
(2020) 04 BOM CK 0017

In the Bombay High Court

Case No : Criminal Writ Petition No. 194 Of 2020

Mukesh @ Mukya Ramesh Desaiakar

APPELLANT

Vs

Vivek Phansalkar And Ors

RESPONDENT

Date of Decision : 09-04-2020

Acts Referred:

Indian Penal Code, 1860 — Section 326, 394, 504, 506
Maharashtra Police Act, 1951 — Section 37(1), 135, 142
Arms Act, 1959 — Section 4(25)
Conservation Of Foreign Exchange And Prevention Of Smuggling. Activities Act, 1974
— Section 3(3)
Constitution Of India, 1950 — Article 22, 22(5)

Citation : (2020) 04 BOM CK 0017

Hon'ble Judges : S. S. Shinde, J, V. G. Bisht, J

Bench : Division Bench

Advocate : D.S. Mhaispurkar, J.P. Yagnik,

Final Decision : Allowed/ Disposed Of

Judgement

S. S. Shinde, J

1 Rule. Rule made returnable forthwith and heard with the consent of learned counsel appearing for the parties.

2. The Petitioner / detenu has preferred this Petition questioning the preventive detention order passed on 31st October 2019 by Respondent No. 1 â?

Commissioner of Police, Thane. The said detention order has been passed under the Maharashtra Prevention of Dangerous Activities of Slumlords,

Bootleggers, Drug offenders, Dangerous persons and Video Pirates, Sand Smugglers and persons engaged in Black-marketing of Essential

Commodities Act, 1981 (hereinafter referred to as â??MPDA Actâ??). The said detention order has been issued as the according to the detaining

authority, Petitioner / Detenu is a Dangerous person whose activities are prejudicial to the maintenance of public order. The detention order is based on three Crimes i.e. I-196/2019 dated 12th May, 2019 registered with Khadakpada Police Station for the offences punishable under Sections 326, 504, 506, of Indian Penal Code read with Section 142 of the Maharashtra Police Act, C.R. i.e. II-320/2019 dated 10th September, 2019 registered with Khadakpada Police Station for the offences punishable under Sections 4 (25) of Arms Act read with Section 37 (1), 135 of Maharashtra Police Act and C.R. I-355/2019 dated 16th October, 2019 registered with Khadakpada Police Station for the offences punishable under Sections 394 of the Indian Penal Code read with Sections 37(1), 135 of Maharashtra Police Act, and two in-camera statements of witnesses A and B recorded on 05-09-2019 and 19-08-2019 respectively.

3. Though the number of grounds have been raised in the present petition whereby the detention order has been assailed, however, the learned counsel appearing for the Petitioner has pressed following grounds before us i.e. ground Nos. C, D, E, F, H, I, J, K, L, O, P and S. Those grounds are reproduced herein below in verbatim.

C. That the detenu was arraigned as an accused in CR No. I 196/2019 registered at Khadakpada Police Station, Kalyan on 12.05.2019 and was arrested on 13.05.2019 and was released on bail vide order dated 17.06.2019. The statements of in-camera witnesses were recorded on 5.9.2019 & 19.8.2019, those statements of in-camera witnesses were verified by the concerned ACP on 5.10.2019. The detenu was thereafter arraigned as an accused in CR No. II 320/2019 registered at Khadakpada Police Station, Kalyan on 10.9.2019 and was arrested and released on bail vide order dated 10.9.2019. The detenu was thereafter arraigned as an accuse in C.R. No. I 355 of 2019 registered in Khadakpada Police Station Kalyan on 16.10.2019 wherein the detenu was arrested on 17.10.2019. The detenu had filed bail application in the Sessions Court, Kalyan, which was adjourned for hearing to 2.11.2019 vide order dated 23.10.2019. Thereafter the present order of detention was issued by the Detaining Authority on 31.10.2019, by relying upon the documents running into about 204 pages. The last document placed before the Detaining Authority was dated 23.10.2019, as such

it was virtually impossible for the Detaining Authority to issue the detention order on 31.10.2019, after applying his mind and arriving at his subjective satisfaction and also to serve the same after getting the papers translated on 31.10.2019, due to paucity of time. Therefore the Detaining Authority has issued the detention order mechanically and without application of mind. The impugned order of detention as issued is thus, per se punitive in character rather than preventive in nature. The impugned order of detention is thus malafide null and void.

D. That it appears that the Detaining Authority has not formulated the grounds by himself, and has issued the order of detention on the basis of the grounds already formulated by the Sponsoring Authority or has merely copied the proposal as forwarded by the Sponsoring Authority.

E. That the impugned order of detention was thus issued hurriedly, mechanically, without application of mind and if the Detaining Authority has not formulated the grounds himself, then in that case, the subjective satisfaction arrived at by the Detaining Authority is rendered sham and not genuine and on account of the aforesaid reason by itself, the order of detention is rendered ipso facto malafide, null and void.

