

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 1722 OF 2024

Aman Yusuf Pathan @ Khan .. Petitioner
Versus
Commissioner of Police and ors .. Respondents
...

Ms.Jayshree Tripathi a/w Anjali Raut for the petitioner.
Mr.J.P. Yagnik, APP for the State.

CORAM: BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ.
DATED : 6th AUGUST, 2024

P.C:-

1 Aman Yusuf Pathan @ Khan is directed to be detained by an order of detention passed by the Commissioner of Police, Pune City on 4/01/2024, since he deemed it necessary to prevent him from acting in any manner prejudicial to the maintenance of public order and therefore, in exercise of powers conferred by sub-section (2) of Section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons, Video Pirates, Sand Smugglers and Persons engaged in Black-marketing Essential Commodities Act, 1981. His detention was ordered from the date of service of the order upon him.

On the very same day, by passing a separate committal order, he is directed to be detained in Amravati Central Prison, Amravati.

The grounds of detention also came to be communicated to the detenu justifying the passing of detention order by the detaining authority.

2 On 10/05/2024, 'Rule' was issued by making the same returnable.

Pursuant thereto, the detaining authority as well as the State Government filed its affidavit in reply and we heard Ms. Jayshree Tripathi, for the petitioner along with Advocate Anjali Raut and Mr. J.P. Yagnik, the learned APP for the State.

Ms. Tripathi has pressed into service ground (d) in the petition which reads to the following effect:-

“(d) The petitioner says and submits that the order of detention came to be passed on 04.01.2024 while he was in custody, in C.R. No.155/2023 dated 05.07.2023, U/Sec. 307, 324, 504, 506, 34 IPC & U/Sec. 37(1)(3)/135, of MPA & U/Sec. 4(25) of Arms Act r/w 3, 7 of Criminal Law Amendment Act registered on 05.07.2023, the petitioner came to be arrested on 06.07.2023. The petitioner was in custody, while the order of detention came to be passed against him. The detaining authority has not recorded his satisfaction to the effect that there is imminent/real possibility of the petitioner's release on bail based on any cogent material, which is a mandatory requirement while passing a detention order against a person (while he is in Custody). Law is well settled that a valid order of detention can be passed (while in Custody) if the detaining authority has recorded three satisfactions, Firstly, awareness about the bail position of the petitioner, Secondly, that there is real/imminent possibility of his release on bail based on cogent material (therefore a detention order) and thirdly, the petitioner may again continue his prejudicial activities in future. The detaining authority is duty bound to give justifiable and cogent reasons based on material available that there is a necessity for passing detention order against a person while he is in custody,

in this case the detaining authority has failed to record his satisfaction of imminent/real possibility of release on bail, which is a mandatory requirement of law. The order of detention is illegal and bad in law for not recording satisfaction, the order of detention is liable to be quashed and set aside.”

3 Elaborating the aforesaid ground, Ms.Tripathi has submitted before us that the detaining authority has failed to record any satisfaction about any imminent or real possibility of his release from custody on bail and despite being in custody in connection with C.R. No.155 of 2023, which had invoked Section 307, 324, 504, 506, r/w 34 of IPC and under Section 37/135, 142 of the Maharashtra Police Act and Section 4(25) of the Arms Act, where he was arrested on 6/07/2023. When the detention order was passed on 4/01/2024, the detenu was in custody and Ms. Tripathi would submit that merely on the pretext that the detenu was likely to be released on bail and once he is a free person, he may indulge himself in similar offences, would not justify the formation of subjective satisfaction by the detaining authority.

She has placed reliance upon the decision of the Apex Court in case of ***Kamarunnisa vs. Union of India and anr, (1991) 1 SCC 128*** and the decision in case of ***Abdul Razak A.W. Shaikh vs. Commissioner of Police & Ors. (1989) 2 SCC 222***.

4 We have perused this particular observation of the detaining authority in the grounds of detention, which read to the following effect:-

“8. *I have mentioned the offences and preventive actions taken in Para 3, 3.1 and 3.2 of the grounds of detention to show that you are habitual criminal involved in continuous criminal activities. Accordingly I had relied upon the material mentioned*

in Para 5.1 and 6.1 and 6.2 of the grounds of detention to arrive at my subjective satisfaction that you are a dangerous person as defined in Para 2 (b-1) of the M.P.D.A Act., and your criminal activities are prejudicial to maintenance of public order. Presently, you are in judicial custody of the concerned Hon'ble Court in the offence of 1) Samarth Police Station, Pune C. R. No. 155/2023, u/s 307, 324, 504, 506, 34 of IPC & u/s 3,7 of Criminal law amendment act & u/s 37(1)(3)/135 of MPA & u/s 4(25) of arms act. Moreover, in future you may be granted bail under the ordinary law of the land as the said offence is not compulsorily punishable with death sentence. In view of your tendencies and inclinations reflected in the offences committed by you as stated above as well as the incidents recorded in the 'In-Camera' statements, I am further satisfied that after availing bail facility and becoming a free person, you again are likely to revert to similar activities. These are prejudicial to the maintenance of public order in future and it is necessary to detain you under the said Act to prevent you from acting in such prejudicial manner in future."

