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**HIGH COURT OF MADHYA PRADESH,
PRINCIPAL SEAT AT JABALPUR**

Case No.	W.P. No.9799/2021
Parties Name	Rajeev Kumar Jain Vs. State of Madhya Pradesh and others
Date of Order	28/07/2021
Bench Constituted	Division Bench: Justice Prakash Shrivastava Justice Vishal Dhagat
Judgment delivered by	Justice Prakash Shrivastava
Whether approved for reporting	Yes.
Name of counsels for parties	Shri Veer Kumar Jain, learned senior counsel with Shri Anurag Gohil, counsel for the petitioner. Shri A.P.Singh, learned Deputy Advocate General for the State.
Law laid down	If the detenu is in custody at the time of passing the detention order then it is necessary for the Detaining Authority to mention this fact in the detention order and also consider the prospects of release of the detenu on bail and apprehension that the detenu would indulge in prejudicial activities in case of his release on bail. The non-application of mind by the Detaining Authority or non-recording of satisfaction in this regard vitiates the detention order. If the detenu is in jail then the compelling necessity justifying the detention must be reflected to sustain the order.
Significant paragraph numbers	Paras 8 to 17

ORDER
(28.07.2021)

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Per: Prakash Shrivastava, J.

By this petition, the petitioner has challenged the order dated 3.5.2021 passed by the District Magistrate, Satna, for his detention under section 3(1) of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980. The petitioner has also challenged the order dated 10.5.2021 passed by the State Govt. approving the detention order dated 3.5.2021.

2. The case of the petitioner is that he is running business with the trade name of M/s Vindhya Engineering Company at Rewa and Satna and also having GST registration certificate. The FIR No.595/2021 was lodged against the petitioner in Police Station Kolgawan, Satna, on 2.5.2021 alleging commission of offence under section 420 of the I.P.C., section 53 and 57 of the Disaster Management Act, 2006, section 3 of the Epidemic Diseases Act, 1897, section 3 and 7 of the Essential Commodities Act, 1955 and section 5 and 13 of the M.P. Drugs Control Act, 1949. The FIR has been registered on the basis of the written complaint of Drug Inspector, Satna, alleging that the petitioner who is the Manager of M/s Vindhya Engineering Company had illegally stocked oxygen cylinders in his warehouse and was selling oxygen cylinders at higher price to the general public. The raid in the premises of the petitioner was conducted and oxygen cylinders along with LPG cylinders were seized and thereafter the impugned detention order dated 3.5.2021 was passed by the respondent no.2. Aggrieved with the same, the petitioner had preferred the representation before the respondent no.1. It is alleged that the said representation was not considered.

3. The respondents have filed their reply disclosing that on 2.5.2021 the Drug Inspector had submitted the application

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that the petitioner did not possess valid licence for possession of non-metal oxygen medical grade. Thereafter, the petitioner's godown was inspected and 571 jumbo oxygen cylinders, 90 small oxygen cylinders and 28 LPG cylinders were seized from the godown of the petitioner and accordingly the FIR was registered. The Sponsoring authority S.P. Satna vide report dated 3.5.2021 had informed the District Magistrate, Satna, to initiate proceedings of preventive detention under the Act of 1980. Thereafter, the detention order was passed and the grounds of detention along with the material particulars were served upon the petitioner on 4.5.2021 and receipt was obtained. The detention order was communicated to the State Govt. and the State Govt. had approved it on 10.5.2021. The State Govt. had placed the preventive detention case of the petitioner before the Advisory Board in the virtual meeting held on 8.6.2021 and the Advisory Board had opined that there exists sufficient cause for detention of the petitioner and the order dated 10.5.2021 was passed by the State Govt. approving the order of detention and by the order dated 14.6.2021 passed under section 12(1) of the Act it was mentioned that the detention period will be from 4.5.2021 to 3.8.2021 for three months.

4. The main contention of learned counsel for the petitioner is that the FIR was registered and the petitioner was taken in custody on 2.5.2021 and at the time of passing the detention order the petitioner was already in custody and the fact that the petitioner was in custody and his likelihood of release on bail has not been considered by the detaining authority, therefore, the order of detention suffers from non-application of mind. He has further submitted that the representation of the petitioner has not been considered by the State Govt. as the order of approval dated 10.5.2021 does

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not even mention the petitioner's representation and that the petitioner's representation has also not been placed before the Advisory Board. He has also submitted that the petitioner has no criminal antecedents and all oxygen cylinders were empty and oxygen cylinders are not the essential commodities. In support of his contention he has relied on various judgments.

