to pass the order of detention. This shows total 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. We have heard the learned Advocate Mr. Udaynath Tripathi, representing the Petitioner and he would submit that he would rely on ground (d) read with ground (i) and ground (h) for assailing the order of detention. He would submit that the approach adopted by the detaining authority reflects total non-application of mind and on perusal of the grounds of detention, the detaining authority had categorically stated that the grounds are communicated to the detenu on the basis of which order is passed by the detaining authority. Shri Tripathi would submit that the detaining authority enlist the list of past offences and details of the preventive action initiated against the detenu and in Paragraph No.3.1, sets out the details of the FIR and crime chart and it is stated that the relevant documents such as the FIR and the crime chart of the same are annexed so as to enable the detenu to make an effective representation. Mr. Tripathi would submit that the grounds of detention, then state that the

criminal activities of the detenu are showing an ascending trend and the previous preventive action against the detenu has been specifically referred by the detaining authority alongwith the papers of chapter case and the externment order passed under Maharashtra Police Act, 1951. The copies are also supplied to the detenu.

5. It is the specific case of Advocate Tripathi that the detaining authority has thus based his subjective satisfaction on the entire material that was placed before him and arrived at the conclusion that the activities of the detenu are prejudicial to the maintenance of public order. He would submit that once the said material on which the detaining authority has relied upon has formed the part and parcel of the decision making process arrived by the detaining authority in form of the grounds of detention, which takes into consideration the previous offences registered against the detenu from the year 2013 to the year 2017 alongwith the preventive action initiated in the year 2013 and 2017, it amounts to total non-application of mind on part of the detaining authority to set out in the grounds of detention that the detention order is based mainly on the grounds mentioned in

Paragraph No.4.1 and Paragraph No.5. He would submit that the said approach of the detaining authority vitiates the subjective satisfaction with the result that the detention order cannot be sustained.

Advocate Tripathi has also invited our attention to the representation preferred by him to the Additional Chief Secretary, Home Department, which has been exhibited as Ex.D to the petition. The said representation has been preferred on 20th March 2018. Shri Tripathi would submit that in the said representation he had specifically demanded a document at page No.79 purportedly to be an application for releasing an accused on depositing the cash security, which is in English language, whose Marathi translation is found at page No.80 of the compilation. In the representation, it is categorically urged that in English version there is an order of the court permitting to furnish cash security, whose Marathi translation is not furnished to the detenu. Request was therefore made to the State Government to furnish the translation of the said judicial order in Marathi language so as to enable the detenu to make effective representation at the earliest. Thus, a specific stand is taken by

the detenu that in absence of the said document being supplied, he could not exercise his rights guaranteed to him under Article 22 (5) of the Constitution of India to make an effective representation. Advocate Tripathi would submit that no heed has been paid to the said request made by him and the order of detention was confirmed by the State Government on 12th March 2018. The sum and substance of the arguments of the learned counsel is that without the Petitioner availing the opportunity of making the representation in absence of the documents being supplied to him, the State Government had already confirmed the order of detention and has failed to supply the documents sought by him, causing a grave prejudice.

6. In support of the order of detention, we have heard Mrs. Mhatre, the learned APP representing the Respondent authority. She would submit that the first grievance raised by the Petitioner is without any substance, since the detaining authority has passed the order of detention only on the basis of C.R.No. 625 of 2017 registered with the police station, Jaripataka, against the detenu. She would submit that the detenu authority has also placed reliance on two statements of “in-camera” witnesses while

issuing the order of detention. As far as reference to the offences in the past are concerned, Mrs.Mhatre would submit that the past offences mentioned in the chart of offences as contained in Paragraph No.3.1 of the grounds of detention have not been relied upon while passing the order of detention, but are only referred to show that the detenu has been habitually committing the offences under Chapter XVI and XVII of the Indian Penal Code and Chapter V of the Indian Arms Act. Mrs. Mhatre would submit that the recent offences reflecting the involvement of the detenu has been the basis for passing the order of detention. She would rely on the criminal activities of the detenu as reflected in C.R.No.625 of 2017, where the detenu has been alleged to be indulged into an activity of extorting money and had assaulted the complainant and according to her, this act of the detenu disturbed the public order. Mrs.Mhatre would also submit that the criminal activities of the detenu being prejudicial to the maintenance of public order are further reflected from the statement of witnesses (A) and (B), which were recorded in-camera in view of the atmosphere of fear and terror created by the detenu in the locality.

