

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

CRIMINAL WRIT PETITION NO.1149 OF 2020

Vikas S/o Machindra Gorde,
Age: 35 yrs, Occ: Agriculture,
R/o Guntegaon, Taluka Georai,
Dist. Beed.

Presently in Central Jail
Harsul, Aurangabad.

... PETITIONER

VERSUS

- 1] The State of Maharashtra,
Through the Secretary,
Home Department (Special),
2nd Floor, main building Mantralaya,
Mumbai-400032.
- 2] The Deputy Secretary/Section Officer,
Home Department (Special),
2nd Floor, main building Mantralaya, Mumbai.
- 3] The District Magistrate/Collector
Beed, Taluka & Dist: Beed.
- 4] The Police Inspector,
Chaklamba Police Station,
Taluka: Georai, Dist: Beed.

... RESPONDENTS

...
Mr. Rahul P. Mote, Advocate for Petitioner.

Mr. S. J. Salgare, APP for Respondents.

...

CORAM : T. V. NALAWADE &
SHRIKANT D. KULKARNI, JJ.

DATE : 23rd November, 2020.

ORDER: (Per T. V. Nalawade, J.)

. The petition is filed to challenge the order of detention made by the District Magistrate, Beed on 23rd May, 2020 against the Petitioner. The order is passed under the provision 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 Act' or the "MPDA Act"). The order is approved and confirmed by the State Government and the Government has considered the opinion given by the Advisory Board constituted under the Act.

2 Both the sides are heard.

3 The order of detention was passed on 23rd May, 2020 and the grounds of detention were communicated to the Petitioner on 26th May, 2020. He was taken in custody and detained on 26th May, 2020. It was informed to the Petitioner that six crimes were registered against him in the past and in one case, which was filed for the offences punishable under Sections 307, 379, 149 etc. of the Indian Penal Code, there was conviction against him. The information, which was supplied was as under:

Offences

Sr. No.	Police Station	C.R.No.	Section	Filing date	Court Case No.	Remarks
01	Chaklamba	64/2015	324, 323, 506, 34 IPC	23/08/2015	RCC No. 134/16	Acquitted due to compromise
02	Chaklamba	86/2017	307,327,332, 333,336,337, 338,341,353, 379,143,147, 149, 323 IPC with Sec. 21(4) of Mines & Minerals Act.	07/04/2017	Sessions Case No. 40/2018	Convicted
03	Chaklamba	150/2017	379 IPC with Sec. 21(4) of Mines & Minerals Act	25/06/2017	RCC No. 191/18	Court Pending
04	Georai	N.C. No. 516/18	507 IPC	16/06/2018	----	----
05	Chaklamba	116/2020	379 IPC with Sec. 21(4) of Mines & Minerals Act	29/04/2020	----	Investigation
06	Chaklamba	123/2020	379, 511 IPC	09/05/2020	----	Investigation

4 In the aforesaid order, it was also communicated to the Petitioner that even after registration of the crimes and conviction, the conduct of the Petitioner had not improved. It was informed that in the past, a proceeding for externment was started against him and even chapter case was started against him as a preventive measure, but he did not improve his conduct. In the communication, details of the material available against him of the aforesaid matters, were given and it was also informed that there were statements of two witnesses,

which were in-camera statements, showing that he had become a threat to the public at large. It was informed that the District Magistrate had formed opinion that he had become a dangerous person as defined in Section 2 (b-1) of the Act. The offence, which was registered against him, C.R. No.116 of 2020, registered in the same police station was mainly considered against him alongwith the statements of two confidential witnesses. It was informed that the District Magistrate had formed opinion that the Petitioner was acting in a manner prejudicial to the maintenance of public order and so the detention order was passed against him.

5 In the aforesaid order, it was also informed to Petitioner that he was entitled to make representation to the State Government against the detention order. It was informed that the Government is expected to refer the matter to Advisory Board, which is expected to give opinion about the material as to whether it is sufficient for detention purpose. It was informed that the Petitioner was entitled to make representation to the Advisory Board also.

6 The detention order came to be approved by the State Government on 29th May, 2020. As per the record, Advisory Board gave hearing to the Petitioner on 9th July, 2020 and sent opinion against the Petitioner to the Government. The Government confirmed

the order of detention on 15th July, 2020. The record shows that the Petitioner had made representation to Advisory Board also.