5. Opposing the prayer, learned counsel for the State has referred to Schedule 1 of the National List of Essential Medicines, 2015, and has submitted that the oxygen is covered in the said list and referring to the order dated 25.4.2021, annexure R/11, he has submitted that the use of liquid oxygen was allowed by the Government only for medical purposes keeping in view the Covid 19 Pandemic. He has submitted that the complaint was received against the petitioner that he was selling the oxygen at an exorbitant rate, therefore, the raid was conducted and oxygen cylinders were seized and these cylinders were filled cylinders except 20 empty LPG cylinders. He has further submitted that there is no proof of dispatch of representation by the petitioner.

6. We have heard the learned counsel for the parties and perused the record. The order of detention has been passed under section 3 of the Act of 1980 which reads as under :-

“3. Power to make orders detaining certain persons.—(1) The Central Government or a State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person that with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community it is necessary so to do, make an order directing that such person be detained. *Explanation.*—For the purposes of this subsection, the expression “acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community” means—

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(a) committing or instigating any person to commit any offence punishable under the Essential Commodities Act, 1955 (10 of 1955), or under any other law for the time being in force relating to the control of the production, supply or distribution of, or trade and commerce in, any commodity essential to the community; or

(b) dealing in any commodity—

(i) which is an essential commodity as defined in the Essential Commodities Act, 1955 (10 of 1955), or

(ii) with respect to which provisions have been made in any such other law as is referred to in clause (a),

with a view to making gain in any manner which may directly or indirectly defeat or tend to defeat the provisions of that Act or other law aforesaid.

(2) Any of the following officers, namely:—

(a) District magistrates;

(b) Commissioners of Police, wherever they have been appointed, may also, if satisfied as provided in sub-section (1), exercise the powers conferred by the said sub-section.

(3) When any order is made under this section by an officer mentioned in sub-section (2), he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless in the meantime it has been approved by the State Government:

Provided that where under section 8 the grounds of detention are communicated by the authority making the order after five days but not later than ten days from the date of detention, this sub-section shall apply subject to the modification that for the words “twelve days”, the words “fifteen days” shall be substituted.

(4) When any order is made or approved by the State Government under this section or when any order is made under this section by an officer of the State Government not below the rank of Secretary to that Government specially empowered under sub-section (1), the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order.

7. The first and foremost ground of challenge raised by the counsel for the petitioner is that the Detaining authority had not applied its mind about the custody and possibility of release of the petitioner. The plea of the petitioner that at the

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time of passing of the detention order, the petitioner was in custody has not been disputed by the counsel for the respondents. A minute perusal of the detention order dated 3.5.2021 as also the grounds of detention clearly reveal that there is no mention of the fact in the said detention order that the petitioner was in custody and that he had applied for bail or there is his possibility of being release on bail.

8. The Supreme Court in the matter of **Rameshwar Shaw Vs. District Magistrate, Burdwan and another**, reported in AIR 1964 SC 334, in a case where an order of detention was passed under section 3(1) of the Preventive Detention Act, 1950, when the petitioner was in custody has held that in such a case the satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner was clearly absent.

9. In the matter of **Vijay Kumar Vs. State of Jammu & Kashmir and others**, reported in (1982)2 SCC 43, it has been held that if the detenu is already in jail for an alleged criminal offence when detention order was passed then the order must have clear mention of this fact and indicate that such detention was not sufficient to prevent the detenu from the prejudicial activities covered by the preventive detention law.

10. In the matter of **Binod Singh Vs. District Magistrate, Dhanbad, Bihar and others**, reported in (1986)4 SCC 416, it has been held that if the detenu was already in jail at the time of service of the order and the detenu is released or prospects of his imminent release are not considered then the continued detention is illegal on the ground of non-application of mind to the relevant factors even if the detention is otherwise found to be justified.

