

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

CRIMINAL WRIT PETITION NO. 3789 OF 2022

Gousiya Firoz Khan,
Aged : 36 years, Occu : Housewife,
R/o. Old Survey No.1140, New
Survey No.1146, Bhavani Peth,
Opp. Aaina Masjid, AD Camp Chowk,
Pune, Maharashtra

...Petitioner

Versus

1. The Commissioner of Police,
Pune City,
2. The Superintendent of Jail,
Nagpur Central Prison,
Nagur.
3. The Secretary,
Advisory Board (MPDA),
Mantralaya, Mumbai

...Respondents

Ms. Misbaah Solkar, Advocate for Petitioner.

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

**CORAM : A.S. GADKARI AND
PRAKASH D. NAIK, JJ.**

RESERVED ON : 8th FEBRUARY, 2023.

PRONOUNCED ON : 20th FEBRUARY, 2023.

JUDGMENT – (PER : PRAKASH D. NAIK, J.) :-

1. Petitioner has preferred this Petition under Article 226 of Constitution of India, challenging the Order of Detention dated 6th September, 2022 passed by Commissioner of Police, Pune City (Respondent No.1) under Section 3(2) of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug

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Offenders, Dangerous Persons, Video Pirates, Sand Smugglers and persons engaged in Black-marketing of Essential Commodities Act, 1981 (for short 'M.PD.A. Act'), directing that Mr. Firoz @ Babali Makbul Khan be detained with a view to prevent him from acting in any manner prejudicial to the maintenance of public order. Petitioner is wife of the said detenu.

Alongwith Order of Detention the detenu was also served with the grounds of Detention and the documents relied upon by the Detaining Authority for passing Impugned Order of Detention.

2. Learned Advocate Ms. Misbaah Solkar appearing for Petitioner submitted that, the Order of Detention is based on C.R. No.156 of 2022 registered with Khadak Police Station for offence under Sections 143, 147, 148, 149, 427, 504, 506 of Indian Penal Code (for short 'IPC') and Section 4(25) of the Arms Act and Section 7 of Criminal Law Amendment Act and C.R. No.116 of 2022 registered with Samarth Police Station for offence under Sections 326, 323, 504, 506, 34 of IPC and Sections 3 and 7 of Criminal Law Amendment Act. The Detaining Authority has also relied upon statement of witnesses A and B recorded in camera for issuing the impugned Order of Detention. It is submitted that, the detenu was arrested in connection with C.R. No.156 of 2022 on 31st May, 2022 and in C.R. No.116 of 2022 on 7th July, 2022.

Pursuant to the arrest of detenu in C.R. No.156 of 2022 the detenu was produced before the concerned Court and remanded to magisterial custody till 14th June, 2022. In the grounds of detention it was stated that the detenu had applied for bail on 2nd June, 2022 before the J.M.F.C. Court, Pune which was granted and he was released accordingly. In C.R. No. 116 of 2022 the detenu was produced before the concerned Court on 8th July, 2022 and remanded to magisterial custody till 22nd July, 2022. He had applied for bail on 8th July, 2022 and the application was pending. On completing investigation, charge-sheet was filed. The impugned Order of Detention was issued on 6th September, 2022. On the date of issuance of Order of Detention the detenu was in custody. The Detaining Authority was aware that the detenu was already in judicial custody. However, the Detaining Authority has not disclosed any possibility of detenu being released on bail. The Detaining Authority has not disclosed any cogent material and facts which necessitated the making of Detention Order. The valid Detention Order can only be passed against the detenu if the Detaining Authority is subjectively satisfied that there is real and imminent possibility of the detenu being released on bail based on cogent material and that it is absolute imperative to pass a valid Detention Order against the detenu while he is in custody. The

Detaining Authority is duty bound to express its satisfaction in the grounds of detention as to the imminent possibility of detenu's release on bail, which is not done in this case. The satisfaction of the Detaining Authority is vitiated as it is not based on any cogent material. The Detaining Authority has not dealt with this issue in the affidavit-in-reply. Reliance is placed on the decision of this Court dated 25th January, 2023 in the case of *Jayesh Damodar Koli V/s. The Commissioner of Police & Ors.*, passed in Criminal Writ Petition No. 2967 of 2022.