F. That on perusal of sub para of para 7 of the grounds of detention, more particularly the wordings and language used therein it is apparent that the Detaining Authority has issued the order mechanically and without application of mind and without formulating the grounds by himself but has merely signed the grounds prepared by his subordinate officer or has merely copied the proposal.

H. That assuming without admitting that the Detaining Authority had himself scanned all the documents and the entire material, and had himself formulated the grounds of detention; it is enjoined upon the Detaining Authority to disclose to this Honâ??ble Court as to whether the Detaining Authority had considered all the documents and the entire material together at one and the same time. That it is accordingly enjoined upon the Detaining Authority to disclose to this Honâ??ble Court as to on which date the Detaining Authority received the proposal for the detention of the detenu and as to how many documents were received by the Detaining Authority along with the proposal. That it is further enjoined upon the Detaining Authority to disclose to this Honâ??ble Court as to whether the Detaining Authority had received any additional documents after he had

received the documents initially along with the proposal and if so, when and which documents, the Detaining Authority had so received, at a later date or dates. That if the Detaining Authority had formulated the grounds of detention by considering some of the documents from amongst the total number of documents (Annexure â? D) as listed in the list of documents then it is further enjoined upon the Detaining Authority to disclose to this Honâ?ble Court as to whether after the receipt of the additional documents at a latter date, the Detaining Authority had rescinded the grounds of detention which were earlier formulated and whether the Detaining Authority had reformulated the grounds of detention once again by reconsidering the documents already considered along with the additional documents received at a later date or dates together at once and the same time. That the Detaining Authority could not have issued the impugned order of detention by considering piecemeal the documents purported to have been placed before him. That unless the Detaining Authority had carried out such an exercise as stated above; the impugned order of detention cannot be said to have any sanctity in law. The impugned order of detention, in the absence of carrying out such an exercise, is per se malafide and ab-initio null and void. That such an exercise if was so carried out, it is incumbent upon the Detaining Authority to place before this Honâ?ble Court the relevant contemporaneous record to ascertain and verify as to whether such an exercise was so carried out and on the failure of the Detaining Authority to place before this Honâ?ble Court such record, an adverse inference be drawn against the Detaining Authority and the impugned order of detention in that case be held as malafide and ab-initio null and void.

I. That although the Detaining Authority has in detail narrated about past prejudicial activities of the detenu, in para 2 and 3 of the grounds of detention, however, neither there is any supporting material placed before the Detaining Authority nor was any such material supplied to the detenu.

Thereby the order of detention suffers from vice of non-application of mind for having considered extraneous material, which has influenced the mind of the Detaining Authority and the detenu was also deprived of his right to make effective representation at an earliest opportunity.

J. That in para 3 of the grounds of detention the Detaining Authority has made reference to the earlier criminal cases registered against the detenu

and the preventive action taken in past. Thereafter the Detaining Authority has stated that contents of para 2 & 3 are preamble introduction to the grounds of detention and the facts mentioned in para 2 & 3 were not relied upon by the Detaining Authority while forming his subjective satisfaction to issue the present order of detention. However from perusal of the subjective satisfaction as recorded by the Detaining Authority in para 8 and 9 of the grounds of detention, it is amply clear that the Detaining Authority has not only referred to and relied upon but also got influenced by the result of the preventive action taken against the detenu in past. Therefore the Detaining Authority ought to have supplied the detenu all the material referred and relied upon by the Detaining Authority, while arriving at its subjective satisfaction about preventive action taken against the detenu in past, which has resulted in depriving the detenu of his right to make effective representation at an earliest opportunity and it also discloses non application of mind on the part of the Detaining Authority.

K. That the Detaining Authority failed to appreciate that the proposal was moved with the malafide intention and the statements of in camera

witnesses are untrue and were recorded with malafide intention so as to enable to issue the detention order after the detenu was arrested and released

on bail in C.R. Nos. 196/2019. Therefore the order of detention has been issued by the Detaining Authority mechanically without application of mind.

The impugned order of detention as issued is, thus, per se punitive in character rather than preventive in nature. The impugned order of detention is

thus malafide null and void.

L. That the Detaining Authority has recorded in para 5 of the grounds of detention that "After considering the seriousness of the aforesaid crimes,

Senior Police Inspector of Khadakpada Police Station, Thane conducted confidential enquiry of criminal activities of the detenu pursuant to which

statements of two in-camera witnesses were recorded on 5.9.2019 and 19.8.2019. However the second ground viz. CR No. II 320/2019 was

registered at Khadakpada Police Station, Kalyan on 10.9.2019 and third ground viz. criminal case registered against the detenu at Khadakpada Police

Station was registered vide C.R. No. I-355/2019 in respect of incident dated 16.10.2019. Therefore the satisfaction of the Detaining Authority that

after noticing the involvement of the detenu in the incidents as mentioned in

grounds, the Sponsoring Authority made confidential enquiry and pursuant to which the statements of in-camera witnesses were recorded, discloses non-application of mind on the part of the Detaining Authority and that the in-camera statements are untrue, false and bogus statements recorded only for the purpose of enabling the Detaining Authority to issue the detention order.

