

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 1122 OF 2017

Mohammed Mustafa s/o
Mohammad Mastan
Age-26 years, Occ. Nil,
R/o. Jahangir Colony,
Aurangabad.

... **Petitioner**

Versus

1. The State of Maharashtra
Through the Commissioner of Police,
Division Aurangabad.
2. The Secretary,
Home Department ,
Mantralaya, Mumbai.

... **Respondents**

Mr. U.B. Jogdand Patil, Advocate for the Petitioner.
Mr. V.M. Kagne, A.P.P. for the Respondent/State.

**CORAM : S.S. SHINDE &
MANGESH S. PATIL, JJ.**

**DATE OF RESERVING THE JUDGMENT : 15.11.2017
DATE OF PRONOUNCING THE JUDGMENT : 04.12.2017**

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JUDGMENT: (*Per Mangesh S. Patil, J.*)

. Rule. Rule is made returnable forthwith. With the consent of both the sides the matter is heard finally.

2. This is a petition under Article 226 and 227 of the Constitution of India read with Section 482 of Cr.P.C. for quashing and setting aside the order passed by the learned Commissioner of Police, Aurangabad in case no. D.O.2017/MPDA/DET-3/CB-31 dated 30.06.2017 under the provisions of Section 31 of the Maharashtra Preventive Detention Act, 1970 and under Section 3(1) of the Maharashtra Prevention of Dangerous Activities of Slumlord, Bootleggers, Drug-offenders, Dangerous Persons, Video Pirates, Sand Smugglers and Persons Engaged in Black Marketing of Essential Commodities Act, 1981 (hereinafter referred to as the MPDA Act). Similarly he is challenging the order passed by the State Government approving the detention and directing him to be detained for a period of twelve (12) months on the basis of the report submitted by the advisory board constituted under the MPDA Act.

3. Shortly stated the impugned orders have been passed on various grounds justifying the conclusion that the petitioner is a dangerous person within the meaning of the MPDA Act. In support of such conclusion the following facts are stated to have weighed with the Commissioner of Police, Aurangabad and the State Government. There are as many as seven criminal cases pending trial against him for variety

of serious charges like attempt to murder, kidnapping and abduction, robbery and breach of the order of externment passed under the Maharashtra Police Act, 1951. In spite of preventive measures in the form of institution of chapter case under Section 110 of the Cr.P.C. And the order of exterment under the provisions of Maharashtra Police Act, the anti-social activities of the petitioner have not abated. On the contrary his such activities are on the rise. In-camera statements of couple of witnesses were also recorded and the Commissioner of Police, Aurangabad after having been satisfied with the material collected and mentioned herein-above, by the impugned order (Exhibit-A) directed the petitioner to be detained under the provisions of Section 3(1) of the MPDA Act.

4. The case of the petitioner was further considered by the advisory board constituted under Section 9 of the MPDA Act and on its advise, the State Government by the impugned order dated 18.08.2017 directed detention of the petitioner to continue for a period of one year from the date of detention by invoking the powers conferred on it under Section 12(1) of the MPDA Act.

5. Hence this writ petition.

6. We have heard the learned Advocate for the petitioner. According to him, the basic vice from which the impugned orders suffer is the fact that the inquiry seems to have been completed by the Deputy Commissioner of Police, Aurangabad when under the powers conferred under Section 3(1) of the MPDA Act, the Commissioner of Police himself should have inquired into and should have reached the subjective satisfaction about the petitioner being a dangerous person. He having not done so, the impugned order passed by him is not sustainable in law. The learned Advocate further submitted that the maximum period for which the petitioner could have been directed to be detained is only six months and the impugned order of the State Government directing his detention beyond the period of six months is illegal. Learned Advocate submitted that though it has been mentioned in the grounds of detention furnished to him while passing the impugned order the Commissioner of Police, Aurangabad had not supplied him the copies of the statements of the witnesses recorded in-camera and the petitioner was deprived of an opportunity to verify those statements. The learned Advocate lastly submitted that the grounds are not sufficient for a man of ordinary prudence to reach a conclusion to which the Commissioner of Police had reached.