3. Learned APP submitted that the Detaining Authority was aware that the detenu was in custody on the date of issuing Order of Detention. In the grounds of detention it is stated that the detenu had applied for bail in C.R. No.116 of 2022 and the application for bail was pending before the Court. In paragraph No.8 of grounds of detention the Detaining Authority has stated that the application for bail of detenu is pending for decision. The detenu may be granted bail under the ordinary law of the land as the offence is not compulsorily punishable with death sentence. In view of his activities the Detaining Authority is satisfied that after availing bail facility and becoming a free person the detenu is likely to revert to similar activities. It is submitted that the question of dealing with submission advanced by the learned Advocate for

Petitioner in the affidavit-in-reply did not arise since the aforesaid ground is not pleaded in the Petition. Learned APP adverted to ground (F) urged by Petitioner in the Petition wherein it has been urged that, despite the Sponsoring Authority knowing that, the detenu was in judicial custody in C.R. No.116 of 2022 registered with Samarth Police Station, the Sponsoring Authority moved a proposal before the Detaining Authority during the pendency of the bail application of the detenu only to ensure that the detenu continues to be behind bars, if the Court grants bail to the detenu and therefore, Detention Order smacks of *malafide* rendering it to quash and set aside. It is submitted that in the context of the ground urged by Petitioner the Detaining Authority in the affidavit-in-reply has stated that the said ground pertains to Sponsoring Authority and therefore, the affidavit of Sponsoring Authority may be perused. Learned APP then pointed out the reply filed by the Sponsoring Authority and submitted that Petitioner's contention urged in the ground 6-(F) has been dealt with in the said affidavit-in-reply by stating that it is denied that Sponsoring Authority has moved the proposal before Detaining Authority during the pendency of bail application of detenu, only to ensure that, he continues to remain behind the bars. It is also denied that the Order of Detention smacks of *malafide*. It was also stated that

during the course of investigation the detenu was arrested on 7th July, 2022. The bail application preferred by detenu was pending on the day of issuance of Order of Detention. Hence, there is no substance in the say of Petitioner.

4. Assuming that the submission advanced by the learned Advocate for Petitioner is not raised categorically in the grounds of challenge in the Petition, the grounds urged in the Petition would indicate that the proposal was submitted for detention before the Detaining Authority during the pendency of bail application of the detenu. Although there may be justification for not replying the aforesaid ground in the affidavit-in-reply by Detaining Authority, the documents on record, the ground of detention and subjective satisfaction reflected in the grounds of detention would indicate that on the date of issuance of Order of Detention the detenu was in custody in connection with C.R. No. 116 of 2022, he preferred an application for bail on 8th July, 2022. It was pending. It is pertinent to note that Order of Detention was issued on 6th September, 2022, thus for a period of two months until Detention Order was issued, the detenu was not released on bail.

5. In the case of *Ramesh Yadav V/s. District Magistrate, Etah and Others (1985) 4 SCC 232*, the Supreme Court has observed that the Order of Detention was issued as the Detaining Authority

was apprehensive that in case the detenu was released on bail he would again carry activities in the area. If the apprehension of the Detaining Authority was true, the bail application had to be opposed and in case bail was granted, challenge against that Order in the higher forum had to be raised. Merely on the ground that accused in detention as an under trial prisoner was likely to get bail an Order of Detention under the National Security Act should not ordinarily be passed.

6. In the case of *Kamarunnissa V/s. Union of India and another and connected petitions (1991) 1 SCC 128*, it was observed that even in the case of person in custody a Detention Order can validly be passed (i) if the authority passing the Order is aware of the fact that he is actually in custody; (ii) if he has reason to believe on the basis of reliable material placed before him that there is a real possibility of he being released on bail and on being so released he would in all probability indulge in prejudicial activity; (iii) If it is felt essential to detain him to prevent him from so doing.