O. That the Sponsoring Authority while forwarding the proposal did not place before the Detaining Authority the detailed order dated 17.6.2019

passed by the Ld. Sessions Judge Kalyan, granting me bail in C.R. No. 196 of 2019 but forwarded only the operative part, even though the Sponsoring

Authority forwarded earlier order dated 22.5.2019 rejecting bail application along with its translation. The detailed order passed by the Ld. Sessions

Judge, Kalyan while releasing the detenu was a vital piece of evidence and the same out to have been forwarded to the Detaining Authority and the

Detaining Authority ought to have called for it and perused the same.

P. That failure on the part of the Detaining Authority to refer and rely upon copy of the order dated 17.6.2019 has impaired his subjective satisfaction

for want of considering the vital document and non-application of mind and failure to supply copy of the order dated 17.6.2019 has also deprived of the

detenu of his right to make effective representation at an earliest opportunity.

S. That since at the time of the issuance of the detention order the detenu was in custody, the Detaining Authority has failed to record his satisfaction

that the detenu was likely to be released on bail therefore the order of detention was unwarranted and discloses non application of mind on the part of

the Detaining Authority and the casual and cavalier manner in which the Detaining Authority has issued the detention order. The order of detention is

thus issued mechanically and hence liable to be quashed and set aside.

4 The gist of the aforesaid grounds raised by the Petitioner in the present Writ Petition is that the Detaining Authority has issued the order of detention

mechanically and without application of mind. It is also the case of the Petitioner that the order of detention has been issued on the basis of the

grounds already formulated by the Sponsoring Authority, and therefore the subjective satisfaction arrived at by the Detaining Authority is not genuine.

That the Detaining Authority did not carry out exercise of considering all the documents and entire material together at one and the same time. There

was no supportive material placed before the Detaining Authority. The Detaining Authority has relied upon and referred to the preventive action taken

against him in past, and therefore, the Detaining Authority ought to have supplied the detenu all the material referred to and relied upon by the

Detaining Authority while arriving at subjective satisfaction which has resulted in depriving the detenu of his right to make effective representation.

That two statements recorded in-camera are bogus and recorded only for the purpose of enabling the Detaining Authority to issue the detention order.

That since at the time of issuance of detention order, the Petitioner was in custody and likely to be released on bail, therefore the order of detention

was unwarranted.

5 The learned counsel appearing for the Petitioner relying upon the aforesaid Grounds submits that there was non-application of mind by the Detaining

Authority while passing the order of detention; the alleged in-camera statements are fabricated and not properly verified by the Detaining Authority. It

is further submitted that the Detaining Authority consider all the documents and material placed on piecemeal basis and the right of the Petitioner to

make representation has been deprived of. He also submits that the Detaining Authority has got influenced by the result of the preventive action taken

against the Petitioner in past. In support of the aforesaid contentions, the learned counsel appearing for the Petitioner relied upon the following

judgments :- 1] Tahira Haris & others v/s Government of Karnataka & others(2009) 11 SCC page 438Â 2] Kirti Kumar Chamanlal Kundaliya v/s

Union of India(1981) 2 SCC 436 3] Shalini Soni v/s. Union of India(1980) 4 SCC 549Â 4] Union of India v/s. Paul Manicam & Anr. (2003) 8 SCC

342Â 5] Baba @ Ramjan Rukmoddin Shaikh v/s. The Commissioner of Police & ors (order dated 06/02/2013 in Writ Petition No.3941 of 2012), 6]

Lakhan Rohidas Jagtap v/s. The Commissioner of Police, Pune (order dated 19/11/2019 in Writ Petition No.3018 of 2019) 7] Narendra @ Chotya

Balkawade v/s. The Commissioner of Pune and ors (order dated 09/01/2020 in Writ Petition No.6041 of 2019) 8] Md. Ishaq MD. Ismail Shaikh v/s.

Sanjay Barve (order dated 28/02/2020 in Writ Petition No.133 of 2020.

