

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.359 OF 2019

BHIMA SOMA PAWAR

)...PETITIONER

V/s.

**1) THE COMMISSIONER OF POLICE
SOLAPUR**

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2) THE STATE OF MAHARASHTRA

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**3) THE SUPERINTENDENT, YERWADA
CENTRAL PRISON, PUNE**

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**4) THE SECRETARY, ADVISORY BOARD
FOR M.P.D.A. ACT**

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)...RESPONDENTS

Mr.Udaynath Tripathi, Advocate for the Petitioner.

Mrs.M.H.Mhatre, APP for the Respondent - State.

**CORAM : INDRAJIT MAHANTY &
A. M. BADAR, JJ.**

DATE : 27th MARCH 2019

JUDGMENT :

1 By this petition, the petitioner, who is brother of detenu Mahadev Mersing Pawar, has challenged the order of detention dated 7th January 2019 bearing no.01/CB/BL/2019 passed by respondent no.1 Commissioner of Police, Solapur, under Section 3 of the 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 (hereinafter referred to as the M.P.D.A. Act for the sake of brevity). Along with the detention order, brother of the petitioner Mahadev Mersing Pawar was served with the grounds of detention dated 7th January 2019, in compliance with Section 8 of the M.P.D.A. Act. Said Mahadev Mersing Pawar is detained in pursuant to the said detention order at the Yerwada Central Prison, Pune.

2 Though several grounds were raised by the petitioner in support of his contention that detention of his brother is illegal, the learned counsel for the petitioner has pressed in service

Ground no.5(e) to substantiate his contention that the continuation of detention of the detenu is illegal. The said ground reads thus :

“5(e) The Petitioner says and submits that a representation of the detenu was submitted to the State Government on 15.01.2019 by his lawyer on behalf of the detenu by speed post. The said representation was sent for expeditious consideration and revocation of the order of detention. The petitioner says and submits that so far no communication is received by the detenu or his lawyer as regards the consideration of the said representation of the detenu, thereby the abovesaid authority has delayed in considering the representation of the detenu. The State Government is called upon to explain the said delay, if any, to the satisfaction of this Hon'ble Court, failing which the continued detention of the detenu will be held illegal. The order of detention is illegal and bad in law, liable to be quashed and set-aside.”

By drawing our attention to this ground, the learned counsel argued that representation of the detenu was kept pending despite its receipt by the State Government on 15th January 2019 and the

delay in deciding the representation of the detenu vitiates the detention order and continuation of detention of the brother of the petitioner, as such, is illegal.

3 To rebut this contention, the learned APP argued that representation of the detenu dated 15th January 2019 was received by the Special Branch of the Home Department on 17th January 2019 and then remarks were called from respondent no.1 - Commissioner of Police, Solapur, on the very same day. Accordingly, remarks were received, but in the meanwhile, proposal for detention was referred to the Advisory Board and as such, representation of the detenu was kept pending till receipt of the report of the Advisory Board. Our attention was drawn to the paragraph 2 of the reply affidavit filed on behalf of the Home Department of the State, which reads thus :

“2 With reference to the Ground No.5(e) of the Petition, it is submitted that representation of detenu dated 15.01.2019 was received in the Special Branch-3B desk on 17.01.2019. Thereafter, the remarks were called for from the Detaining

authority i.e. Commissioner of Police, Solapur on same day. The remarks of the Detaining Authority were received on 22.01.2019 vide letter dated 21.01.2019. However, as the proposal of detention was referred to the Advisory Board on 14.01.2019 as per the provisions of Section 10 of the MPDA Act 1981, the representation of the detenu dated 15.01.2019 was kept pending till the receipt of the report of the Advisory Board. The said Representation was sent to Advisory Board for the consideration in the meeting. The report of Advisory Board's meeting held on dt. 07.02.2019 was received on dt. 12.02.2019 vide letter dtd. 12.02.2019 in the Special Branch-3B desk. As per the opinion of Advisory Board, confirmation order dtd. 12.02.2019 was issued for the continuation of detention of the said Detenu for the period of one year from the date of Detention Order.

