

Ladda

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION No. 5291 of 2017.

Suryakant @ Mukesh Laxman ..**Petitioner.**
Dhotre, age 42 years, residing at
144, North Kasba, Solapur and
151/21 Raviwar Peth, Near
Kuchan Prashala Solapur.

Vs.

The Commissioner of Police, .. **Respondents.**
Solapur and others.

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

Ms. M.H. Mhatre, APP for the
State.

**CORAM: S.C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.
Reserved on :- 8/02/2018.
Pronounced on-13/02/2018.**

JUDGMENT (Per: Smt. BHARATI, H. DANGRE,J)

1 The petitioner/detenu, detained at Yerwada Central Prison

under the provisions of *Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons and Video Pirates, Sand Smugglers and Persons Engaged in Black-marketing of Essential Commodities Act, 1981*, has approached this Court praying for quashing and setting aside the impugned order of detention dated 27/9/2017 passed by the Commissioner of Police, Solapur and thereupon seeking his release forthwith.

The impugned order of detention is passed by respondent no.1 in exercise of the power conferred by sub-Section (2) of Section 3 of the *Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons and Video Pirates, Sand Smugglers and Persons Engaged in Black-marketing of Essential Commodities Act, 1981* (for short “MPDA Act, 1981”). In the grounds of detention, the detaining authority had referred to number of offences registered against the detenu. The said offences are registered under the Bombay Prohibition Act, 1949 in the year 2015 and 2016. The grounds of detention also makes a reference to the preventive

actions initiated against the detenu in the year 2016. Though in the grounds of detention, the detaining authority has categorically mentioned that he is not relying upon the previous offences to pass the impugned order but these offences are reflected only to highlight his previous criminal history. The grounds of detention, then, sets out that the order of detention is based on two offences, namely, C.R. No. 0237/2017 and C.R.No. 0434/2017, both registered under Section 65(e) of the Bombay Prohibition Act, 1949 with the Faujdar Chawadi Police Station. The grounds of detention, thereafter, refer to the two in-camera statements of residents of Solapur and based on this material, the detaining authority has formed the subjective satisfaction that the detenu is a free person and his tendency previously reflected from the offences committed by him in the recent past, there was likelihood of the detenu resorting to similar activities, prejudicial to the maintenance of public order and public health. The detaining authority recorded a satisfaction that the detenu is a habitual bootlegger and it is necessary to detain him. The grounds of detention, then, inform the detenu of the rights which he could avail

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in terms of the Constitutional safeguards.

2 The impugned order of detention is assailed on several grounds. However, on hearing the learned Counsel for the petitioner Shri Udaynath Tripathi, we are convinced that the writ petition needs to be allowed on the very first ground which has been putforth before us by the learned Counsel and which is reflected in ground (b) of the writ petition.

(b) The Petitioner says and submits that while recording the satisfaction in paragraph 7 of the grounds of detention, the detaining authority has taken into consideration six prohibition cases, in all these cases samples were sent to Chemical Analysis, opinion obtained and conclusion drawn that the facts relating to said C.R. resulting to cause danger to public health. However, the detaining authority has taken only 2 prohibition cases for passing order of detention, thereby the detaining authority has taken into consideration extraneous material. The satisfaction of detaining authority vitiates. The order of detention is illegal and bad in law, liable to be quashed and set aside.

By referring to the said ground as raised in the petition, the learned Counsel invited our attention to the grounds of detention on him. In the opening paragraph 1 of the grounds of detention communicated to the detenu, the detaining authority has observed as follows :-

In pursuance of section '8' of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons, Video Pirates, Sand Smugglers and person engaged in Black-marketing of Essential Commodities Act, 1981 (No. L.V of 1981) (Amendment-1996, 2009 & 2015) r/w Article 22(5) of the Constitution of India. I hereby communicate to you the grounds as mentioned in paragraph No.5 below on which a detention order has been made by me on this day against you, under sub section (2) of section 3 of the said Act. Copies of the documents placed before me are enclosed except the names and identifying particulars of the witnesses/victims in connection with the grounds mentioned in paragraph No.5-4 and 5-5 below, which cannot be furnished to you in the public interest and for which I claim privilege.