7. As regards the ground in relation to the document at Page 80 of compilation which is Marathi translation of document Page 79, she would invite our attention of Paragraph No.11 of the affidavit of the detaining authority which is reproduced below:

“With reference to paragraph 5(e) of the petition, it is denied that the document at page 80 of the compilation purporting to be Marathi translation of Bail Application is not true and fair translation of its English version since the order passed by the J.M.F.C. granting cash surety is not reflected in its Marathi translation.

It is submitted that there is no order passed by the Learned J.M.F.C. Nagpur granting cash surety found in English version of Bail Application. The bail order is at page No.81 and its translation in Marathi is at page No.82. The said documents were already been supplied to the petitioner/detenu and therefore, there is no violation of fundamental rights under Article 22(5) of the Constitution of India.”

Mrs.Mhatre would support the order of detention and would submit that the grounds raised by the Petitioner are without any substance. As far as specific ground raised in point No.(e) of the petition, Mrs. Mhatre would invite our attention to the

affidavit of the State Government filed by the Deputy Secretary, Government of Maharashtra, Mantralaya, Mumbai and she would submit that the representation of the detenu dated 28th March 2018, was received in the Special Branch, Desk of the Home Department on 3rd April 2018. She would submit that thereafter the remarks were sought from the detaining authority i.e. the Commissioner of Police, Nagpur, which were received on 6th April 2018. She would submit that the concerned Assistant Section Officer submitted the file containing the remarks of the detaining authority alongwith the representation of the detenu to the Section Officer on 6th April 2018, and then after making an endorsement by the Section Officer, it was forwarded to the Deputy Secretary on the same day and thereafter, transmitted to the Additional Chief Secretary on 7th April 2018 and ultimately the Additional Chief Secretary considered the representation of the detenu and rejected the same on 10th April 2018, by applying his mind and according to Mrs. Mhatre, the said rejection was communicated to the detenu on the same date. According to Mrs. Mhatre, there was no lapse on part of the detaining authority and even the authority competent to take cognizance of the

representation of the detenu i.e. the State Government and the representation was decided with promptitude.

8. We have carefully perused the petition alongwith its annexures and also the affidavit filed by the detaining authority as well as the State Government. During the course of the hearing of the matter, we have also called the learned APP to produce the record pertaining to the detention order and the said record was placed before us. On consideration of the submissions, and on perusal of the record, it can be seen that the grounds of detention communicated to the detenu in terms of Section 8 of M.P.D.A. Act, 1981 would refer to the past offences and preventive action initiated against the detenu and the relevant documents pertaining to the said offences including the FIR, and the crime chart were supplied to the detenu, necessarily conveying that the same was also placed before the detaining authority. This referred to the offences registered against the detenu from the year 2013 to the year 2017 and includes the offences under Chapter XVI and XVII of the Indian Penal Code as well as under Section 135 (3) of the Maharashtra Police Act, 1951. The detaining authority has taken into

consideration the said activities of the detenu and the fact that he was arrested in the said offences and has noted that in spite of registration of the offences, and arrest in those offences, it did not deter the detenu from indulging into dangerous criminal activities and rather his activities were on the ascending trend. The detaining authority has also referred to the preventive action initiated against detenu in form of chapter proceedings in the year 2013 and 2017 and also an order of externment passed on 13th January, 2015, thereby, externing the detenu for the period of two years. The grounds of detention make a reference to the said activities of the detenu and conclude that in spite of the said preventive action, no deterrent effect could be brought to bear on the detenu and rather the detaining authority concluded that the normal laws of the land are not sufficient to curtail his dangerous criminal activities which are on the rise, thereafter the detaining authority takes note of the recent involvement of the detenu, in C.R.No.625 of 2017 registered under Section 385, 294, 506, 323, 34 of the Indian Penal Code. It also takes note of the fact that the detenu had preferred an application seeking bail in the said offence and the