Thereafter, the concerned Assistant Section Officer submitted file containing remarks of Detaining Authority alongwith the representation of the detenu to the Section Officer on 12.02.2019. The Section Officer endorsed it on same day and forwarded it to the Deputy Secretary (in-charge) on the same day. The Deputy Secretary (In-charge)

endorsed it on 13.02.2019 and forwarded it to the Additional Chief Secretary (Home) on the same day. The Additional Chief Secretary (Home) considered the representation of the detenu and the remarks of the Detaining Authority and rejected the representation on 16.02.2019 by applying his mind. The rejection of representation was communicated to the detenu vide letter dated 16.02.2019. Thus, the representation of the detenu was considered by the State Government as expeditiously as possible.”

With this, the learned APP submitted that the petition is devoid of any substance and is liable to be dismissed.

4 We have considered the submissions so advanced and in our considered view, the petition needs to be allowed, as representation submitted by the detenu was not decided at the earliest by the State. Undisputedly, representation of the detenu dated 15th January 2019 (Exhibit D) was received by the State on 17th January 2019 and even as per the say of the respondent/State, remarks of the Detaining Authority were also received by it on 22nd January 2019. As such, there was no reason for the Detaining Authority to keep the representation

pending on the pretext of awaiting report of the Advisory Board. The representation of the detenu, as seen from the affidavit of the State, was kept pending, and it was considered only after receipt of the report of the Advisory Board.

5 Our view is supported by the judgment of this court in Shrinivas Kishor Sanga vs. The Commissioner of Police, Solapur¹ and Others to which one of us (Hon'ble Shri. Justice Indrajit Mahanty) was a party. In paragraphs 22 and 23 of the said judgment, it is held thus :

“22 In the instant case before us, admittedly, the representation of the detenu was received by the State Government after the matter was referred to the Advisory Board. The representation was kept pending and it was considered only after the receipt of the report of the Advisory Board. In the light of the discussion in the Judgments referred to hereinabove this course was impermissible and it violated the mandate of section 22(5) of the Constitution of India and thereby infringed the detenu's right to make his

1 Criminal Writ Petition No.5682 of 2018 decided on 19th March 2019

representation at the earliest for its expeditious consideration.”

“23 In our considered view, applying the ratio of these Judgments to the facts of the present case before us, the Petition deserves to be allowed. The representation made to the State Government dated 15/11/2018 was received by the State Government on 17/11/2018 and it was kept pending till the receipt of the report of the Advisory Board which was received only on 04/12/2018. The representation, thereafter, was rejected on 04/12/2018 as on the same day, the order of detention was also confirmed. Sub-Article (5) of Article 22 of the Constitution of India reads thus :

“22 Protection against arrest and detention in certain cases.

(1)

(2)

(3)

(4)

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to

such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.”

One of the major requirements of Article 22(5) is that the detenu must be afforded the earliest opportunity of making a representation against the order. This requirement will not be effective if such a representation is not decided at the earliest. Affording the detenu the earliest opportunity of making a representation is meaningless unless such representation is considered and decided at the earliest. In the instant case, admittedly, the representation was received by the State Government on 17/11/2018 and was decided only on 04/12/2018. It was kept pending for receipt of report of the Advisory Board. This course of inaction was directly contrary to the letter and spirit of Article 22(5) of the Constitution of India. In the instant case, there is clear violation of the constitutional rights of the Petitioner. On this ground alone, the detention order is liable to be set aside. Hence, we pass the following order.”

6 In view of the fact that representation of the detenu was kept pending on the pretext of awaiting report of the Advisory Board without deciding it at the earliest, the detention order of the brother of the petitioner cannot be sustained. Hence, the order :

ORDER

- i) The Detention Order dated 7th January 2019 bearing no.01/CB/BL/2019 passed by the respondent no.1 Commissioner of Police, Solapur, and confirmed by the respondent no.2 State of Maharashtra, is quashed and set aside.
- ii) Detenu Mahadev Mersing Pawar be released from his detention forthwith, if not required in any other case.
- iii) Rule is made absolute in these terms.

(A. M. BADAR, J.)

(INDRAJIT MAHANTY, J.)