Paragraph 4 the grounds of detention read as follows :

You are a habitual bootlegger and had been committed many offences in the contravention of the provisions of the Bombay Prohibition Act, 1949. In past following offences were registered against you.

Sr. No.	Police Station	CR No. & Date	Under Section	Status
1	Faujdar Chawadi	6056/2015 Dt.24/07/15	Sec.65 (e) of Bombay Prohibition Act, 1949	Court Pending
2	Faujdar Chawadi	6072/2015 Dt.17/09/15	Sec.65(e) of Bombay Prohibition Act, 1949	Court Pending

The learned counsel would, then, invite our attention to paragraph 7 of the grounds of detention which is reproduced below :-

I have carefully gone through the material as well as statements of in-camera witnesses A and B, placed before me.

On going through fact of offences registered against you it becomes clear that you are a habitual bootlegger.

Police have sent samples, collected in C.R.No. 6056/15, 6072/15, 6092/15, 190/16, 368/16, 237/17, which are committed by you, in contravention of the provisions of the Bombay Prohibition Act, 1949 to Regional Forensic Science Laboratory, Pune for chemical analysis, and Assistant Director of Regional Forensic Science Laboratory, Pune has given his result stating as **“Sample contains Ethyl alcohol in water”**

As per this result, opinion was asked to Department of Forensic Medicine and Toxicology, Dr. V.M. Government Medical College, Solapur, that if said Ethyl alcohol is

injurious to human body. On that Department of Forensic Medicine and Toxicology, Dr. V.M. Government Medical College, Solapur, has given its opinion stating that, **“consumption of Ethyl alcohol in excessive amount is harmful to human body, which cause death”**.

Thus, the facts relating to the above C.Rs i.e C.R.No. 6056/15, 6072/15, 6092/15, 190/16, 368/16, 237/17 shows that the activities of you are such that they have caused danger to the public health.

3 The learned counsel for the petitioner would argue that the grounds of detention are reflective of the thought process gone into by the detaining authority and the said grounds are rather justification or rationale behind passing the order of detention. The learned counsel would argue that the detaining authority has relied on the factum of offences registered against the detenu to arrive at a conclusion that the detenu is habitual bootlegger. What Mr. Tripathi objects to is the later part contained in Paragraph 7 of the grounds of detention where the detaining authority states that the police had forwarded the samples collected in CR Nos. 6056/2015, 6072/2015, 6092/2015, 190/2016, 368/2016 and 237/2017 which are alleged to

be committed by the detenu in contravention of provisions of the Bombay Prohibition Act, to the Regional Forensic Science Laboratory, Pune for chemical analysis on which the Regional Forensic Science Laboratory has given its opinion. The Department of Forensic Medicine and Toxicology, Dr.V.M. Government Medical College, Solapur has then opined that the said Ethyl alcohol is injurious to human body. According to Mr. Tripathi, by referring the samples of the offences on which the detaining authority has not relied on for passing the order of detention and opinion based on those samples amounts to taking into consideration the extraneous material and thus vitiating the subjective satisfaction. The learned counsel would argue that on this ground the subjective satisfaction reached by the detaining authority suffers from the vice of non-application of mind and the detention order passed on the basis of such subjective satisfaction cannot be sustained.

We had called upon learned APP to deal with the said ground putforth by the learned counsel for the detenue. The learned APP Ms. Mhatre invited our attention to the portion of the affidavit

filed by the Detaining Authority on 29th January, 2018. Paragraph 9 of the affidavit deals as below:-

With reference to Ground 6(b) of the petition, it is denied that I being Detaining Authority considered extraneous material pertaining to six prohibition cases as stated in paragraph 7 of the grounds of detention.