7 The learned counsel for Petitioner submitted that if first offence, which was registered against the Petitioner in the year 2017 and the offence, which is of 2020 are considered, it can be said that there was no urgency to the authority to take such action and the action was delayed. It was submitted that only when the Petitioner was granted bail by the Judicial Magistrate First Class in the last crime, action came to be taken against him and so the action is *malafide*. It was submitted for the Petitioner that the two confidential witnesses could not have been believed by the District Magistrate in view of the nature of allegations made by them. It was submitted that there is discrepancy in the date of verification of these two statements made by the witnesses and the date of forwarding proposal by police to the District Magistrate and this circumstance shows that there was some manipulation and the action was *malafide*.

8 As per the directions given by this Court, entire file of detention with the opinion of the Advisory Board was made available to this Court. The original statements of two confidential witnesses were also made available. This Court has perused that record.

9 It is true that the date of proposal made by police station as per the record is 16th May, 2020. The date of verification of the two in-camera statements is mentioned as 17th May, 2020. However, file shows that the proposal was received by the office of District Magistrate on 19th May, 2020. The file was put up before the District Magistrate on 21st May, 2020 and on the same day after considering the opinion given by the Law Officer, the detention order was passed by the District Magistrate. The mater was sent to the State Government for approval on 28th May, 2020.

10 As per the record, the proposal of the police station is dated 16th May, 2020, but the District Superintendent of Police forwarded this proposal to District Magistrate on 19th May, 2020 and so there is no discrepancy as contended by the learned counsel for Petitioner. The order of detention was sent to the District Superintendent of Police on 23rd May, 2020 and reasons were then communicated to the Petitioner. Thus, no inconsistency was found in the record, which was made available to this Court.

11 The grounds of detention were communicated to the Petitioner in vernacular language, Marathi language. One set was prepared in English language also. The papers on which the District Magistrate had placed reliance were also supplied alongwith the

communication to the Petitioner. The communication was served on the Petitioner on 26th May, 2020 and on that day, he was taken in custody and then sent to jail. As per the record, matter was forwarded to the Government, Home Department on 28th May, 2020 for approval. As per the record, the State Government gave approval to the detention order on 29th May, 2020. The order of approval was served on the Petitioner on 2nd June, 2020. The record shows that the Petitioner sent his representation to the Government on 3rd August, 2020 through jail. As already observed, he was given hearing by Advisory Board on 9th July, 2020 and the record shows that the Advisory Board considered the representation given to Advisory Board. As per the record, the opinion of the Advisory Board was sent to Government and confirmation order came to be made on 15th July, 2020.

12 On merits, for detention purpose, there is a record of following nature:

The record shows that in respect of incident dated 7th April, 2017, Sessions Case No.40 of 2018 was filed against the Petitioner and five others for the offences punishable under Sections 307, 353, 327, 337, 379, 323, 149 etc. of the Indian Penal Code. The charge-sheet was filed for the offence punishable under Section 21(4) of the Mines and Minerals Act also. The copy of the judgment

delivered by the learned Additional Sessions Judge, Beed in this case shows that on 10th May, 2019, the Petitioner was convicted with other accused for the offences punishable under Sections 323 read with 34 and 379 read with 34 of the Indian Penal Code. The judgment shows that the Sessions Court held that there was incident of illegal excavation of sand and taking away the sand, which was illegally excavated. It was observed that due to absence of private complaint by the officers as required under the Mines and Minerals Act, it was not possible to give conviction under the provisions of the Mines and Minerals Act. The Sessions Court held that the conviction for the offence punishable under Section 379 of the Indian Penal Code was not possible as there was special Act like the Mines and Minerals Act for considering such offences conviction for theft of other article was given. Thus, by giving some technical reasons, acquittal was given by the Sessions Court to the Petitioner in respect of theft, smuggling of sand. It was the sand from Godavari river bed, belonging to the Government. As per the record, these accused were involved in illegal excavation and theft of sand belonging to the Government and they were caught on the spot where the extraction was going on.

13 The record of R.C.C. No.191 of 2018 filed in C.R. No.150 of 2017 shows that on 25th June, 2017 with the machinery of extraction of sand, six tractors were found ready for carrying sand in river bed.

One of the six tractors was belonging to the present Petitioner and one machine of extraction was also belonging to the present Petitioner.

14 The record of C.R. No.116 of 2020 shows that on 28th April, 2020 similar incident was detected. On this occasion, heaps of sand were found on the backside of the house of Petitioner. There were tractors and machinery used for extraction of sand and for transportation of sand.

