

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL WRIT PETITION NO.3605 OF 2019**

Pandharinath S. Waje

Age : 56 years, an Indian Inhabitant,
Residing at Flat No.4, Rushabh Heights
Society, Sadguru Jai Bhavani Road,
Nashik.

...Petitioner
(father of Detenu)

Aniket Pandharinath Waje

...Detenu

Vs.

1. The State of Maharashtra
Through Secretary Home
Department (Special), Mantralaya,
Mumbai 400 032.

2. Vishwas Nangre Patil
The Commissioner of Police, Nashik.

3. The Superintendent of Nashik Road
Central Prison, Nashik.

...Respondents

Mr. P.S. Vaze a/w Mr. A.R. Shaikh a/w Mrs. Nasreen Ayubi i/b Mrs.
A.M.Z. Ansari, advocates for the petitioner.
Mrs. M.H. Mhatre, APP for the respondents-State.

**CORAM : S.S. SHINDE &
N.B. SURYAWANSHI, JJ.**

JUDGMENT RESERVED ON : 16TH OCTOBER, 2019.

JUDGMENT PRONOUNCED ON : 22ND OCTOBER, 2019.

JUDGMENT : (Per N.B. SURYAWANSHI, J.)

. This Petition takes exception to the order of detention dated 17th June, 2019 passed by the Commissioner of Police, Nashik, under 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 (for short “the said Act”), thereby detaining the Detenu under the said Act.

2. This court granted Rule in the matter on 18th July, 2019. Rule is made returnable and with the consent of both the parties, the matter is heard finally.

3. Perused the original record of the matter, which was made available to us by the learned APP, with the assistance of the learned counsel for the petitioner and the learned APP.

4. The only ground relied upon by the learned counsel for the petitioner was that the representation of the Detenu was not considered and decided by the State Government, and hence, there is violation of right of the Detenu and which has vitiated the impugned detention order, as the fundamental right of the Detenu guaranteed under Article 22(5) of the Constitution of India is violated.

5. The learned AGP in reply submits that the Detenu has not sent representation to the Government and only one copy of the representation was submitted by the Detenu to the Advisory Board.

6. On perusal of the original file of the detention, it is clear that the representation of the Detenu dated 11th July, 2019 was addressed by the Detenu to the Chairman of Advisory Board, and also, to the Additional Chief Secretary, Home Department (Special), Government of Maharashtra, Mantralaya.

7. During the course of argument, the learned counsel for the petitioner has placed on record, a copy of covering letter of the

representation dated 11th July, 2019, addressed to the Superintendent, Nashik Road Central Prison, Nashik. The subject of the said covering letter is 'representation of the Detenu' and it is mentioned in the said letter that three copies of the representation of the Detenu are being presented, one of which is to be sent to the State Government, one for the Detenu and one for the Superintendent of Nashik Road Central Prison, Nashik. The said communication further states that the copy of Advisory Board is given to the Advisory Board. The same bears acknowledgment of receipt of the same of Outward/Inward Clerk, Nashik Road Central Prison, dated 13th July, 2019. The said communication is taken on record and marked as 'X' for identification.

8. There is no reply to the contention of the advocate for the petitioner that vide Exhibit 'X', three copies were submitted by the Detenu, one of which was to the Superintendent of Nashik Road Central Prison, i.e., the respondent No.3. It is pertinent to note that in reply filed on behalf of the respondent No.1 in paragraph 2, it is categorically admitted that 'representation of the Detenu dated 11th July, 2019 was received in the Home Department Registry on 15th

July, 2019 vide letter of Superintendent, Nashik Road Central Prison, dated 13th July, 2019. However, the representation was sent to the Special Branch-10 Desk (Advisory Board Desk) by the Registry of the Home Department. It is submitted that the representation of the Detenu was not received to the Special Branch-3b Desk.

9. The learned counsel for the petitioner was right in placing reliance on the authority in the case of Smt. Gracy Vs. State of Kerala & Anr., reported in (1991) 2 SCC page 1, wherein it was held that,

“8. It is undisputed that if there be only one representation by the detenu addressed to the detaining authority, the obligation arises under Article 22(5) of its consideration by the detaining authority independent of the opinion of the Advisory Board in addition to its consideration by the Advisory Board while giving its opinion. In other words, one representation of the detenu addressed only to the Central Government and not also to the Advisory Board does not dispense with the requirement of its consideration also by the Advisory Board. The question, therefore, is: Whether one of the requirements of consideration by government is

dispensed with when the detenu's representation instead of being addressed to the government or also to the government is addressed only to the Advisory Board and submitted to the Advisory Board instead of the government? On principle, we find it difficult to uphold the learned Solicitor General's contention which would reduce the duty of the detaining authority from one of substance to mere form. The nature of duty imposed on the detaining authority under Article 22(5) in the context of the extraordinary power of preventive detention is sufficient to indicate that strict compliance is necessary to justify interference with personal liberty. It is more so since the liberty involved is of a person in detention and not of a free agent. Article 22(5) casts an important duty on the detaining authority to communicate the grounds of detention to the detenu at the earliest to afford him the earliest opportunity of making a representation against the detention order which implies the duty to consider and decide the representation when made, as soon as possible. Article 22(5) speaks of the detenu's 'representation against the order', and imposes the obligation on the detaining authority. Thus, any representation of the detenu against the order of his detention has to be considered and decided by the detaining authority, the requirement of its separate consideration by the Advisory Board being an additional requirement implied by reading together clauses (4) and

(5) of Article 22, even though express mention in Article 22(5) is only of the detaining authority. Moreover, the order of detention is by the detaining authority and so also the order of its revocation if the representation is accepted, the Advisory Board's role being merely advisory in nature without the power to make any order itself. It is not as if there are two separate and distinct provisions for representation to two different authorities viz. the detaining authority and the Advisory Board, both having independent power to act on its own.

9. It being settled that the aforesaid dual obligation of consideration of the detenu's representation by the Advisory Board and independently by the detaining authority flows from Article 22(5) when only one representation is made addressed to the detaining authority, there is no reason to hold that the detaining authority is relieved of this obligation merely because the representation is addressed to the Advisory Board instead of the detaining authority and submitted to the Advisory Board during pendency of the reference before it. It is difficult to spell out such an inference from the contents of Article 22(5) in support of the contention of the learned Solicitor General. The contents of Article 22(5) as well as the nature of duty imposed thereby on the detaining authority support the view that so long as there is a representation made by the detenu against the order of detention, the aforesaid dual obligation

under Article 22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the Advisory Board or to both. The mode of address is only a matter of form which cannot whittle down the requirement of the constitutional mandate in Article 22(5) enacted as one of the safeguards provided to the detenu in case of preventive detention.”

10. In view of the admission of the State Government that representation of the Detenu was not received to the Special Branch-3b Desk, it is clear that the State Government has not at all decided the representation of the Detenu, which is mandated by the provisions of the said Act. The same, according to us, is a clear breach of Article 22(5) of the Constitution of India. Therefore, the impugned order is vitiated and is unsustainable in law and facts of the case. Hence, the following order :-

ORDER

- (i) The impugned detention order of the Detenu, bearing No. D.O.2019/MPDA/DET-3/CB-29, dated 17th June, 2019, at Exhibit 'A' to the Petition, is hereby quashed and set aside.
- (ii) The Detenu be released forthwith, if not required in

any other case.

(iii) Rule made absolute in the above terms with no order as to costs.

(N.B. SURYAWANSHI, J.)

(S.S. SHINDE, J.)