7. In the case of *Binod Singh V/s. District Magistrate, Dhanbad, Bihar and another (1986) 4 SCC 416*, it was held that there must be awareness of the facts necessitating preventive custody of a person for social defense. If a man is in custody and

there is no imminent possibility of he being released, the power of preventive detention should not be exercised. Detenu was in jail. There was no indication that this factor or the question that the said detenu might be released or that there was such possibility of his release, was taken into consideration by the Detaining Authority properly and seriously before the service of the Order. A bald statement is merely an *ipse dixit* of the officer. If there were cogent material for thinking that the detenu might be released then this should have been made apparent.

8. In the case of *A. Shanthi (SMT) V/s. Govt. of T. N. and Others (2006) 9 SCC 711*, it was observed that there was no cogent material before the Detaining Authority on the basis of which the Detaining Authority could be satisfied that the detenu was likely to be released on bail. The inference has to be drawn from the available material on record. In the absence of such material on record the mere *ipse dixit* of the Detaining Authority is not sufficient to sustain the Order of Detention.

9. This Court in the case of *Smt. Suman Sudhakar Jadhav V/s. The Commissioner of Police Thane & Ors. in Criminal Writ Petition No.3977 of 2017 dated 20th December, 2017*, has dealt with the submission that the detenu is already in custody and there was no necessity of issuing detention order. The Detaining

Authority had arrived at conclusion that the detenu is violent and terrorizing character in the concerned area and indulged in various criminal activities. He was arrested and remanded to custody. He preferred an application for bail which was pending before the Court. The Detaining Authority had stated that, Detaining Authority was aware of the fact that the detenu was in custody and his application for bail was pending. After scrutinizing the factual aspects of the case, this Court had observed that the Detaining Authority has grossly failed to record any satisfaction that there was reliable material before authority on the basis of which it would have reason to believe that the detenu is likely to be released on bail. Though the Detaining Authority 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 the said apprehension. It was also observed that the Order which did not spell out the reasons required in support of it, cannot be explained through an affidavit. The Detaining Authority has failed to record the satisfaction on which the Detention Order could have been sustained.

10. The subjective satisfaction of the Detaining Authority records that the detenu has applied for bail and the application is

pending and in future he may be granted bail. The Detaining Authority was aware that detenu was in custody. This is not sufficient requirement to issue the Order of Detention while the detenu is in custody. The Detaining Authority should have reason to believe on the basis of reliable material placed before him, that there is real possibility of the detenu being released on bail and that being so released he would in all probability indulge in prejudicial activity and it is essential to detain him to prevent him doing so. The satisfaction the Detaining Authority does not reflect any reliable material placed before him to arrive at such conclusion. It is not apparent that there was cogent material to arrive at the conclusion that the detenu might be released on bail. There was no cogent material before Detaining Authority on the basis of which the Detaining Authority was satisfied that the detenu was likely to be released on bail. No such inference could be drawn from the available material on record. The Detaining Authority has failed to record any satisfaction that there was reliable material before the authority on the basis of which there was reasoned to believe that the detenu is likely to be released on bail.

11. Considering the aforesaid circumstances, the impugned Order of Detention would not sustain and deserves to be quashed and set aside. Hence the following order.

ORDER

- i. Criminal Writ Petition No. 3789 of 2022 is allowed.
 - ii. Rule is made absolute.
 - iii. Order of Detention dated 6th September, 2022, bearing No.OW.NO./CRIME PCB/DET/KHAN/283/2022 passed by Respondent No.1 is quashed and set aside.
 - iv. Petitioner/Detenu be released from jail forthwith, unless required in any other case.
12. All the concerned to act on the basis of an authenticated Order of this Court.

[PRAKASH D. NAIK, J.]

[A.S. GADKARI, J.]