

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

**CRIMINAL WRIT PETITION NO. 2986 OF 2025
WITH
INTERIM APPLICATION NO. 3583 OF 2025**

Faisal Javed Shaikh s/o Javed Mohd Shaikh
Age: 35 years, Occ:- Business,
Residing at: R No.103, First Floor,
Ansari Heights, X Cross lane,
Dongri, Mumbai-40009,
(At present in Judicial Custody in Central Prison,
Puzhal, Chennai)

... Petitioner

V/s.

1. Joint Secretary,
(Government of India, Ministry of Finance,
Department of Revenue, PITNDPS UNIT
2. The State of Maharashtra
(Through the Superintendent of the
Central Prison, Arthur Road.
3. The State of Maharashtra
(Through Dongri Police Station)
4. The Superintendent,
(Central Prison, Puzhal, Chennai)
5. Union of India
(Through NCB, Mumbai)

... Respondents

Mr. Ayaz Khan i/b Ms. Munira Palanpurwala a/w Ms. Sumaiya Khan, Mr. Tahir Hussain, Ms. Deepa Amati, Kainat Sayed, Advocate for the Petitioner.
Mr. Ajay Patil, APP for the Respondent-State.
Mr. S.K.Halwasia, Additional PP a/w Smt. S. S. Halwasia and Mr. Keshav Thakur, Advocate for Respondent Nos.1 & 5.

**CORAM : A. S. GADKARI AND
RANJITSINHA RAJA BHONSALE, JJ.**

DATE : 16th DECEMBER 2025.

JUDGMENT [Per: RANJITSINHA RAJA BHONSALE, J] :-

1) By the present Petition, filed under Article 226 and 227 of the Constitution of India, the Petitioner approaches this Court with the prayer that the Order of Detention bearing F. No. U-11011/02/2025-PITNDPS dated 26th March 2025 issued against the Petitioner under Section 3(1) of the Prevention of Illicit Trafficking of Narcotics Drugs and Psychotropic Substances Act, 1988 (PITNDPSA Act) be quashed and set aside. The Petitioner, being detained, seeks a direction for being released and set at liberty. The Detention Order dated 26th March 2025 was served upon the Petitioner on 20th May 2025, when the Petitioner was in custody and lodged at the Chennai prison in Crime No. 496 of 2024. The Petitioner further prays that, the Petitioner be released on a suitable bond from the Central Prison, Puzhal, Chennai on terms and conditions that this Hon'ble Court may deem fit and proper or in the alternative, be transferred from the Central Prison, Puzhal, Chennai to the custody of Respondent No.2- State of Maharashtra.

2) By Order dated 25th June 2025, this Court had issued Rule in the Petition. The contesting Respondents have filed their Affidavits in reply and opposed the Petition and the grant of any reliefs to the Petitioner.

3) We have heard Mr. Ayaz Khan, learned counsel for the Petitioner, Mr. Ajay Patil, learned APP for the Respondent–State and Mr. S. K. Halwasia, learned Additional Public Prosecutor for the Respondent Nos.1 and 5. We have perused the entire record.

4) Mr. Ayaz Khan, learned counsel appearing for the Petitioner submitted that:

4.1) The Detention Order dated 26th March 2025, relies upon two Crimes i.e (i) C.R. No. 496 of 2024 dated 16th December 2024 registered with the Dongri Police Station and (ii) NCB, Mumbai, Crime No. 11 of 2023 dated 9th June 2023. C.R. No. 496 of 2024 was registered on 16th December 2024 with the Dongri Police Station under sections 8(c), 21(c) and 29 of the NDPS Act, in which crime, the Petitioner was arrested on 30th December 2024 and has since been in custody. That, the Detention Order dated 26th March 2025 and the grounds of Detention do not refer to or discuss the fact of the real possibility or the likelihood of the Petitioner being released on bail. That, the Detaining Authority in the grounds of detention has stated that, while the Petitioner was on bail in C.R. No. 11 of 2023, he committed an offence being C.R. No.496 of 2024 which was registered on 16th December 2024 with the Dongri Police Station. That, though the Detention Order records that the Sponsoring Authority is in the process of filing an appeal in this Court for cancellation of the Petitioner's bail, no steps have been taken in that regard. That, the subjective satisfaction, that there is a likelihood of the Petitioner

being released on bail or likely to be released on bail, is not recorded. That, the Petitioner has specifically raised this ground in the Writ Petition, which has not been dealt with by the Respondents in their affidavits in reply. That, there is only a bare denial of the said ground.