15 The record of C.R. No.123 of 2020 shows that on 8th May, 2020 there was specific information against the present Petitioner that he was extracting sand from the Godavari bed river. At about 03:00 am, on that day, police visited the spot. It was noticed that the Petitioner was present there with machinery and he was extracting the sand. He ran away after seeing police. In this case, as sand was found at the river bed itself, the crime was registered for the offence punishable under Section 379 read with 511 of the Indian Penal Code.

16 The two statements of confidential witnesses show that the Petitioner was involved in illegal excavation of sand from river bed, he has muscle power, he has money power and people are afraid due to his activities and power, which he is having. They gave statements subject to condition that they will not be called to Court for giving

evidence against the Petitioner.

17 The other circumstance is that in externment proceeding, which was started under Section 55 of the Maharashtra Police Act, the order of externment was made. It appears that this order was subsequently set aside by this Court. There is a record of chapter proceeding, which was started against the Petitioner under Section 110 (e) and (g) of the Code of Criminal Procedure and this proceeding was filed in the year 2017. These two proceedings need not be considered in the present matter as the material, which was available for passing detention order. However, the circumstances appearing from the material that he had formed a gang and his activity was illegal excavation of sand and theft of sand belonging to the Government need to be kept in mind. It shows that he was not ready to stop his activities.

18 The District Magistrate has placed reliance mainly on C.R. No.116 of 2020 to show that his action has proximity with the recent incident. He has also mentioned that the statements of two confidential witnesses were relevant for him for passing the order. Thus, the last incident had taken place on 8th May, 2020 and after that proposal was made for detention. Other relevant dates are already mentioned. Though the District Magistrate has mentioned the main

circumstances, other record cannot be ignored in such a case as the activity of the Petitioner as sand smuggler is to be considered and that activity needs to be made out on the basis of many acts. These days, such persons are working virtually as mafia and they are called as sand mafia. They have the courage even to attack the public servants, who want to take action against them. Some murders have taken place of public officers and they were virtually run over by the vehicles of the sand smugglers. This seriousness needs to be kept in mind while considering the matters like present one.

19 The learned counsel for Petitioner placed reliance on the following reported cases:

- a) **Criminal Writ Petition No.103 of 2020**, (*Smt. Vijaya Raju Gupta Vs. R.H. Mendonca, Commr. of Police and others*) decided on 20th October, 2020, by the Division Bench of this Court at Principal Seat;
- b) **Criminal Writ Petition No.2331 of 2015**, (*Jay @ Nunya Rajesh Bhosale Vs. Commissioner of Police, Pune and Ors.*) decided on 16th September, 2015, by the Division Bench of this Court at Principal Seat;
- c) **Criminal Writ Petition No.1277 of 1995**, (*Vijayraj Jivraj Solanki Vs. Union of India and others*) decided on 10th August, 1996, by the Division

Bench of this Court at Principal Seat;

- d) **Criminal Writ Petition No.6041 of 2019**, (Narendra @ Chotya Mahadev Balkawade Vs. The Commissioner of Police Pune City and ors.) decided on 09th January, 2020, by the Division Bench of this Court at Principal Seat; and
- e) **2017 AIR (SC) 3770**, (Lahu Shrirang Gatkhal Vs. State of Maharashtra, through the Secretary and Ors).

20 The learned APP also placed reliance on some reported cases. Those cases are being quoted at proper places. This Court is considering the specific points raised by the learned counsel for Petitioner hereinafter on the basis of law developed on these points.

21 **Delay in action:** Relevant facts with the dates of the incidents are already mentioned by this Court. In the case reported as **AIR 1988 SC 1255**, (Rajendrakumar Natvarlal Shah Vs. State of Gujarat), the Apex Court has considered the defence of delay caused in taking action in such a case and following observations are made at para 10, which are as under:

“10 Viewed from this perspective, we wish to emphasise and make it clear for the guidance of the different High Courts that a distinction must be drawn between the delay

in making of an order of detention under a law relating to preventive detention like the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 and the delay in complying with the procedural safeguards of Art. 22(5) of the Constitution. It has been laid down by this Court in a series of decisions that the rule as to unexplained delay in taking action is not inflexible. Quite obviously, in cases of mere delay in making of an order of detention under a law like the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 enacted for the purpose of dealing effectively with persons engaged in smuggling and foreign exchange racketeering who, owing to their large resources and influence have been posing a serious threat to the economy and thereby to the security of the nation, the Courts should not merely on account of delay in making of an order of detention assume that such delay, if not satisfactorily explained, must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. Taking of such a view would not be warranted unless the Court finds that the grounds are 'stale' or illusory or that there is no real nexus between the grounds and the impugned order of detention."