7. The Commissioner of Police has contested the petition by his affidavit in reply (page 21) and also additional affidavit in reply (page 34). Based on the statements in these affidavits the learned A.P.P. vehemently opposed the writ petition. He submitted that though the inquiry was conducted by the Deputy Commissioner of Police that would not *ipso facto* be sufficient to conclude that the respondent no.1- Commissioner of Police has not applied his mind or has not verified the material collected during the course of inquiry. The learned A.P.P. submitted that it is only after a careful scrutiny of all the grounds, the Commissioner of Police having been satisfied about sufficiency of ground has reached a conclusion that the petitioner is a dangerous person within the meaning of the MPDA Act. The Commissioner of Police has only taken the help of a subordinate officer in conducting the inquiry leading to the passing of the impugned order. It would not make the impugned order invalid. The learned A.P.P. thus prayed to dismiss the writ petition. Lastly, he also relied upon the judgment of the Division Bench of this Court to which one of us was party (Coram: S.S. Shinde, J.) in **Criminal Writ Petition No. 1698 of 2016 Tushar s/o Rajansingh Rajpur V/s. State of Maharashtra and Ors. dated 03.04.2017** and also a decision of another Division Bench of this Court to which the brother Judge was again a party in the case of **Shaikh Hafiz Shaikh Yusuf V/s.**

The Commissioner of Police and Ors; Criminal Writ Petition No. 561 of 2017 dated 09.10.2017.

8. At the outset, it is necessary to note that the very object of providing for the remedy of preventive detention of a person under Section 3 of the MPDA Act is to detain a person whose activities are likely to be prejudicial to the public peace and order. Taking in to account, the object of such power what is necessary for a competent authority is to arrive at a satisfaction reached on the basis of objective material collected and it would not be enough to reach a subjective satisfaction alone. Bearing in mind the object of providing for this power, in our considered view takes out from the judicial purview sufficiency or otherwise of the grounds which weigh with the authorities in directing preventive detention. In our view, therefore each of those grounds cannot independently be scrutinized and are not justiciable in view of Section 5-A of the MPDA Act *per se*.

9. Taking up over all view, it is apparent that admittedly as many as seven criminal cases are pending against the petitioner for serious offences like attempts to murder, kidnapping and abduction, robbery etc. First of all those offences were registered way back in the year 2011 and last of the offences has been registered in the current

year i.e. 2017. One case for the offence punishable under Section 307 of the I.P.C. was registered in the year 2013. In the year 2014 he is alleged to have breached the externment order. Again in the year 2015 he was involved in a case on the allegations of attempt to murder punishable under Section 307. In the year 2016 another case under the Arms Act was registered. The sequence of such offences being registered against the petitioner speaks in volume about his persistent behavior over a long period of more than six years. It is also apparent that inspite of couple of preventive actions in the form of registration of a chapter case in the year 2015 and the order of externment passed under the Maharashtra Police Act, 1951 in the year 2014 in the intervening period there seems to be no change in the attitude and behavior of the petitioner. Therefore on the face of it we find no sufficient and cogent reason to reach to a different conclusion than the one reached by the learned Commissioner of Police while holding the petitioner to be a dangerous person.

10. More importantly, it is pertinent to note that the petitioner nowhere in the petition has even attributed any *mala fides* on the part of respondent no.1-Commissioner of Police or for that matter any other official of the State Government about having any ulterior

motive/intention in wrongfully and intentionally causing the impugned orders to be passed. Therefore, even for this reason we see no sufficient ground or reason to discard the conclusion drawn by the respondent no.1.

11. As regards the recording of the statement of witnesses (A and B) in-camera is concerned, a careful perusal of the original record reveals that those statements were verified by the Deputy Commissioner of Police by putting up a specific endorsement. The statements also bear endorsement of Commissioner of Police specifically mentioning that the statements of the witnesses were seen by him and the apprehension expressed by them against the petitioner were true and reasonable. Consequently, it cannot be said that the respondent no.1-Commissioner of Police has not arrived at subjective satisfaction after application of mind.

12. As regards objection of not furnishing the copies of these statements of witnesses is concerned, assuming for the sake of arguments that copies of these statements were not furnished to the petitioner still in our view that would not *per se* vitiate the inquiry. What is important is the personal verification of the statements by the Commissioner of Police and as mentioned herein-above when the

respondent no.1 has reached the subjective satisfaction after seeing these statements, the petitioner is not entitled to make any capital out of this.

13. It has been laid down in the case of **Khudiram Das V/s. The State of West Bengal and Ors; (1975) 2 SCC 81**, that the subjective satisfaction of the detaining authority as regards the procedural formalities and the grounds constitutes the foundation for the exercise of the power of detention and the Court cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction is based. The Court cannot on a review of the grounds substitute its own opinion in place of the opinion of the detaining authority and the power of detention is not a quasi judicial power.