4.2) The present offences against the Petitioner are registered under the NDPS Act and if one considers Section 37 of the NDPS Act, the possibility of the Petitioner being released on bail is very remote. The powers under the Preventive Detention Laws, must be exercised by the authorities, in exceptional cases and with great caution. The facts of the present case do not warrant the exercise of the powers under the Preventive Detention Laws. That, the Petitioner being in custody for offences under the NDPS Act, the Detaining Authority has erred in invoking the preventive detention laws.

4.3) The Hon'ble Supreme Court in the case of *Amritlal Vs. Union Government* reported in (2001) 1 SCC 341 has observed that when a person is in custody, and there is no possibility of him being released on bail the power of detention or the preventive detention laws ought not to be invoked. That, the Detaining Authority should have material before it to conclude that the proposed detenu is likely to be released on bail and indulge in the same illegal activities, if released on bail.

5) Learned Advocate Mr. S.K. Halwasia, Additional Public Prosecutor appearing for the Respondent Nos. 1 and 5 while referring to a compilation of judgments and certain legal provisions submitted that:

5.1) The Detaining Authorities failure in not referring to the fact that: there was a likelihood of the Petitioner being released on bail, is not fatal to the case. That, it is not necessary that at all time and in all cases that the said fact is to be mentioned or relied upon by the Detaining Authority to reach the subjective satisfaction. That, the absence of such a reference would not vitiate the Detention Order and or the subjective satisfaction of the Detaining Authority. In support of this argument, the learned Advocate would place reliance on paragraph 17 of the judgement of the Supreme Court in the case of *Union of India vs. Ankit Ashok Jalan* reported in (2020) 16 SCC 185.

5.2) Referring to the judgment of the Hon'ble Supreme Court in the case of *Union of India Vs. Dimple Happy Dhakad* reported in (2019) 20 SCC 609, learned advocate would submit that, what is necessary under Article 22(5) of the Constitution of India is that, the documents and other material relied upon in the grounds of detention should be furnished to the detenu alongwith the grounds of detention.

5.3) It cannot be presumed or concluded that, the Detaining Authority has not applied its mind, merely on the basis that the Detention Order does not expressly state that there is the "detenu's likelihood of being released on bail" and "if so released, he is likely to indulge in the same prejudicial activities". That, it is sufficient that the Detaining Authority records the relevant acts and antecedents of the detenu and the satisfaction that the detenu has an inclination to commit such offences in the future. That, the

conduct and the activities of detenu have to be taken into consideration. That, calling in question a Detention Order merely on the ground that the Detaining Authority has not expressly recorded the requirements or followed the principles laid down in *Kamarunnissa vs. Union of India (1991) 1 SCC 128* is not a proper approach. That, the same cannot be the only basis to quash and set aside a Detention Order.

5.4) The Hon'ble Supreme Court in the case of *Kamarunnissa Vs. Union of India and another* in paragraph 13 has recorded a categorical finding that, in the case of a person in custody, a Detention Order can be validly passed, if the Authority passing the Order is aware of the fact that, the person is actually in custody, has reason to believe on the basis of reliable material that there is a real possibility of the person being released on bail and that on being so released the person would in all probabilities indulge in prejudicial activities and therefore it is essential to detain him under the preventive detention laws. The Order itself records that, it is well settled that even in a case where person is in custody if the facts and circumstances so demand, the resort can be taken to the law of preventive detention.

5.5) In the present case, the Detention Order is issued considering the fact that, the Petitioner who was involved in Drug Trafficking Activities after being released on bail in connection with C.R. No.11 of 2023 (Crime under the NDPS Act) on 13th September 2024, violated the conditions of his bail by continuing his involvement in Drug Trafficking. That, the Petitioner was

arrested by the Dongri Police Station on 30th December 2024 in connection with the seizure of 940 gms of Cocaine and is at present in Judicial custody. That, the Petitioner being habitual offender, there is a strong likelihood that if he is released, he would resume Drug Trafficking Activities.

6) Mr. Ayaz Khan, learned counsel for the Petitioner, in rejoinder arguments submitted that:

6.1) The Judgment referred to and cited on behalf of Respondent Nos.1 and 5 do not in any manner negate or neutralize the submissions of the Petitioner. That, in fact the principal argument of the Petitioner, finds support in the said judgments. That, if the Authority passes a Detention Order, after recording its satisfaction after considering the conditions/guidelines as enunciated by the Hon'ble Supreme Court in the case of *Kamarunnissa Vs. Union of India (1991) 1 SCC 128* a Detention Order can be passed against a person in custody.