22 The aforesaid observations of the Apex Court show that in each and every case the Court needs to consider the facts and Court needs to ascertain whether the grounds for detention mentioned are stale or illusory or that there is no real nexus between the grounds and

the detention order. Further, the nature of activity also needs to be kept in mind while considering such defence. On this point, some observations are already made by this Court. In the case of *Narendra* cited (*supra*), in view of the nature of activity and the facts of that case, it was held that the action was delayed. Those observations cannot be used in the matter like present one.

23 In the case reported as **2016 ALL MR (Cri) 5144**, (*Harish Patil Vs. The State of Maharashtra & Ors.*), this Court at Principal Seat has made the following observations in respect of activities of sand mafia. The observations are at para 36 and they are as under:

“36. Public Order is synonymous with peace, safety and tranquility. It means there is absence of order involving breaches of local significance. Sand is a mineral which is openly available on the river banks or in the river, which is required to be preserved in the interest of local public. It is noticed that there are grave repercussions of excavation and rampant theft of sand from the river banks which affects the locals as the water table and water level goes down. This affects the public in general and more particularly farmers. It is noticed that sand smugglers on the basis of muscle and money power create terror in the vicinity and they are a menace to the public order. Thus, such new trend of offence has emerged leading to direct threat to the public order. The detenu is a sand smuggler. The 4 CRs in which the detenu is involved pertain to theft of sand. On account of sand smuggling, the water

available is reduced. The ecological balance is disturbed. On account of reduction in water, there is great scarcity of water for drinking purposes and for irrigation. There is monetary loss to farmers and other citizens in the area. People in the area know about the activities of the detenu and are living in a state of fear. All this amounts to disturbance of public order. Hence to protect the interest of the public in such cases, the legislation has amended the definition and incorporated 'Sand Smugglers' in section 2 of the Act. The Detaining Authority has rightly considered the situation, the nature of offences and the nature of its effect on public order and has passed the order."

24 **Grounds for detention and necessity of material for subjective satisfaction:** On the basis of some observations made by this Court in the case of *Smt. Vijaya* cited (*supra*) by the learned counsel for Petitioner, it was submitted that there was no proper verification of the statements of the confidential witnesses. It was submitted that if statements of confidential witnesses were not available then it cannot be said that there was subjective satisfaction on the basis of confidential statements of two witnesses. This Court has gone through the facts of the reported case and the observations made. The relevant facts of the present matter are already quoted and they are different. The record of verification shows that the verification was done by the superior police officer of the rank of Deputy Superintendent. It was made to ascertain as to whether the

statements were made by the witnesses and also to ascertain the truthfulness. In the reported case no attempt was made to verify the truthfulness. The endorsement in the present matter is of different nature. This Court has seen the original statements of the witnesses on which there are endorsements of the superior police officer. For verification, there was other material like other contemporaneous material and this material is used by the authority for passing the order of detention. In the case of Supreme Court reported as *AIR 2000 SC 2527*, (*Phulwari Jagdambaprasad Pathak Vs. R.H. Mendonca and Ors*), following observations are made about the necessity of material at para 16 and they are as under:

“16. Then comes the crucial question whether ‘in-camera’ statements of persons/witnesses can be utilised for the purpose of arriving at subjective satisfaction of the detaining authority for passing the order of detention. Our attention has not been drawn to any provision of the Act which expressly or impliedly lays down the type of material which can form the basis of a detention order under Section 3 of the Act. Preventive detention measure is harsh, but it becomes necessary in larger interest of society. It is in the nature of a precautionary measure taken for preservation of public order. The power is to be used with caution and circumspection. For the purpose of exercise of the power it is not necessary to prove to the hilt that the person concerned had committed any of the offences as stated in the Act. It is sufficient if from the material available on record the detaining authority could

reasonably feel satisfied about the necessity for detention of the person concerned in order to prevent him from indulging in activities prejudicial to the maintenance of public order. In the absence of any provision specifying the type of material which may or may not be taken into consideration by the detaining authority and keeping in view the purpose the statute is intended to achieve the power vested in the detaining authority should not be unduly restricted. It is neither possible nor advisable to catalogue the types of materials which can form the basis of a detention order under the Act. That will depend on the facts and situation of a case. Presumably, that is why the Parliament did not make any provision in the Act in that regard and left the matter to the discretion of the detaining authority. However, the facts stated in the materials relied upon should be true and should have a reasonable nexus with the purpose for which the order is passed.”