It is submitted that I being Detaining Authority has considered only four incidents I.e two offences under Bombay Prohibition Act and statements of two in-camera witnesses while issuing the order of detention against the detenu. The reference of six prohibition cases have been mentioned only to show habitual nature of the detenu to involve into the bootlegging activities. The said reference about six cases has been mentioned in the grounds of detention while narrating the past history of the detenu in bootlegging activities. The said material was not considered by me while issuing the Order of detention. Hence, there is no substance in the say of the Petitioner in this para.

The learned APP would argue that the detaning authority has clearly made a distinction between the offences which have been referred to in the grounds of detention only for the purposes of demonstrating the past conduct of the detenu consistently from the year 2015. According to her, the said offences have been referred to

reflect the tendency of the detenu to repeatedly indulge into such type of offences. She would argue that in the grounds of detention even the detaining authority has dissected the offences, which have formed the basis for the detention order and this would include only two offences namely C.R. No.0237/2017 and 0434/2017 registered under Section 65(e) of the Bombay Prohibition Act, 1949 and which are pending for adjudication. According to learned APP, the said offences are sufficient enough for forming the subjective satisfaction that the detenu is a bootlegger and in fact the said two offences together with two in-camera statements are sufficient to clamp the detenu with an order of detention.

4 We have carefully perused the grounds of detention, affidavits filed and also considered the arguments advanced by the respective counsel. On going through the grounds of detention, we have noted that the detaining authority has made reference to the criminal record of the detenu to establish and label his activity as known bootlegger who had established many dens for selling of

country made liquor and “Hatbhatti” in the areas of North Kasba, Tarti Naka Chawl, MG Road, Chambhar Galli, Balives, Salai Maruti and nearby area within the jurisdiction of Faujdar Chawadi Police Station and that he is engaged in committing offences of transportation of selling country made liquor and “Hatbhatti” in contravention of the provisions of the Bombay Prohibition Act, 1949. It is also alleged that the detenu is the owner of these dens. The detaining authority, then, mentions that the detenu along with his associate armed with knives visit these dens every day in order to manage the illegal business and openly assault people who oppose such business or who provide the information to the police. In this way, the detenu has created terror in the minds of people from the locality. It is also alleged that the people who consume such liquor, indulge into activities of harassing women/girls, quarreling, creating an uproar in the locality and also creating unhygienic atmosphere by vomiting on streets. The activities of detenu are recorded by the detaining authority by making a reference to the offences registered against him in the year 2015 under the provisions of the Bombay Prohibition Act, 1949. The

detaining authority also makes a reference to the preventive action initiated against the detenu in the year 2015 under section 110 of the Code of Criminal Procedure. Then, the detaining authority refers to the crime registered against the detenu in the year 2016 and the preventive action initiated against him in the year 2016. The grounds of detention then mentions that the preventive actions taken against the detenu, has not deterred him from indulging into such activities and was booked in CR No. 0056/2017 on 25/2/2017 at Faujdar Chawadi Police Station under Section 65(e) of the Bombay Prohibition Act, 1949 read with section 109 of the Indian Penal Code. All the offences registered against the detenu in the year 2015 and 2016 and the preventive action against the detenu have been noted by the detaining authority to highlight the antecedents/criminal history of the detenu. The grounds, mention that the Detaining Authority is not relying on the offences but he refers to two recent crimes registered with Faujdar Chavdi Police Station in the recent times, namely on 18/4/2017 and 30/6/2017 to show that the detenu has no respect for the normal law of land and he is a habitual bootlegger with the