6.2) After registering an offence under the NDPS Act, the possibility of the Petitioner getting bail is extremely remote. That, the Hon'ble Supreme Court in the case of *Mortuza Hussain Choudhary Vs. The State of Nagaland and Ors.* reported in *(2025) SCC OnLine SC 502* has held that in respect of a person who is in custody, a Detention Order ought to be passed only after the Detaining Authority is satisfied on the basis of cogent material that there is a real possibility of the detenu being released on bail and further, if released on bail, the material on record must reveal that the detenu would indulge in

prejudicial activity again, if not detained.

6.3) Learned counsel would further rely on the judgment of the Hon'ble Supreme Court in the case of *Sayed Abul Ala Vs. Union of India* reported in (2007) 15 SCC 208 contended that, in an NDPS matter when bail application is filed, the restrictions/conditions imposed under Section 37 of the NDPS Act, have to be taken into consideration. That, Section 37 of the NDPS Act limits the jurisdiction of the Court to grant bail. That, the Hon'ble Supreme Court in the case of *Amritlal Vs. Union Government (supra)* has observed that in matters of NDPS, the possibility of getting bail is remote and bleak. That, a Detention Order being passed against a person, when he is in custody in an NDPS case, the same has far reaching consequences. That, as a consequences of the Detention Order as provided in the statute, the forfeiture of the property of the detenu is completed. That, in this context the observations and guidelines in the case of *Kamarunnissa Vs. Union of India (supra)* assume extreme importance and significance. The Hon'ble Supreme Court in the case of *Binod Singh V. District Magistrate, Dhanbad, Bihar and ors.(1986) 4 SCC 416* has reiterated the principles laid down in *Kamarunnissa Vs. Union of India and anr. (Supra)*

7) Having considered the submissions of the parties, we shall at the first instance proceed to consider the law as laid down by the Hon'ble Supreme Court in matters of Preventive Detention and the procedure and factors which the Detaining Authority is required to keep in mind and follow

while passing an Preventive Detention Order, against a person who is already in custody.

7.1) The Hon'ble Supreme Court in the case of *Binod Singh V. District Magistrate, Dhanbad, Bihar and others* reported in (1986) 4 SCC 416 which pertained to a case of indiscriminate firing in full view of the shopkeepers, customers and passers-by of the area the Hon'ble Supreme Court has observed that,

“5. It, however, appears that after the order of detention was passed and before the actual service of the order of detention, the petitioner was taken into custody. From the affidavit of the District Magistrate it does not appear that either the prospect of immediate release of the detenu or other factors which can justify the detention of a person in detention were properly considered in the light of the principles noted in the aforesaid decision and especially in the decisions in Rameshwar Shaw v. District Magistrate, Burdwan (1964) 4 SCR 921 and Ramesh Yadav v. District Magistrate, Etah (1985) 4 SCC 232, though there was a statement to the effect that the petitioner was in jail and was likely to be enlarged on bail. But on what consideration that opinion was expressed is not indicated, especially in view of the fact that the detenu was detained in a murder charge in the background of the facts mentioned before. His application for bail could have been opposed on cogent materials before the court of justice.

7. It is well settled in our Constitutional framework that the power of directing preventive detention given to the appropriate authorities must be exercised in exceptional cases as contemplated by the various provisions of the different statutes dealing with preventive detention and should be used with great deal of circumspection. There must be awareness of the facts necessitating preventive custody of a person for social defence 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. A bald statement is merely an ipse dixit of the officer. If there were cogent materials for thinking that the detenu might be released then these should have been made apparent. Eternal vigilance on the part of the authority charged with both law and order and public order is the price which the democracy in this country extracts from the public officials in order to protect the fundamental freedoms of our citizens. In the affidavits on behalf of the detaining authority though there are indications that transfer of the detenu from one prison to another was considered but the need to serve the detention order while he was in custody was not properly considered by the detaining authority in the light of the relevant factors. At least the records of the case do not indicate that. If that is the position, then however disreputable the antecedents of a person might have been, without consideration of all the aforesaid relevant factors, the detenu could not have been put into preventive custody. Therefore, though the order of preventive detention when it was passed was not invalid and on relevant considerations, the service of the order was not on proper consideration.

8. *It may be mentioned that in the petition it is nowhere stated that the detenu has since been released or that the prospect of his imminent release was properly and with seriousness considered by the detaining authority.”*

7.2) The Hon’ble Supreme Court in the case of *Kamarunnissa Vs.*

Union of India and another, reported in (1991) 1 SCC 128 has observed that:

“13. 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.....”