Hon'ble J.M.F.C. had passed a release order releasing him on bail. The detaining authority also places reliance on the statement of two witnesses, who were knowing the detenu and his activities, but on account of fear the in-camera witnesses have narrated two independent incidents were not ready to depose against the detenu openly. One of which transpire first week of November 2017, and one being of November 2017, when the said witnesses were abused and assaulted and robbed of their money by forcibly extracting the same. The common thread in both the incidents is that when the detenu was inflicting such a treatment to these witnesses, people nearby fled away from the spot and nobody came to the rescue of the said witnesses. Based on the aforesaid activity of the detenu, the detaining authority arrived at the conclusion that he is a habitual and dangerous criminal involved in serious crime and dangerous criminal activities and poses threat to the lives and properties of the public and inspite of the preventive action being initiated, it had no deterrent effect on the detenu and rather his criminal activities are on the rise. Perusal of the grounds of detention in its totality would give clear impression that the grounds are

based on overall assessment of the detenu's conduct, his indulgence into the criminal activities in the past, continuation of the said activities in the recent times and his propensity to indulge into such activities in future.

9. The detaining authority has formulated the grounds of detention on the basis of material placed before him and this material includes the material in form of the offences registered against the detenu from the year 2015 to 2017, as well as the preventive action initiated, which according to the detaining authority had not deterred the detenu from indulging into crimes. Though the detaining authority has stated in the grounds of detention that he has mainly relied on C.R.No.625 of 2017 alongwith in-camera statement, it can very well be seen that the grounds of detention do not refer only to the said C.R. and the "in-camera" statements. The entire gamut of activity of the detenu, continuing one from the year 2013 till the year 2017, as a dangerous desperado of violent character, indulging into terrorizing activities can only be gathered from a cumulative effect of all such activities, which could be further gathered from the documents, which were placed before the detaining

authority in relation to all the said offences. The grounds of detention cannot be segregated or severed into activities of past record when the basis of detention is a continuing conduct of the detenu and the grounds which are required to be formulated on application of mind by the detaining authority to the relevant facts and material placed before it, before reaching a subjective satisfaction would go into the decision making process of the authority. Though Article 22(5) of the Constitution contemplates communication of ground on which the detention order has been made, it intends to take into its sweep the ground which are based on relevant and proximate matter in regard to each individual case. The grounds are expected to be based on all the constituent and material fact that goes into the making of mind of the statutory functionary. It is thus the entire thought process of an authority which goes into forming as to what is called as a subjective satisfaction. If the extraneous material has gone into the said decision making process, then, it cannot be said that the decision making process is based on germane grounds and on consideration of such extraneous material the subjective satisfaction itself would stand vitiated, for taking into

consideration the grounds which are not proximately connected or some extraneous material, which cannot form the basis of the subjective satisfaction.

10. This court had an opportunity to deal with similar arguments in Writ Petition No.4646 of 2017 delivered by the same Bench and in identical ground being raised observed as under:

“It is not possible for the person to segregate his thought process place it into compartments and when a person relies on material placed before him, the relevant material and irrelevant material gets entangled together and forms the basis of the subjective satisfaction, then, it is not possible to discern the irrelevant or extraneous material and keep the subjective satisfaction, intact on the basis of relevant material. In such circumstances, we are of the firm opinion that the subjective satisfaction reached by the detaining authority cannot be segregated into two water-tight compartments. We are also unable to apply with the principle contained in Section 5A of MPDA Act, 1981 to the present case since it is not a case where one of the grounds on which detention order has been passed is vague or not relevant or invalid but because of

consideration of the irrelevant material, according to us, the whole subjective satisfaction gets tainted and in such a case, we cannot segregate it as a ground, as is intended to be covered under Section 5A of the Act.”

“In view of the aforesaid discussion, we are of the firm opinion that the subjective satisfaction formed by the Detaining Authority suffers from non-application of mind, as the same is formed by taking into consideration extraneous and irrelevant material and, therefore, it is vitiated. Since it is this subjective satisfaction formed by the Detaining Authority on which the edifice of the impugned order rests, resultantly the order of detention is also vitiated.”

11. The facts of the present case, squarely falls within the parameters laid down by this court and we are of the definite opinion that subjective satisfaction reached by the detaining authority is vitiated on account of non-application of mind.