14. In view of such state of facts and law, we are of the view that there are no sufficient and cogent reasons to demonstrate that the satisfaction arrived at by the respondent no.1 is perverse, unreasonable or capricious. He has furnished in detail the grounds in the impugned order.

15. This takes us to the last submission of the learned Advocate for the petitioner. According to learned Advocate, the maximum period

for which a person can be detained in exercise of the powers conferred under Section 3 of the MPDA Act for the first instance is six months which can be extended by the State government by any period not exceeding three months at a time. The impugned order of the State government dated 18.08.2017 directing the petitioner to be detained for one year at one go is clearly illegal.

16. In this respect, the learned Advocate referred to the decision of the Supreme Court in the case of **Cherukuri Mani V/s. Chief Secretary; AIR 2014 SC 290**. In that matter a preventive detention order was passed by invoking a similar provision contained in Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 was invoked. Striking down the order since it prescribed for detention for a period of twelve months it was observed as under:

“14. Where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed procedure. When the provisions of Section 3 of the Act clearly mandated the authorities to pass an order of detention at one time for period not exceeding three months only, the Government order in the present case, directing detention of the husband of the appellant for a period of twelve

months at a stretch is clear violation of the prescribed manner and contrary to the provisions of law. The Government cannot direct or extend the period of detention up to the maximum period of twelve months in one stroke, ignoring the cautious legislative intention that even the order of extension of detention must not exceed three months at any one time. One should not ignore the underlying principles while passing orders of detention or extending the detention period from time-to-time.

15. Normally, a person who is detained under the provisions of the Act is without facing trial which in other words amounts to curtailment of his liberties and denial of civil rights. In such cases, whether continuous detention of such person is necessary or not, is to be assessed and reviewed from time-to-time. Taking into consideration these factors, the legislature has specifically provided the mechanism “Advisory Board” to review the detention of a person. Passing a detention order for a period of twelve months at a stretch, without proper review, is deterrent to the rights of the detenu. Hence, the impugned Government order directing detention for the maximum period of twelve months straightway cannot be sustained in law.”

In the case of **Lahu Shrirang Gatkal V/s. State of Maharashtra and Ors; AIR 2017 SC 3770**, following the decision in the case of **Cherukuri Mani (supra)** following observations have been made:

“8. It is well-settled that a presumptive legislation such as the present Act needs to be given a strict interpretation. As noted above proviso to sub-section (2) of Section 3 prescribes a thing to be done in a particular manner following a particular procedure. Therefore, the proviso to sub-section (2) of Section 3 envisages a period to be specified in the order with a maximum cap of six months at the first instant. From the above analysis it is clear that respondent No.3 could not have passed such a blanket order of detention without specifying the period of detention, as has been done in this case.”

17. However, it must be noted that the earlier judgment of the larger Bench of the Supreme Court in the case of **Mrs. T. Devaki V/s. State of Tamil Nadu; (1990) 2 SCC 456**, a decision of the co-ordinate Bench of the Supreme Court in the case of **Mrs. Harprit Kaur Harvinder Singh Bedi V/s. State of Maharashtra and Anr.; (1992) 2 SCC 177**, holding that the period prescribed in the proviso to Section 3 of MPDA Act only restricts the powers of the authority to whom the State Government delegates power to pass an order and does not apply to the period of detention vesting in the State Government under Section 13 of the Act were not brought to the notice of the subsequent benches which decided **Cherukuri Mani and Lahu Shrirang Gatkai (supra)** cases. Suffice for the purpose to mention that a Division Bench of this Court at

the Principal Seat while deciding the Criminal Writ Petition no. 1766 of 2017 and connected matters, in its judgment and order dated 13.10.2017 has extensively considered all these decisions referred to herein-above and has made following observations:

“10. Thus, in the case of Mrs. Harpreet Kaur Harvinder Singh Bedi (supra), the Apex Court after considering section 3 of the said act categorically held that the period of three (or six months) mentioned in the proviso to sub-section (2) of section 3 has nothing to do with the period of detention. Hence, the argument that the period of detention cannot be fixed at a stretch for twelve months was specifically rejected. We, however, find that in both the decision in the case of Cherukuri Mani w/o Narendra Chowdari (supra) and Lahu Shrirang Gatkal (supra), the Apex Court has held exactly to the contrary. However, we find that while the cases of Cherukuri Mani w/o Narendra Chowdari (supra) and Lahu Shrirang Gatkal (supra) were decided, the attention of the Apex Court was not invited to its earlier decision of a co-ordinate Bench in the case of Mrs. Harpreet Kaur Harvinder Singh Bedi (supra). The view taken in the case of Mrs. Harpreet Kaur Harvinder Singh Bedi (supra) is that it is futile to contend that the order of detention was vitiated because in one stroke, the period of detention was extended beyond the period specified in the proviso to sub-section 2 of section 3 of the said Act.”