7.3) The Hon’ble Supreme Court in the case of *Amritlal Vs. Union Government*, reported in (2001) 1 SCC 341 has observed that:

“3. Learned advocate appearing in support of the appeals during the course of hearing informed this Court that while it is true that by reason of efflux of time the period of detention has otherwise expired but continued to press the appeal with some emphasis by reason of the consequence as provided in the statute to with the forfeiture of the property of the detenu and it is in this context strong reliance has been placed on the decision of this Court in Rivadeneyta Ricardo Agustin v. Govt. of the National Capital Territory of Delhi and others, 1994 Supp. (1) SCC 597. This Court while dealing with the matter and relying upon the decision of this Court in Kamarunnissa v. Union of India, 1991(1) SCC 128 came to the conclusion that the order of detention cannot but be quashed. In Kamarunnissa's case (supra) this court was pleased to observe thus:-

“The decisions of this Court to which our attention was drawn by the learned counsel for the petitioners lay down in no uncertain terms that detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty.”

“4. In Agustin's decision (supra) this Court also placed strong reliance on an earlier but often cited decision of this Court in Binod Singh v. District Magistrate, Dhanbad, (1986) 4 SCC 416 wherein it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. This court held that there must be cogent materials before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipsi dixit of the

officer passing the order of detention. It is in this perspective as above, that the recording of the concerned officer in the matter under reference ought to be noticed and the same reads as below :-

"Even though prosecution proceedings under Narcotic Drugs and Psychotropic Substances Act, 1985 have been initiated against Shri Amritlal I am satisfied that there is compelling necessity in view of the likelihood of his moving an application for bail and in the event of his being granted bail, the likelihood of his indulging in Illicit Trafficking of Narcotics Drugs as is evident from the trend of his activities, to detain him under the Prevention of Illicit Trafficking of Narcotics Drugs and Psychotropic Substances Act, 1988."

"7. The emphasis, however, in Binod Singh's case (supra) that before passing the detention order the concerned authority must satisfy himself of the likelihood of the petitioner being released on bail and that satisfaction ought to be reached on cogent material. Available cogent material is the likelihood of having a bail application moved in the matter but not obtaining a bail order."

7.4) The Hon' ble Supreme Court in the case of *Sayed Abul Ala Vs. Union of India* reported in (2007) 15 SCC 208 has observed that:

"19. An application for bail is required to be filed and considered by the appropriate Court in terms of Section 439 of the Code of Criminal Procedure but in cases involving provisions of NDPS Act, the detaining authority was required to take into consideration the restrictions imposed on the power of the court to grant bail having regard to the provisions of Section 37 thereof."

"21. Proper application of mind on the part of the detaining authority must, therefore, be borne out from the order of detention. In cases where the detenu is in custody, the detaining authority not only should be aware of the said fact but there should be some material on record to justify that he may be released on bail having regard to the restriction imposed on the power of the Court as it may not arrive at the conclusion that there existed reasonable grounds for believing that he was not guilty of such offence and that the detenu could not indulge in similar activity, if set at liberty".

"26. No doubt antecedents of the detenu would be a relevant factor

but the same by itself may not be sufficient to press and order of detention in as much as the principles which govern the field so as to enable the court to arrive at a decision that the order of detention can be validly passed despite the detenu being in custody are:

(1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he had a 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 released, he would in all probability indulge in prejudicial activities; and (3) it is felt essential to detain him to prevent him from so doing”.

“27. Yet again, our attention has also been drawn to the decision of this Court in Smt. Azra Fatima v. Union of India & Ors., 1990(2) RCR (Criminal) 347: (1991)1 SCC 76 wherein a Bench of this Court while considering the validity of an order of detention under the said Act had held that the likelihood of the detenu to be released on bail together with other relevant factors namely his antecedents as well as his likelihood of involvement and in continuing to commit similar offences are to be borne in mind. But therein two of the co-detenus had already been released on bail and thus, detaining authority could arise at his subjective satisfaction. However, in this case, the co accused of the appellant had not been released on bail and in that view of the matter the detaining authority was required to apply his mind on the material on record to arrive at his subjective satisfaction.”

7.5) The Hon’ble Supreme Court in the case of *Union of India Vs. Dimple Happy Dhakad* reported in (2019) 20 SCC 609 has observed that,

“30. The High Court quashed the detention orders on yet another ground that the detaining authority has to record grounds of detention indicating the reasons with the satisfaction that there is imminent possibility of detenue's release from the custody and after release, such person is likely to continue to indulge in the prejudicial activities and the detention orders nowhere expressly mention the satisfaction of the detaining authority as to the imminent possibility of the detenue's release on bail and continue to indulge in the prejudicial activities. The High Court held that the tests laid down in Kamarunnissa are not satisfied. The High Court held that mere role played by detenu Nisar

Aliyar in smuggling gold or role of another detenu Dimple Happy Dhakad in aiding and abetting Nisar Aliyar in the illegal activities of smuggling do not dispose with the necessity of recording satisfaction that there is no imminent possibility of the detenues being released on bail.