tendency to revert to such similar activities. The detaining authority, therefore, relied upon two C.Rs., namely C.R.No. 0237/2017 and C.R.No. 0434/2017 registered with Faujdar Chawadi Police Station, Solapur under Section 65 (f) of the Bombay Prohibition Act, 1949 for passing the order of detention. Perusal of the details of the C.Rs. would reflect the involvement of the detenu in the said offences. The charge-sheets have been filed in both the said crimes before the Competent Court and the Court cases are pending. Perusal of the said crimes would reveal that a huge stock of country made liquor–Hatbhatti was seized from the custody of the appellant by following the proper procedure of law and when the samples from the seized contraband were forwarded to the Regional Forensic Science Laboratory, it had opined that the samples contained 8% ethyl alcohol in water. No doubt, in both the said offences the detenu is accused of dealing in country made liquor / Hatbhatti and a case is made out for violation of provisions of the Bombay Prohibition Act, 1949. Since both the offences are bailable, a notice under Section 41 (1)(a) of the Cr.P.C. was given to the detenu.

The detaining authority has also relied on two in-camera statements of witnesses from the locality who had confided that the detenu was carrying out the business of selling illegal country made liquor/Hatbhatti dens. The in-camera witnesses have also given the narration of reign of terror created in the locality by detenu and his associates who are running the dens.

5 Indisputably, the said acts referred to by the detaining authority in ground No. 5.1 to 5.5 are serious in nature and affecting the public order. If the detaining authority would have based his subjective satisfaction on this material, then, it would have been difficult to interfere with the order of detention. However, the detaining authority while forming his subjective satisfaction based on the aforesaid material has also taken into consideration the samples collected in C.R.No. 6056/2015, 6072/2015, 6092/2015, 6190/2016 and 0368/2016 registered under the Bombay Prohibition Act, 1949 along with the samples collected in C.R. No. 0237/2017 and 0434/2017. The detaining authority has formed the subjective satisfaction on the basis of the report that is obtained from the

Assistant Director of Regional Forensic Science Laboratory, Pune after sending the samples collected in all the aforesaid C.Rs. with the result, “*sample contains ethyl alcohol in water*” and further opinion is given by the Department of Forensic Medicine and Toxicology, Dr. V.M. Government Medical College, Solapur, that “*consumption of Ethyl alcohol in excessive amount is harmful to human body, which cause death*”. The detaining authority in paragraph 4 had clearly mentioned activities of the detenu in two parts, the first being two crimes which the detaining authority has relied on allegedly to reflect the criminal antecedents of the detenu and the second being the material in the form of crime on which the detaining authority has relied upon to pass the order of detention. C.R.No. 6056/2015, 6072/2015, 6092/2015, 6190/2016 and 0368/2016 registered under the Bombay Prohibition Act, 1949 belong to the first category which have been merely referred for demonstrating the above criminal activities of the detenu. C.R. No. 0237/2017 is the crime on which the detaining authority would have based his subjective satisfaction. If the detaining authority has based his subjective satisfaction only on two C.Rs. namely, 0237/2017 and

0434/2017 registered with Faujdar Chawadi Police Station under Sections 65 (e) of the Bombay Prohibition Act, 1949, then, it would have been the relevant material and the Chemical Analyser's report of the substances involved in these offences as only relevant material ought to be taken into consideration while forming the subjective satisfaction. But the detaining authority has taken into consideration the report of the samples collected in C.R. Nos. 6056/2015, 6072/2015, 6092/2015, 6190/2016 and 0368/2016 to the following effect:-

“Thus, the facts relating to the above C.Rs. i.e. C.R. No. 6056/2015, 6072/2015, 6092/2015, 190/2016, 368/2016, 237/2017 shows that the activities of you are such that they have caused danger to the public health.”

This observation of the detaining authority vitiates the subjective satisfaction arrived at, since he has taken into consideration the details of C.R. No. 6056/2015, 6072/2015, 6092/2015, 190/2016, 368/2016 registered with Faujdar Chawadi Police Station, Solapur. Whereas, he has not supplied any documents to the detenu in respect

of the said C.Rs. and allegedly so since he intended to place reliance only on the grounds mentioned in paragraph 5 of the order of detention which covers C.R. No. 0237/2017 and 0434/2017 registered with Faujdar Chawadi Police Station under Sections 65 (e) of the Bombay Prohibition Act, 1949.