18. The Division Bench thereafter proceeded to refer to the decision of the Constitution Bench of the Supreme Court in the case of **Makhan Singh Tarsikka V/s. State of Punjab; AIR (39) 1952 SC 27** and has pointed out as to how it is only after the advisory board to which the case has been referred reports that detention (under the preventive detention laws) is justified, the government should determine as to what the period of detention should be and not before. The Division Bench then extensively referred to the observations of the Bench of three Hon'ble Judges of the Supreme Court in the case of **Mrs. T. Devaki (supra)** and particularly those in paragraph nos. 7 and 10 of the judgment and order and then has made following observations:

“13. Hence, the law is that the period of detention can be fixed only after the opinion of Advisory Board is received. Therefore, the failure to mention the period of detention in the first order does not attract any illegality. Hence, the view taken in the cases of Cherukuri Mani w/o Narendra Chowdari (supra) and Lahu Shrirang Gatkal (supra) by a Bench of two Hon'ble Judges is contrary to what is held earlier by a larger Bench in the case of T. Devaki.

14. Moreover, there is a clear divergence of views expressed by the co-ordinate Benches consisting of two Hon'ble Judges of the Apex Court in the case of Mrs. Harpreet Kaur Harvinder Singh on one hand and the subsequent decisions in the cases of

Cherukuri Mani w/o Narendra Chowdari (supra) and Lahu Shrirang Gatkal (supra) on the other hand. The question is now which decision will bind this Court. The said issue is no more res integra. In the case of Sandeep Kumar Bafna V/s. State of Maharashtra. In paragraph 19, the Apex Court has held thus:

*“19. It cannot be overemphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ration with that of a previously pronounced judgment of a co-equal or larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to other obiter dicta. **It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam.**”*

19. It needs to be observed that the Division Bench at the Principal Seat has also considered the law as to binding nature of the precedents when incompatible judgments are rendered by co-ordinate benches, by referring to a judgment of the Division Bench of this Court in the case of Prakash Gobindram Ahuja V/s. Ganesh Pandharinath Dhonde and Ors.; 9 2016 SCC OnLine Bom 8884, paragraph 178 of the judgment, which reads thus:

“Question No.(V): Whether the observation in para (13) of the judgment in Vasant Tatoba Hargude v. Dikkaya Muttaya Pujari (AIR 1980 BOMBAY 341) that in the event of there being conflict, the decision of later Bench would bind only lays down that judgment later in point of time as explaining the earlier judgment would bind?”

Answer: In the light of the decisions of the Hon'ble Supreme Court in the case of State of U.P. v. Ajay Kumar Sharma (supra) and New India Assurance Co. Ltd v. Hilli Multipurpose Cold Storage Pvt. Ltd. (supra), we answer this question to the effect that, in case of conflict between the decisions of Co-ordinate Benches, it is not the later but the earlier one in point of time, which should be followed and applied by the Subordinate Courts to the facts and circumstances of a case before it, unless, of-course, earlier decision is considered and explained in the later decision.”

While concluding the law on the point, the Division Bench has made

following observations in paragraph no. 16.

“16. Therefore, what binds this Court is the decisions in the case of T. Devaki and Mrs. Harpreet Kaur Harvinder Singh Bedi (supra). In the light of the decision of the Constitution Bench of the Apex Court in the case of Makhan Singh (supra), the outer limit of the detention can be fixed by the State Government only after opinion of the Advisory Board is received. That is what section 12 of the said act provides. Therefore, even if the original order of detention under sub-sections (1) or (2) does not mention the period of detention, it will not vitiate the order of detention. In the cases in hand, the State Government has fixed the period of detention as per Section 12 of the said Act.”

20. In this view of the matter, with utmost respect we do not wish to add anything more and conclude that the impugned order passed by the State Government directing the petitioner to be detained for twelve months at one go does not suffer from any illegality, in view of the powers vesting in the State Government under Section 13 of the MPDA Act.

21. In the result, the petition has no merits and is liable to be dismissed.

22. The petition is dismissed. The rule is discharged.

[MANGESH S. PATIL, J.]

[S.S. SHINDE, J.]