38. *In the light of the well settled principles, we have to see, in the present case, whether there was awareness in the mind of the detaining authority that detenu is in custody and he had reason to believe that detenu is likely to be released on bail and if so released, he would continue to indulge in prejudicial activities. In the present case, the detention orders dated 17.05.2019 record the awareness of the detaining authority:-(i) that the detenu is in custody; (ii) that the bail application filed by the detenues have been rejected by the Court. Of course, in the detention orders, the detaining authority has not specifically recorded that the "detenu is likely to be released". It cannot be said that the detaining authority has not applied its mind merely on the ground that in the detention orders, it is not expressly stated as to the detenu's likelihood of being released on bail" and "if so released, he is likely to indulge in the same prejudicial activities". But the detaining authority has clearly recorded the antecedent of the detenues and its satisfaction that detenues Happy Dhakad and Nisar Aliyar have the high propensity to commit such offences in future.*

39. *The satisfaction of the detaining authority that the detenu may be released on all cannot be ipse dixit of the detaining authority. On the facts and circumstances of the present case, the subjective satisfaction of the detaining authority that the detenu is likely to be released on bail is based on the materials. A reading of the grounds of detention clearly indicates that detenu Nisar Aliyar has been indulging in smuggling gold and operating syndicate in coordination with others and habitually committing the same unmindful of the revenue loss and the impact on the economy of the nation. Likewise, the detention order qua detenu Happy Dhakad refers to the role played by him in receiving the gold and disposing of the foreign origin smuggled gold through his multiple jewellery outlets and his relatives. The High Court, in our view, erred in quashing the detention orders merely on the ground that the detaining authority has not expressly recorded the finding that there was real possibility of the detenues*

being released on bail which is in violation of the principles laid down in Kamarunnisa and other judgments and Guidelines. The order of the High Court quashing the detention orders on those grounds cannot be sustained.

7.6) The Hon'ble Supreme Court of India in the case of *Union of India through Joint Secretary (COFEPSA), Ministry of Finance, New Delhi Vs. Ankit Ashok Jalan* reported in (2020) 16 SCC 185 has observed that,

“17. Now applying the law laid down by this Court, referred to hereinabove, to the facts of the case on hand and considering the ground (para 7) and the various circumstances noted by the Detaining Authority, we are satisfied that the detention orders cannot be quashed on this ground. It is to be noted that the detenus have been granted bail by the Court on the very date the orders of detention were quashed by the High Court, i.e., on 2.8.2019. Therefore, the apprehension in the mind of the Detaining Authority that the detenus are likely to be released on bail was well founded and fortified. Therefore, the High Court has fallen in error in quashing and setting aside the detention orders on the ground that there is a clear lapse and failure on the part of the Detaining Authority, to examine and consider the germane and relevant question relating to the imminent possibility of the detenus being granted bail granted bail, while recording its subjective satisfaction and passing the detention orders.

7.7) The Hon'ble Supreme Court of India in the case of *Mortuza Hussain Choudhary Vs. State of Nagaland & Others* reported in (2025) SCC ONLINE SC 502 has observed that,

“8. We may now note precedential law on the subject. In Kamarunnissa v. Union of India, (1991) 1 SCC 128 the detenus were already in judicial custody at the time the orders of preventive detention were passed against them. This Court affirmed that detention orders could be validly passed against detenus who were in jail, provided the officers passing the orders were alive to the factum of the detenus

being in custody and there was material on record to justify the conclusion that they would indulge in similar activities, if set at liberty. Reference was made to the earlier decision of this Court in Binod Singh v. District Magistrate, Dhanbad, Bihar, (1986) 4 SCC 416 wherein it was held that there must be cogent material before the officer passing the detention order to infer that the detenu was likely to be released on bail and such an inference must be drawn from the material on record and must not be the ipse dixit of the officer passing such order. This Court, therefore, emphasized that before passing the detention order in respect of a person who is in jail, the concerned authority must satisfy himself and such satisfaction must be reached on the basis of cogent material that there is a real possibility of the detenu being released on bail and, further, if released on bail, the material on record must reveal that he/she would indulge in prejudicial activity again, if not detained.