12. As regards another ground of non-supply of the translation of documents at annexure on page No.79, we have carefully perused the record produced by the learned APP. The petitioner has raised a specific ground in the petition, alleging that the document supplied to him at page 80 of the compilation

purportedly to be a Marathi translation of the bail application, is not true and fair translation in as much as order passed by JMFC Nagpur is not at all translated in Marathi version. The Petitioner has raised a ground that the judicial order is a vital document and non furnishing its translation in vernacular language, adversely affects his right to make representation guaranteed under Article 22(5) of the Constitution. On such ground being raised and argued by Shri Tripathi, we have perused the record produced by the learned APP. At page 79 of the said record is an application for releasing the accused on bail/ depositing the cash security, filed in the court of JMFC, Court No. 7, Nagpur in Crime No. 525 of 2017. This appears to be an application filed by the accused stating that they have been falsely implicated in the crime and they are ready to deposit the cash security amount in respect of the release and undertake to appear before the court on every date punctually. It contains a prayer to release the accused person(s) on depositing cash security, in the interest of justice. It is signed by the counsel for accused person and is dated 1st November 2017. In the left corner of the said application there is a remark which read thus:-

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Cash security of Rs.3,000/-each. Total
Rs.16000/- deposited vide C.No.832/17 &
833/17.

Dated 1/11/17.

sd/-

At page 18 of the record is a Marathi translation of the said document, sans remark made in the left column. On perusal of the said two documents, it is clear that an endorsement has been done on the said application by some official on receipt of cash security of Rs.3,000/- each from the accused persons and the details by which the said amount are deposited are also given. It is not an endorsement made by the learned Judge as has been sought to be canvassed by Shri Tripathi, however, it is equally true that the translation of the same do not find place at page 18. Mrs.Mhatre, the learned APP would submit that the said endorsement is not an order of the court and no prejudice is caused to the petitioner, if the same was not supplied. We may be in a position to agree with the submission of Mrs.Mhatre, but

it is not our satisfaction which is relevant. The petitioner has raised a specific grievance about non-supply of the translation of the Remark on the application and when he preferred a representation to the State Government on 28th March 2018, he raised a specific ground in form of ground (i) in the said representation to allege that the detenu was not supplied with the vernacular translation of an order of court permitting to furnish cash surety though the marathi translation of the application was supplied to him. He therefore, requested to furnish the translation of the said judicial order in marathi language to enable him to make effective representation at the earliest.

13. When the representation was made by the detenu to the State Government, on 28th March 2018, the order of detention was already confirmed by the State Government, however it was incumbent on part of the State Government to deal with the said grievance and it was always open to the State Government to point out to the detenu that the said endorsement which is not supplied to the detenu is not a vital document and non-supply of the same would not cause any prejudice to the detenu. However,

the State Government has not bothered to deal with the said specific submission when the detenu has specifically represented to the State Government that in absence of such a translation being supplied to him, he was not able to make an effective representation and he had made a request to supply this document in marathi language. Whether non-supply of such a document has caused prejudice or not is a distinct issue, but what is important is taking cognizance of a grievance raised by the detenu before the State Government. The State Government did not accede to or reject his request and on the contrary, without any application of mind, rejected his entire representation on 10th April 2018. It is a specific case of Mr.Tripathi that in absence of the said document, his right to make an effective representation was curtailed. Preventive detention contrast to punitive detention is a drastic power to detain a person without trial and therefore, such power is hedged by various safeguards set out in Article 21 and 22, and to be specific Clause (4) to (7) of Article 22. Liberty being the most cherished and prized possession of a citizen in this county, the power to detain must be exercised with great care and caution and on following due procedure of

law.

We are of the firm opinion that this is not the manner in which a person can be deprived of his liberty and in flagrant violation of the safeguards provided by Article 22(5) of the Constitution of India and it is the duty of the State to safeguard the life and liberty of its citizen. We observed nothing more.

In the light of the aforesaid decision, the continued detention of the petitioner/detenu is declared to be illegal. The detenu having been denied the right to make an effective representation, the writ petition succeeds. The impugned order, copy of which is at Exhibit A to the petition, dated 29th January 2018, is quashed and set aside. The detenu shall be released forthwith if not required in any other case. Rule is made absolute accordingly.

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

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