

(2023) 01 BOM CK 0100

In the Bombay High Court

Case No : Criminal Writ Petition No. 2967 Of 2022

Jayesh Damodar Koli

APPELLANT

Vs

Commissioner Of Police & Ors

RESPONDENT

Date of Decision : 25-01-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 307, 323, 324, 504, 506(2)
Maharashtra Police Act, 1951 — Section 37(1), 135
Arms Act, 1959 — Section 4, 25

Citation : (2023) 01 BOM CK 0100

Hon'ble Judges : A.S. Gadkari, J;Prakash D. Naik, J

Bench : Division Bench

Advocate : Jayshree Tripathi, S.D. Shinde

Final Decision : Allowed

Judgement

Prakash D. Naik, J

1. Petitioner assails the Order of Detention dated 18th May, 2022 issued by Commissioner of Police, Thane under the provisions of 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 'M.P.D.A. Act'). The Petitioner was served upon the Order of Detention, grounds of detention and the documents relied upon by the Detaining Authority while issuing the Order of Detention.

2. Learned Advocate Ms. Tripathi appearing for the Petitioner submitted that the Order of Detention is bad in law. The Detaining Authority was aware that the Petitioner was already in judicial custody without availing bail in C.R. No.I-95/2022. However, the Detaining Authority has not disclosed any possibility of release on bail. The Detaining Authority has not disclosed any cogent material and facts which necessitated the making of the Detention Order. The valid Detention Order can only be passed against the detenu if the Detaining Authority is subjectively satisfied that there is real or imminent possibility of 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 released 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 what so ever. In reality Petitioner was granted bail by Sessions Court, Thane vide Order dated 30th November, 2022 i.e. after a period of about six months from date of Order of Detention.

3. Learned Advocate for the Petitioner has relied upon the following decisions :

1. Ramesh Yadav V/s. District Magistrate, Etah and Others, (1985) 4 SCC 232.
2. Kamarunnissa V/s. Union of India and another, (1991) 1 SCC 128.
3. Abdul Razak Abdul Wahab Sheikh V/s. S.N. Sinha, Commissioner of Police, Ahmedabad and another, (1989) 2 SCC 222.
4. Binod Singh V/s. District Magistrate, Dhanbad, Bihar and another, (1986) 4 SCC 416.
5. A. Shanthi (SMT) V/s. Govt. of T. N. and Others, (2006) 9 SCC 711.
6. Smt. Suman Sudhakar Jadhav V/s. The Commissioner of Police Thane & Ors., delivered by this Court in Criminal Writ Petition No. 3977 of 2017 dated 20th December, 2017.
7. Shri. Manmoorat R. Pandey V/s. The Commissioner of Police, Thane and Ors., delivered by this Court in Criminal Writ Petition No.1001 of 2022 dated 4th August, 2022.

4. Learned APP submitted that the Detaining Authority was aware about the fact that the Petitioner was in custody at the time of issuance of Order of Detention. In the grounds of detention it is stated that the Petitioner is in custody in connection with C.R. No. I-95/2022 and he has preferred an application for bail before the Court which is pending and he is in jail. It is also stated that considering Petitioner's Modus Operandi, criminal tendencies and inclinations reflected in the offences committed by him, the Detaining Authority is satisfied that after granting bail, he being a free person and in the event of he being at large, he being a criminal, is likely to indulge in activities prejudicial to the maintenance of public order, peace and tranquility in future and that with a view the prevent him from acting in such a prejudicial manner in future, it is extremely necessary to detain him under the said Act. Learned APP has also relied upon the contents of Affidavit-in-reply filed by the Detaining Authority wherein it is stated that the Petitioner has applied for bail in C.R. No.I-95/2022 and he is in jail. It shows that the Petitioner has tried to get released on bail. He is making efforts to get bail in the case. Petitioner may be granted bail under normal law of the land at any time as the offence is not compulsorily punishable with death sentence. In view of his tendencies and inclinations reflected in the

offences committed by Petitioner as stated in the grounds he is likely to indulge in activities prejudicial to the maintenance of public order.

5. From the factual analysis it is evident that the Petitioner was arrested on 17th March, 2022 in C.R. No.I-95/2022 registered with Kalwa Police Station for offence under Sections 307, 324, 323, 504, 506(2), 34 of Indian Penal Code (for short 'IPC') r/w Sections 4, 25 of Arms Act r/w Sections 37(1) and 135 of Maharashtra Police Act. Petitioner preferred an application for bail on 30th March, 2022 which was pending before the concerned Court and the Petitioner continued to be in custody. The impugned Order of Detention was issued on 18th May, 2022. Learned Advocate for the Petitioner brought to our notice that the said application for bail was ultimately allowed vide Order dated 30th November, 2022.

6. In the case of Ramesh Yadav V/s. District Magistrate, Etah and Others (supra) 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.

7. In the case of Kamarunnissa V/s. Union of India and another and connected petitions (Supra), 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 him.

8. In the case of Binod Singh V/s. District Magistrate, Dhanbad, Bihar and another (Supra), 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 his 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 these should have been made apparent.

9. In the case of A. Shanthi (SMT) V/s. Govt. of T. N. and Others (Supra), 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.

10. This Court in the case of Smt. Suman Sudhakar Jadhav V/s. The Commissioner of Police Thane & Ors. (Supra), 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.

11. From the factual analysis of the present case it is apparent that the Petitioner was arrested in C.R. No. I-95/2022 and was in custody. He preferred an application for bail which was pending. The Detaining Authority was aware that the Petitioner was in custody. The subjective satisfaction of Detaining Authority records that the Detaining Authority is satisfied that after grant of bail and in the event the Petitioner being at large, he is likely to indulge in activities prejudicial to the maintenance of public order. This is not sufficient requirement to issue the Order of Detention while the detenu is in custody. There is no debate that even in case a person is in custody a Detention Order can validly be passed. The Detaining Authority should have reason to believe on the basis of reliable material placed before him, that there is a 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 on so doing. The satisfaction of the Detaining Authority does not reflect on the reliable material placed before him to arrive at such conclusion. It is not made apparent that there was cogent material to arrive at the conclusion that the detenu might be released on bail. In the affidavit in reply the Detaining Authority has stated that the Petitioner had been making efforts to get bail and he may be granted bail under normal law of the land at any time as the offence is not punishable with death sentence. These assertions were lacking in the subjective satisfaction of the Detaining Authority. 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. Mere ipse dixit of the Detaining Authority is not sufficient to sustain the Order of Detention. The Detaining Authority has failed to record any satisfaction that there was reliable material before the authority on the basis of which there was reason to believe that the detenu is likely to be released on bail.

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

ORDER

- i. Criminal Writ Petition No. 2967 of 2022 is allowed.
- ii. Rule is made absolute.
- iii. Order of Detention dated 18th May, 2022, bearing No.TC/PD/DO/MPDA/09/2022 issued by Respondent No.1 is quashed and set aside.
- iv. Petitioner/Detenu be released from jail forthwith, unless required in any other case.