9. On similar lines, in *Rekha v. State of Tamil Nadu, (2011) 5 SCC 244* a 3-Judge Bench of this Court affirmed that, where a detention order is passed against a person already in jail, there should be a real possibility of the release of that person on bail, that is, he must have moved a bail application which is pending. It was observed that if no bail application is pending it logically followed that there is no likelihood of the person in jail being released on bail. The Bench, however, pointed out that the exception to this Rule would be where a co-accused, whose case stood on the same footing, was granted bail. The Bench cautioned that details in this regard have to be recorded, otherwise the statement would be mere ipse dixit and cannot be relied upon. The law laid down in *Rekha (supra)* was reiterated and followed in *Huidrom Konungjao Singh v. State of Manipur and others, (2012) 7 SCC 181*.

10. Earlier, in *Union of India v. Paul Manickam and another, (2003) 8 SCC 342* this Court observed that, where detention orders are passed against persons who are already in jail, the detaining authority should apply its mind and show awareness in the grounds of detention of the chances of release of such persons on bail. It was observed that the detaining authority must be reasonably satisfied, on the basis of cogent material, that there is a likelihood of the detenu's release and in view of his/her antecedent activities, which are proximate in point of time, he/she must be detained in order to prevent him/her from indulging in

such prejudicial activities. It was held that an order of detention would be valid in such circumstances only if the authority passing the order is aware of the fact that the detenu is actually in custody; the authority has a reason to believe, on the basis of reliable material, that there is a real possibility of the detenu being released on bail; and that, upon such release, he/she would, in all probability, indulge in prejudicial activities; and it is felt essential to detain him/her to prevent him/her from so doing. This principle was again reiterated and applied in Union of India and another v. Dimple Happy Dhakad, (2019) 20 SCC 609.

8) Having considered the aforementioned judgments, and the law as laid down by the Hon'ble Supreme Court we find it necessary to also refer to section 37 of the NDPS Act. Section 37 of the NDPS Act reads as under:

"37. Offences to be cognizable and non-bailable.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974) -

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for (offences under Section 19 or section 24 or section 27A and also for offences involving commercial quantity) shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any

offence while on bail."

9) We have perused the record, affidavits in reply and considered the authorities cited by the learned Advocates. We are of the opinion that the Detaining Authority before proceeding to pass a detention order against a person must satisfy itself of the following facts:

(i) Whether the person is in custody ?

(ii) If yes, whether in law and on the material available before the Detaining Authority is there a real possibility of the person being released on bail ? and

(iii) If released on bail, whether there is a possibility of the person again indulging in the prejudicial activities ?

9.1) The answers to point (ii) and (iii) are to be based on the applicable law, the cogent material and facts which is available on record and not on the ipse dixit of the concerned Authority and or on surmises or conjecture. We are of the view that, if the Detaining Authority is aware that the person is in jail/custody, then the detaining authority ought to acknowledge the same. The application of mind to the aspect of the "real possibility of being released on bail" should be based on cogent and realistic material and the same ought to be reflected and evident in and from the Detention Order. The Detention Order, is required to reflect the said awareness/knowledge of the Detaining Authority of the person being in custody and identify the material/ factual basis on which the Detaining

Authority comes to the conclusion that there is a real possibility or real chances of the said person being released on bail and that once released the person would again indulge in the said prejudicial activity. The same has to be considered. In short, the conditions/guidelines laid down by the Hon'ble Supreme Court in the case of *Kamarunnissa (supra)* have to be followed in its true letter and spirit.

10) We are of the opinion that, in matters of Preventive Detention, the Detaining Authorities consideration of the real possibility of the person being released on bail is of utmost importance. This is so because if the possibility of being released on bail is remote/ bleak, the powers under the Preventive Detention Laws ought not to be invoked. Further, it is imperative that the “real possibility of being released on bail”, be based on cogent material and arrived at after taking into the consideration the relevant and special laws if any in that regard. Once the said satisfaction of “real possibility of being released on bail” is reached, then the next important factor is, of the likelihood of such persons indulging in similar prejudicial activities is to be considered. The persons past acts and conduct, the fact that preventive detention may be required to prevent the person from again indulging in similar prejudicial activities etc. are required to be considered.