5 On the other hand, learned APP appearing for the Respondents/State invites attention of this Court to the order of detention so also the grounds and

the replies filed by the respective Respondents/Authorities and submits that the

Detaining Authority after proper application of mind has passed the impugned order of detention. It is submitted that after proper inquiry and following the procedure of law, the in-cameras of the witnesses have been recorded. He submits that the Detaining Authority has properly considered the material and documents placed before it and after application of mind the Detaining Authority has passed the order of detention. In support of the aforesaid contentions, the learned APP has relied upon the following judgments :- 1] Abdul Sattar Abdul Kadar Shaikh v/s. Union of India and others(1990) 1 SCC 480Â 2] Vicky Satyawar Chavan @ Barkya v/s. The Commissioner of Police, Mumbai and ors. (Order dated 15/01/2020 in Writ Petition No.5800 of 2019), 3] Lakhan Rohidas Jagtap v/s. The Commissioner of Police and ors. (order dated 19/11/2019 in Writ Petition No.3018 of 2019).

7 We have given careful consideration to the rival submissions. With the able assistance of the learned counsel appearing for the Petitioner and the learned APP appearing for the Respondents/State, we have carefully perused pleadings in the Petition and specifically the grounds â??Câ??, â??Dâ??, â??Eâ??, â??Fâ??,â??Hâ??, â??Iâ??, â??Jâ??, â??Kâ??, â??Lâ??, â??Oâ??, â??Pâ?? and â??Sâ?? raised by the learned counsel for the Petitioner.

8 So far ground (c) raised in the petition is concerned, the first respondent has filed affidavit in reply and admitted that the last document submitted before the detaining authority i.e. the first respondent was on 23rd October 2019 and the order of detention was passed on 31st October 2019, but it is denied that it was virtually impossible for the first respondent to issue the detention order on 31st October 2019 due to short time i.e. one week to apply his mind. It appears from the reply filed by the first respondent and documents placed on record that there was one week time to the detaining authority to apply his mind. Therefore, there is no substance in the argument of counsel for the petitioner that it was virtually impossible for the detaining authority to issue the detention order on 31st October 2019 since the last document was placed before him on 23rd October 2019. There was sufficient time to the first respondent to apply his mind.

9 As far ground (d) in the petition is concerned, the first respondent has stated in reply that after proper application of mind, the detaining authority has

formulated the grounds and the said grounds formulated by him have not been copied from the proposal received from the sponsoring authority. In our opinion, it cannot be said that the detaining authority has copied the grounds from the proposal received from the sponsoring authority without application of mind. We also do not agree with the contention of the counsel for the petitioner that the first respondent has hurriedly passed the impugned order of detention mechanically and without application of mind.

10 We have carefully perused grounds (d), (e), (f) and (h) in the petition and those grounds needs no consideration since we are of the opinion that the first respondent has passed the order of detention after proper application of mind. However, it appears that the sponsoring authority while forwarding the proposal to the first respondent i.e. detaining authority did not place detailed order stating the reasons while granting bail to the detenu in C.R. No.

196 of 2019. It appears from the perusal of the original record and reply filed by the respondents that the proposal submitted by the sponsoring authority did not contain the copy of the reasoned order dated 17th June 2019 passed by the Sessions Judge, Kalyan, granting bail to the detenu in C.R.No.196 of 2019. It appears that only operative part of the said order was forwarded by the sponsoring authority to the detaining authority. The detail order passed by the learned Sessions Judge, Kalyan while releasing the detenu was a wider piece of evidence and ought to have been forwarded to the detaining authority by the sponsoring authority.

11 The Supreme Court in the case of Rushikesh Tanaji Bhoite Vs. State of Maharashtra (Criminal Appeal No.24/2012 decided on 4th January 2012) has taken a view that full text of order granting bail in favour of the detenu was necessary to be placed before the detaining authority so as to facilitate him to take an appropriate decision thereby recording the subjective satisfaction. Therefore, we are of the view that the order of detention impugned in the petition cannot be legally sustained.

12 Upon perusal of order of detention and the grounds of detention it appears that detaining authority has relied upon the material about the past preventive action, however the copies of said material/documents were not supplied to the detenu.

13 The Honâ??ble Supreme Court in the case of Thahira Haris and ors Vs. Government of Karnataka and ors decided on 15th April 2009 in

paragraph 31 observed that, on proper construction of clause(5) of Article 22 of the Constitution of India read with Section 3(3) of the COFEPOSA

Act, it is imperative for valid continuance of detention that the detenu must be supplied with all documents, statements and other materials relied upon

in the grounds of detention.

14 In the present case, documents in relation to past preventive action were not supplied to the detenu and the detenu was prevented from making

effective representation which violated his constitutional right under clause (5) of Article 22 of the Constitution. In that view of the matter, following

order is passed :-

ORDER

1 Writ Petition is allowed. The impugned order of detention bearing No. TC/PD/DO/MPDA/10/2019 dated 31/10/2019 is quashed and set aside.

2 Detenu Mukesh @ Mukya Ramesh Desaikar shall be released forthwith unless required in any other case.

3 Writ Petition is allowed to the above extent. Rule is made absolute as above. Writ Petition is disposed of accordingly.

4 Parties shall act on ordinary copy of this order.