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11. In the matter of **Smt. Shashi Aggarwal Vs. State of U.P. and others**, reported in (1988)1 SCC 436, Hon'ble the Supreme Court has held that if the detenu is already in jail then mere possibility of his release on bail is not enough for preventive detention. The material justifying apprehension that detenu would indulge in prejudicial activities in case of his release on bail is essential.
12. In the matter of **N.Meera Rani Vs. Government of Tamil Nadu and another**, reported in (1989)4 SCC 418, it is held that if a detenu is already in jail then the absence of detaining authority's satisfaction about likelihood of detenu's release on bail renders the detention order invalid in given facts.
13. In the matter of **Dharmendra Suganchand Chelawat Vs. Union of India and others**, reported in (1990)1 SCC 746, it is held that if the detenu is already in jail then the awareness of the detaining authority to this fact and compelling necessity justifying the detention must be shown to sustain the order.
14. In the matter of **Union of India Vs. Paul Manickam and another**, reported in (2003)8 SCC 342, the Hon'ble the Supreme Court has reiterated the principles which is required to be followed when the detenu is in custody and has held as under :-

“14. So far as this question relating to the procedure to be adopted in case the detenu is already in custody is concerned, the matter has been dealt with in several cases. Where detention orders are passed in relation to persons who are already in jail under some other laws, the detaining authorities should apply their mind and show their awareness in this regard in the grounds of detention, the chances of release of such persons on bail. The necessity of keeping such persons in detention under the preventive detention laws has to be clearly indicated. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention,

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and the decision in this regard must depend on the facts of the particular case. Preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order or economic stability, etc. ordinarily, it is not needed when detenu is already in custody. The detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order. If the detaining authority is reasonably satisfied with cogent materials that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time, he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made. Where the detention order in respect of a person already in custody does not indicate that the detenu was likely to be released on bail, the order would be vitiated. (See *N. Meera Rani v. Govt. of Tamil Nadu*, (1989)4 SCC 418, *Dharmendra Suganchand v. Union of India*, (1990)1 SCC 746). The point was gone into detail in *Kamarunnissa v. Union of India*, (1991)1 SCC 128 . The principles were set out as follows : even in the case of a person in custody, a detention order can be validly 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 release on bail, and (b) that on being released, he would in all probability indulge in prejudicial activities, and (3) if it is felt essential to detain him to prevent him from so doing. If an order is passed after recording satisfaction in that regard, the order would be valid. In the case at hand the order of detention and grounds of detention show an awareness of custody and/or possibility of release on bail”.

15. In the matter of ***Yunman Ongbi Lembi Leima Vs. State of Manipur and others***, reported in (2012)2 SCC 176, it is held that the Detaining authority’s satisfaction must be on proper appreciation of facts about likelihood of detenu’s release on bail and necessity of his detention to prevent him from indulging in prejudicial activities in view of his antecedent activities of proximate nature.

16. In the matter of ***Huidrom Konungjao Singh Vs. State of Manipur and others***, reported in (2012)7 SCC 181, it is held that if the detenu is already in jail then the order of detention can be passed if : (1) it is based on facts relating

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to detaining authority's knowledge of detenu's custody, (2) real possibility of detenu's release on bail, and (3) necessity of preventing him from indulging in activities prejudicial to security of State and maintenance of public order upon his release on bail.

17. From the aforesaid pronouncements it is clear that if the detenu is in custody at the time of passing the detention order then it is necessary for the Detaining Authority to mention this fact in the detention order and also consider the prospects of release of the detenu on bail and apprehension that the detenu would indulge in prejudicial activities in case of his release on bail. The non-application of mind by the Detaining Authority or non-recording of satisfaction in this regard vitiates the detention order. If the detenu is in jail then the compelling necessity justifying the detention must be reflected to sustain the order.

18. Examining the present case in the light of the aforesaid pronouncements, we clearly find that the order of detention suffers from non-application of mind by the Detaining Authority as the petitioner was undisputedly in custody at the time of passing of the detention order; but, the Detaining Authority has not applied its mind to this fact and has also not applied its mind to the possibility of the petitioner being release on bail.

19. Counsel for the petitioner has also raised an issue that the petitioner's representation has not been considered by the State Govt.

20. The representation of the petitioner to the State Govt. is dated 10.5.2021, annexure P/4. During the course of arguments learned counsel for the respondents has denied the receipt of any such representation by submitting that there is

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no proof of dispatch of the representation. This being a disputed question of fact need not be gone into in this petition.

21. So far as the adequacy and sufficiency of material for passing the impugned order is concerned, that is also not open to scrutiny by this Court.

22. Hence, we are of the opinion that the impugned order cannot be sustained and is liable to be set aside on the solitary ground of non-application of mind by the Detaining Authority while passing the detention order in respect to the fact that the petitioner was already in custody at that time and his possibility of being release on bail. Thus, writ petition is **allowed** and the impugned detention order dated 3.5.2021 and the order of the State Govt. dated 10.5.2021 affirming the detention order are set aside.

(PRAKASH SHRIVASTAVA)
JUDGE

(VISHAL DHAGAT)
JUDGE

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