11) In matter of special statutes like the NDPS Act, bail for offences under the said statutes is governed by the provisions of section 37 of the NDPS Act. Section 37 of the NDPS Act provides that every offence under the

NDPS Act shall be cognizable and that no person accused of an offence punishable for offences under section 19 or section 24 of section 27A and for offences involving a commercial quantity shall be released on bail unless (i) the Public Prosecutor is heard and given an opportunity to oppose the bail application and (ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. These twin conditions ought to be taken into account by the Detaining Authorities in deciding whether to invoke the preventive detention laws against an individual. One must note that, the conditions imposed by section 37 of the NDPS Act, are in addition to the provision of the Code of Criminal Procedure Code. We are of the opinion that, the Detaining Authority is also duty bound to be guided by the conditions and principles laid down under the said special statute. This is of course in addition to the conditions and guiding principles as laid down by the Hon'ble Supreme Court in the case of *Kamarunnissa (Supra)*. According to us, considering Section 37 of the NDPS Act, by the Detaining Authority is of utmost importance and extremely necessary at the time of arriving at the subjective satisfaction as to whether there is a "real possibility" of the person being released on bail. Without taking into consideration, the provisions of section 37 of the NDPS Act, one cannot reach to the conclusion as to whether there is a "real possibility" of the person being released on bail.

12) In the present case, we find that, the Detention Order does not refer to, follow or comply with the requirements of the principles/guidelines laid down by the Hon'ble Supreme Court in the case of *Kamarunnissa Vs. Union of India and anr. (supra)*. We find that, the Detaining Authority has only referred to Crime No. 496 of 2024 registered with the Dongri Police Station and NCB Crime No.11 of 2023. There is only a reference to and a discussion in respect of the said two crimes, the statements recorded therein and the steps taken by the Investigating Authorities in the said two crimes. We have noted that, in the present matter the Detaining Authority has interalia made the following observations:

- (i) The Petitioner acts in prejudicial activities of Illicit Trafficking of Narcotics Drugs and Psychotropic Substances poses serious threat to the health and welfare of the citizens and deleterious effect on the national economy;
- (ii) The offences committed by the Petitioner are interlinked and continuous in character, grave and executed in a planned manner;
- (iii) The Petitioner has a continued propensity and inclination to engage in such prejudicial activities;
- (iv) There is ample opportunity for the Petitioner to repeat the said serious prejudicial acts and therefore there is need to immobilise the Petitioner and prevent him from engaging Illicit Trafficking of Narcotic Drugs and Psychotropic Substances in future by invoking the preventive

detention laws.

13) We find that, there is no discussion on the aspect of “real possibility” of being released on bail. The Detaining Authority has not dealt with the fact as to whether there was a likelihood of the petitioner being granted bail in the NDPS matter and more importantly so in the teeth of section 37 of the NDPS Act. We find that the Detaining Authority surprisingly has not even referred to section 37 of the NDPS Act nor stated the reasons based on which the Detaining Authority concludes that the Petitioner would be granted bail. We are of the view that the Detaining Authority, in the present matter ought to have considered and taken into account the provisions of section 37 of The Narcotic Drugs and Psychotropic Substances Act, 1985. We are of the view that, the Detaining Authority ought to indicate the reasons and material/facts which are taken into consideration and on the basis of which it would opine that there is a possibility of the person being released on bail. An Order passed under the Preventive Detention Law without considering the provisions of the NDPS Act would amount to a violating the provisions and safeguards of the Constitution, the order of the Hon’ble Supreme Court and a misuse of the powers of the preventive detention laws.

14) We are of the opinion that, the power of directing preventive detention or invoking the laws under preventive detention should be exercised in furtherance of the objects of the preventive detention laws and not on some untenable inclinations of the Detaining Authority. The preventive detention

laws, cannot be used as an convenient short cut, by the Detaining Authorities, to curtail the liberty of an individual however serious or heinous the crime. Detention orders passed, without taking into account relevant and pertinent provisions of the law or passed in disregard thereof cannot and ought not to be sustained. The power and authority of preventive detention ought to be and must be exercised in exceptional cases, with great deal of care, caution and circumspection and strictly as envisaged by the statutes under the preventive detention laws and nothing more.

15) We are of the opinion that only a reference to the past acts and misconducts though relevant cannot absolve the Detaining Authority from dealing with the question as to whether there is a “real possibility of the person being released on bail”. The analysis of the facts as to whether the person will really get bail or if there is a real possibility of getting bail needs to be undertaken at the first instance after which the past conduct of the Petitioner and possibility the Petitioner indulging in similar activities is to be considered or undertaken. In our opinion without considering and concluding on the aspect of “real possibility of release on bail” one cannot and should not in a matter of invoking the provisions of the preventive detention laws venture into considering the likelihood of the person indulging in similar past activities. Considering the past conduct or the “likelihood of the person indulging in similar acts” de hors of “the real possibility of being released on bail”, in our opinion is not the correct approach. A mere reproduction of the