25 In view of the aforesaid observations and the facts of the present matter, this Court holds that the observations made in the case of *Smt. Vijaya (supra)* are of no help to the present Petitioner.

26 On the point of grounds, which are not substantiated, there is one more circumstance like Section 5A of the Act. The provision runs as under:

“5A. Where a person has been detained in pursuance of an order of detention under section 3 which has been made on two or more grounds, such order of detention

shall be deemed to have been made separately on each of such grounds and accordingly—

(a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are—

(i) vague,

(ii) non-existent,

(iii) not relevant,

(iv) not connected or not proximately connected with such person, or

(v) invalid for any other reason whatsoever, and it is not, therefore, possible to hold that the State Government or an officer mentioned in sub-section (2) of section 3 making such order would have been satisfied as provided in section 3 with reference to the remaining ground or grounds and made the order of detention;

(b) the State Government or such officer making the order of detention shall be deemed to have made the order of detention under the said section 3 after being satisfied as provided in that section with reference to the remaining ground or grounds.”

This provision shows that if there is other material, which is truthful, suspicion about the statements of confidential witnesses cannot give benefit to the detenu.

27 On the aforesaid point, the limits on the power of this Court, the power to go into the details of subjective satisfaction also need to be kept in mind. In the case reported as **1952 Criminal Law**

Journal 75, (*Bhim Sen Vs. State of Punjab*), which was on the Preventive Detention Act, 1950 and in the case reported as **AIR 1982 S.C. 8**, (*Smt. Hemlata Kantilal Vs. State of Maharashtra*), in which the detention order was under COFEPOSA Act, the Apex Court has laid down that when the Legislature has made the subjective satisfaction of authority making order of detention as essential condition for passing of the order, it becomes difficult to presume that under Article 226 of the Constitution of India, the Court has power to examine the material to ascertain whether the material was sufficient for subjective satisfaction of the authority. In view of this position of law, it can be said that if there is a material to show the activities of the Petitioner of the nature alleged against him like he was involved in illegal excavation of sand and commission of theft of sand of Government, the Court is not expected to go into more details of this material.

28 In the case reported as **(2015) 12 Supreme Court Cases 127**, (*State of Tamil Nadu and another Vs. Nabila and another*), it is laid down that the order of detention cannot be set aside on the ground that the detenu was involved in only one solitary case. It is also laid down that in view of the rights guaranteed under Articles 21 and 22 of the Constitution of India in such cases, there need to be strict and meticulous manner of compliance with the procedure given for preventive detention.

29 This Court has mentioned relevant circumstances of the present matter, which include the steps taken as per the time schedule given by the Act. They show that the procedure was followed and the principles of natural justice were followed. This record is sufficient to infer that the sufficient opportunity was given to the present Petitioner to present his case. Thus, on this point also, there is not possibility of interference.

30 **Mention of period of detention in order:** In the case of *Lahu (supra)*, it is observed by the Apex Court that in view of the provision of Section 3(2) of the Act, the period of detention needs to be mentioned in the order of detention. It is also laid down that the period of detention cannot be more than six months at the first instant. On the basis of these observations, the learned counsel for Petitioner submitted that in the order of detention, the District Magistrate had not mentioned the period and first time in the order of confirmation, the State Government mentioned this period as one year and due to this circumstance the order of detention cannot sustain in law.

31 On the aforesaid point, there is recent decision of the Supreme Court reported as 2020 All.M.R.(Cri.) 475, (*State of Maharashtra and others Vs. Balu Waman Patole*). The Apex Court

has held that in view of the scheme of the Act and as it provides both, delegation of power to officer like District Magistrate and providing for total period of detention of twelve of months, such ground cannot be considered for setting aside the detention order within such period. Thus, interference in the order of detention made against the Petitioner is not possible on this ground also. This Court had occasion to consider similar case while deciding *Criminal Writ Petition No.539 of 2020*, (*Baliram s/o Namdeo Bedke Vs. The State of Maharashtra and others*) on 3rd August, 2020. The proceeding was dismissed by this Court.

32 In view of all the aforesaid circumstances, this Court holds that the finding of the authority that the Petitioner is likely to continue the aforesaid illegal activity if he is not detained under the Act, cannot be interfered with and so there is no possibility of interference in the order of detention. In the result, the following order is passed:

ORDER

The petition stands dismissed.

[SHRIKANT D. KULKARNI, J.]

[T. V. NALAWADE, J.]