The detaining authority has taken into consideration material which is not germane to the order of detention and we are in agreement with the learned counsel for the petitioner that the subjective satisfaction of the detaining authority stands vitiated on account of consideration of irrelevant and extraneous material.

In a recent judgment delivered by this Bench (Coram: S.C. Dharmidhikari and Smt. Bharati H.Dangre,JJ) in Criminal Writ Petition No. 4646/2017 dated 31st January, 2018 this Court had an opportunity to deal with the similar challenge about extraneous material being taken into consideration by the detaining authority resulting into the subjective satisfaction being vitiated, this Court has observed thus:

“Communication of grounds presupposes

formulation of grounds and such formulation requires application of mind of the detaining authority to the facts and material placed before it, that is to say to the relevant and proximate matter in regard to each individual's case. It should comprise all the constituent facts and material that went into making of the mind of a statutory functionary. Thus, when the Authority gives its decision based on his subjective satisfaction, it is expected that he would record his satisfaction based on a bunch of facts and influenced by his personal feelings and opinion. The word "subjective" is defined in Oxford Dictionary to mean dependent on the mind or on an individual's perception for its existence. The subjective satisfaction is the satisfaction of a reasonable man which can be arrived at on the basis of some material, influenced by or based on personal beliefs or feelings rather than on objective facts. It is an entire thought process of an authority which goes into to forming what is called "subjective satisfaction". It is a state of mind on which the conclusions are reached, based on the material placed before the authority and an extraneous consideration or material would affect the formation of subjective satisfaction."

"Perusal of the material on which the detaining authority has formed the subjective satisfaction that the detenu is "dangerous person", has revealed that the Authority has taken into consideration not only the offences punishable under Chapter XVI or XVI of the IPC which is the basis for categorizing a person as "dangerous person" as defined in Section 2(b-1) but it also refers to the material by which a person is clamped as "sand smuggler" who is engaged in unauthorized extraction, removal, collection, picking or transportation

of sand. The Detaining Authority has not been able to segregate the activities of detenu and in any case when the facts and the material placed before the detaining authority has been bundled together, it is not always possible for a person to put it in strict water tight compartment and the subjective satisfaction would then be based on all the materials taken.

Detention order of detaining a individual preventively, under a harsh law, deprives an individual of his life and liberty without taking recourse to the normal procedure of availing of an opportunity of answering charges and facing the trial where in due process the suspect becomes an accused and the accused becomes convict. However, the law of detention is based on suspicion and therefore the requirement of complying with the procedural safeguards is more onerous. The detaining authority has to form a subjective satisfaction that the detenu needs to be detained and it is open for the detaining authority to take into account such material as he deems fit to arrive at such a conclusion. But the subjective satisfaction has to be reached on the basis of relevant material placed before him and should reflect application of mind of the detaining

authority. Non consideration of relevant material or irrelevant material would vitiate the subjective satisfaction and this is what we have precisely observed in the present case where the grounds of detention clearly reflect total non application of mind on the part of detaining authority. It is difficult to segregate or dissect the material which is germane and relevant from what is not relied upon or referred merely to emphasize the criminal antecedents. Both have been so mixed up that the exercise now attempted by the learned APP is impossible. The materials are so inextricable or intricately confused that it is impossible to discern what is merely referred and what is relied upon.

6 Resultantly, we are unable to sustain the order of detention based on the said grounds which suffers from the non-application of mind.

7 In the result, the writ petition is allowed. The impugned order of detention dated 27/9/2017 passed by the Commissioner of Police, Solapur is quashed and set aside. The petitioner/detenu Suryakant @ Mukesh Laxman Dhotre, residing at 144, North Kasba,

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Solapur and 151/21 Raviwar Peth, Near Kuchan Prashala Solapur is directed to be set at liberty forthwith, if he is not required in any other case/ offence;

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