words or phrases or a mere statement is not sufficient. The material on the basis of which or the cogent material for arriving at the conclusion that the Petitioner may be released on bail should be reflected in and be apparent in the Detention Order. The Detaining Authority has not considered the fact that the Petitioner when on bail in a NDPS matter committing a similar act, would make his chances of again getting bail extremely remote and bleak. In our opinion, given the facts of the present case, there was no immediate and or imminent possibility of the Petitioner being released on bail. In these circumstances, the preventive detention laws ought not to have been invoked. It cannot be that only one or two conditions thereof are complied with or mentioned in the Detention Order and the order is based thereon. In such cases, the “subjective satisfaction” can be called in question as some of the material or factors on which the Detaining Authority is arrived at are missing and not available.

16) In a bail application filed under the NDPS Act, the restrictions/conditions mentioned and imposed under Section 37 of the NDPS Act, are taken into consideration. Section 37 of the NDPS Act, limits the jurisdiction of the Court to grant bail which is in addition to the provisions of the Code of Criminal Procedure. The possibility of getting bail under normal circumstances is difficult. A Detention Order being passed, against a person when he is in custody in an NDPS case, has far reaching consequences as provided in the statute i.e forfeiture of the property of the detenu is

completed. More particularly in this background, at a pre-trial stage and in a preventive detention action the observations and guidelines in the case of *Kamarunnissa (Supra)* assume extreme importance and significance.

17) We have also noted that, the Detaining Authority has specifically observed that, it was in the process of taking steps to cancel the bail of the Petitioner. We note that, the Detaining Authorities conduct of issuing a Detention Order after recording that it proposes to take steps to cancel the bail speaks volumes of the intention of the Detaining Authority. We have also noted that, the Detaining Authority being aware of the available legal recourse i.e. to seek cancellation of bail and after recording its intention to do so proceeded to take steps under and invoke the preventive detention laws, a summary jurisdiction based on suspicion. The intention of the Detaining Authority, to us, is clear and that is to ensure the Petitioner remains in custody in one way or the other. From the record, it appears that after passing of the bail order, the Detaining Authority has not taken any steps to seek cancellation of the bail. When the detaining Authority records that it is moving an application for cancellation of the bail, it would also imply that the Detaining Authority is itself aware and conscious of the remedies as are available under the normal law to deal with the Petitioners case. Further, in the present case the Authorities could have sought cancellation of bail as stated by them in the Detention Order and also have the opportunity to oppose the application for bail, if any filed by the Petitioner. Considering the case from any angle, the

same does not call for invoking the provisions of the Preventive Detention laws. Under the NDPS Act, a Detention Order leads to forfeiture of property. Considering the consequences of a Detention Order, it is all the more necessary that the authorities follow the Law and the procedure in a very strict manner. The Detention Order according to us is uncalled for and a misuse of the law at the hands of the Authorities. Considering the background of the petitioner, if the Detaining Authority was apprehensive that the Petitioner would if released on bail would indulge in the similar criminal activities and therefore the Petitioner should be detained in custody, it is always open for the Detaining Authority to effectively oppose the grant of bail and if bail is granted to immediately file an application/appeal seeking cancellation of bail before the concerned court. We note that, though the same is observed in the order, as per the record no steps are taken in that regard.

18) After considering the facts and circumstances of the present case, we are of the opinion that the Detention Order does not comply with the principles as laid down by the Hon'ble Supreme Court in the case of *Kamarunnissa (supra)* in as much as it does not deal with the fact whether there a real possibility of the Petitioner being released on bail nor does it deal with the provisions of section 37 of the NDPS Act, which in our opinion was a necessary and important aspect which required consideration. Considering the overall facts and circumstances, we are of the view that the Detention Order is vitiated and cannot be sustained.

19) Hence, the following Order:

- i) Detention Order dated 26th March 2025, bearing No. F-No. U-11011/02/2025-PITNDPS, issued by Respondent No.1, is quashed and set aside.
- ii) Petition is allowed in terms of prayer clause (a).
- iii) Petitioner be released from Jail forthwith, if not required in any other case/cases, on production of an authenticated copy of this operative part of the Judgment.
- iv) Rule is accordingly made absolute in the aforesaid terms.
- v) All the concerned to act on the basis of an authenticated copy of this operative part of the Judgment.

20) In view of disposal of Petition, Interim Application No. 3583 of 2025 does not survive and is accordingly disposed off.

(RANJITSINHA RAJA BHONSALE,J.)

(A. S. GADKARI, J.)