

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.3988 OF 2019

Shahabaj Ejaj Sayyad

...Petitioner

vs.

The Commissioner of Police,
Thane and Ors.

...Respondents

Mr. U.N. Tripathi a/w. Jayshree Tripathi, for the Petitioner.

Mr. J.P. Yagnik, APP for the Respondents-State.

**CORAM : S.S. SHINDE &
N.B. SURYAWANSHI, JJ.**

JUDGMENT RESERVED ON : 8th NOVEMBER, 2019

JUDGMENT PRONOUNCED ON : 18th NOVEMBER, 2019

JUDGMENT (Per N.B. Suryawanshi, J.)

. The Petitioner challenges the detention order passed by the Commissioner of Police, Thane dated 3rd May, 2019 under section 3(2) 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 (for short “the said Act”).

2. Rule was granted in this matter vide order dated 8th

August, 2019 which is made returnable and the matter is heard finally with the consent of parties. Heard learned counsel for the Petitioner and learned APP for the State.

3. With the assistance of both the learned counsel, we have perused the record.

4. The learned counsel for the Petitioner has pressed into service ground (c) to challenge the impugned order of detention which is to the effect that the Petitioner was arrested in C.R. No. I -458 of 2018 on 17th January, 2019. The bail application made by the Petitioner on 11th February, 2019 was rejected on 16th March, 2019. After rejection of the bail application, he never made the bail application and he was in judicial custody. While passing the impugned detention order on 3rd May, 2019 the detaining authority has not recorded satisfaction that there is imminent and real possibility of his release on bail, hence the impugned detention order is vitiated.

5. In the ground of detention the detaining authority has recorded the following satisfaction.

7. “..... On 17th January, 2019 you were arrested in C.R. No. I 458/2018. In this case too you made bail application for your release. But Hon’ble Court rejected your bail and hence you are still in jail.

Considering the modus operandi criminal tendencies and inclinations reflected in the offences committed by you as staed above, I am further satisfied that after you are being granted bail and after release on bail and you are becoming a free person and in the event of you being at large, you being a criminal, are likely to indulge in activities prejudicial to the maintenance of public order, peace and tranquility in future and that with a view to prevent you from acting in such a prejudicial manner in future, it is necessary to detain you under the said Act.”

6. After reading the above statements in the grounds of detention, it is clear that the detaining authority had failed to record its subjective satisfaction that there is imminent and real possibility of release of detenu on bail. The detaining authority in affidavit in reply has stated that seeing the criminal record of the detenu in past 4/5 months, there was imminent possibility of his again making bail application and after release immediately committing another crime. Hence, to prevent him from doing so, it was absolutely necessary to take strong preventive action against him.

7. Thus it appears after going through the record of the

material produced along with the Writ Petition that there was no sufficient and cogent material on record before the detaining authority which could raise apprehension that the detenu was likely to be released from custody in near future. Useful reference can be made in the authority in the case of **Dharmendra Suganchand Chelawat and Anr. vs. Union of India and Ors., AIR 1990 Supreme Court 1196** wherein the Apex Court held in paragraph 19 and 21 as under.

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 re-leased 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.

21. In the grounds of detention the detaining authority has only mentioned the fact that the appellants has been remanded to judicial custody till October 13, 1988. The grounds of detention do not show that the detaining authority apprehended

that the further remand would not be granted by the Magistrate on October 13, 1988, and the appellants would be released from custody on October 13, 1988. Nor is there any material in the grounds of detention which may lend support to such an apprehension. On the other hand we find that the bail applications moved by the appellants had been rejected by the Sessions Judge a few days prior to the passing of the order of detention on October 11, 1988. The grounds of detention disclose that the appellants were engaged in activities which are offences punishable with imprisonment under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985. It cannot, therefore, be said that there was a reasonable prospect of the appellants not being further remanded to custody on October 13, 1988 and their being released from custody at the time when the order for preventive detention of that appellant was passed on October 11, 1988. In the circumstances, we are of the view that the order for detention of the appellants cannot be sustained and must be set aside and the appellants should be released forthwith.

8. It is settled legal position in the detention matter that if a man is in custody and there is no imminent possibility of his being released, power of preventive detention should not be exercised. The Hon'ble Apex Court in the case of **Nasir Abdul Farid Khan vs. D. N. Jadhav Commissioner of Police and Ors.** 2008(2) Bom. C.R. (Cri) 312 has held in paragraph 8 that,

Learned Public Prosecutor submits that possibility of moving an application for bail is different than the possibility of getting released on bail. We agree with the contention of the learned Public Prosecutor, that moving a bail application

would be one of the important factors while coming to the conclusion as to whether there was any likelihood of a person getting released on bail. In the absence of an application seeking bail, there should be something more and there should be cogent material, as has been laid down by the Supreme Court, for the detaining authority to come to a conclusion that the accused was likely to be released on bail. When there is no application for bail being made, the necessity of the relevant and cogent material becomes more. But, in the present case, we have not seen any material which would suggest that the accused would be released on bail. He was facing a trial under [Section 302](#) read with [Section 34](#) of the Indian Penal Code and also under the provisions of [Arms Act](#) and Bombay Police Act and there was likelihood of his not getting a bail.

9. In **Binod Singh vs. District Magistrate, AIR 1986 SC 2090**

it is held in paragraph 7 as under:

“If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the instant case, when the actual order of detention was served upon the detenu the detenu was in jail. There is no indication that this factor or the question that the said detenu might be released or that there was such a possibility of his release was taken into consideration by the detaining authority properly and seriously before the service of the order. If there were cogent materials for thinking that the detenu might be released, then these should have been made apparent”.

10. Thus, the legal position which emerges from the above authorities that if a person is already in custody and detaining

authority has reason for passing the order of detention, the detaining authority must be satisfied on the basis of material before him that detenu is likely to be released from the custody in the near future. If the above ratios are applied to the facts of the present case, the material on record does not show any real possibility of the detenu's release on bail and there was absolutely no material before the detaining authority to apprehend that the Petitioner was likely to be released on bail. The Hon'ble Apex Court in **Kamarunnissa vs. Union of India and Anr. (1991) 1 Supreme Court Cases 128** has held that

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.

11. After going through the material placed on record, we are of the considered view that there is no material available on

record for the detaining authority to come to the conclusion that the detenu is likely to be released on bail in the near future. In absence of the said subjective satisfaction and or any material before the detaining authority about the likelihood of detenu being released on bail, the impugned order is vitiated and the same cannot be sustained.

12. The learned APP strenuously urged that serious offences are registered against the Petitioner and he is likely to indulge in similar offences in near future. We cannot accept this argument because if on facts the detention order is held to be illegal, the Hon'ble Apex Court in **V.C. Mohan vs. Union of India and Ors. (2002) 3 Supreme Court Cases 451** has held that enormity or gravity of the alleged offence committed by the detenu, held, irrelevant.

13. In view of the above observations the Writ Petition deserves to be allowed. Hence, the following order.

(a) The impugned order of detention of the Petitioner passed by the Commissioner of Police, Thane dated 3rd May, 2019 is hereby quashed and set aside;

(b) The Petitioner to be released forthwith, if he is not required in any other offence or proceeding;

(c) Rule is made absolute in above terms. There shall be no order as to costs.

(N.B. SURYAWANSHI, J.)

(S.S. SHINDE, J.)