5 The detaining authority is conscious that the petitioner is in judicial custody of the Court in connection with C.R. No.155/2023, but when he passed the detention order on 4/01/2024, he merely expressed a possibility that in future he may be granted bail under the ordinary law of the land, as the said offence is not compulsorily punishable with death sentence. The detaining authority further expressed the satisfaction that after availing bail facility and becoming a free person he may again revert to similar activities, prejudicial to the maintenance of public order in future and therefore, it has become necessary to detain him.

6 It may be true that an order of detention can be validly passed against a person in custody, but in such a contingency it is necessary that the grounds of detention must reflect to two

circumstances; one the detaining authority was aware of the fact that the detenu was already in detention and two where the compelling reasons justify such detention, despite the fact that the detenu is already in custody.

The expression 'compelling reasons' in the context of making an order of detention of a person already in custody necessarily imply existence of cogent material, on the basis of which the detaining authority is satisfied that the detenu is likely to be released from custody in the near future.

7 When we perused the grounds of detention, we do not find any basis for this apprehension and therefore, we turn our attention to the affidavit filed by the Commissioner of Police, Pune City, the Detaining Authority and we find reiteration of the grounds, which are already communicated to the petitioner and in regards to the specific ground raised, he has responded in the following manner:-

“Accordingly, the then Detaining Authority had relied upon the material mentioned in Para 5.1 and 6.1 and 6.2 of the grounds of detention to arrive at his subjective satisfaction that Detenu is a dangerous person as defined in Para 2(b-1) of the MPDA Act and Detenu’s criminal activities are prejudicial to maintenance of public order. Presently, Detenu is in Judicial Custody of the concerned Court in the offence of 1) Samarth Police Station, Pune, C.R. No.155/2023, u/s 307, 504, 506, 34 of IPC & u/s 3, 7 of Criminal law amendment Act and u/s 37(1)(3)/135 of MPA Act and u/s. 4(25) of Arms Act. Moreover, in, future Detenu may be granted bail under the ordinary law of the land as the said offence is not compulsory punishable with death sentence. In view of Detenu’s tendencies and inclinations reflected in the offences committed by Detenu as stated above after availing bail facility and becoming a free person, Detenu again are likely to revert to similar activities

which are prejudicial to the maintenance of public order in future and it is necessary to detain him under the said Act to prevent him from acting in such prejudicial manner in future.”

According to us, merely by saying that the offence is not compulsorily punishable with death sentence and therefore, the detenu is likely to be released on bail in future is not sufficient, as in the said C.R. No.155 of 2023, the detenu is released on bail only on 9/01/2024, after the detention order was passed on 4/01/2024.

It is necessary that there must be awareness in the mind of the detaining authority that the detenu is in custody at the time of service of the order of detention on him and cogent relevant materials and fresh facts have been disclosed, which necessitates the making of an order of detention.

In the present case, though the detaining authority was alive to the fact that the petitioner was in jail custody on the date of passing of the detention order, the perfunctory observation that there is possibility of his release on bail is not substantiated by any cogent material. If he was already detained in the C.R. registered against him invoking Section 307 on 5/07/2023, then the propriety did not demand his detention, since he was arrested on 6/07/2023 and all the while till the passing of the detention order on 4/01/2024, he was not released on bail. It was imperative for the detaining authority to ascertain whether there was a real possibility of release of a person on bail as one of the ground may be his co-accused having been released on bail or his long incarceration may deserve his release, but in absence of such satisfaction being recorded, merely on the ground that the detenu is likely to be released on bail in future though he could not secure the bail from 6/07/2023, the passing of detention

order against him suffer from complete non application of mind. If for this offence, he was incarcerated and was not granted bail from the date of his arrest, which suffice the purpose of taking care of the alleged prejudicial activities, we fail to understand the justiciability of passing of the detention order.

8 In addition, to the aforesaid ground we must also note that C.R. No.155 of 2023, was registered against the petitioner on 5/07/2023, whereas the statements of in camera witnesses came to be recorded on 15/12/2023 and 20/12/2023, respectively.

As far as witness 'A' is concerned, he referred to the incident of 2/07/2023, when he alleged that he was threatened by the detenu and the incident created a issue of public order as he had seen people running around the street and shopkeepers closing their shops in a hurry as the detenu along with his accomplice was moving along with knife and he brandished the knife at him.

As far as witness 'B' is concerned, he referred to an incident of June, 2023, whereas his statement is recorded on 20/12/2023, and evidently it can be seen that the statements of the in camera witnesses are recorded to fill in the gap from the date of registration of the offence, which is relied upon by the detaining authority, for passing the order of detention it being registered on 5/07/2023, and in connection thereof he was arrested on 6/07/2023, and was remanded to judicial custody till 21/07/2023, and the charge-sheet came to be filed on 15/12/2023, the silence of 5 months from the date of registration of the offence and till the recording of statements of witness 'A' and 'B' clearly reflect upon the attempt to establish continuity as the witnesses have referred to incidents of

June, 2023, and July, 2023, but thereafter since the petitioner was already in judicial custody, there was no question of he indulging into any activities and therefore, the necessity for passing the order of detention is completely ruled out.

9 For the aforesaid reason, since we find the order of detention passed against the petitioner/detenu suffer from non application of mind, and hence by quashing and setting aside the order of detention, rule is made absolute.

The impugned order of detention dated 4/01/2024, passed by the detaining authority is quashed and set aside.

The petitioner is directed to be released from custody forthwith.

(MANJUSHA DESHPANDE,J)

(BHARATI DANGRE, J.)