

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 133 OF 2020

Mohamad Ishaq Mohamad Ismail Shaikh]
Aged : 53 years, occ ; Business]
Resident of Rangari Chawl Building,]
Room No.310, Kolsagalli, P. B. Marg,]
Girgaon, Mumbai – 400004]..... Petitioner.

VERSUS

1. Shri. Sanjay Barve]
Commissioner of Police]
Mumbai City.]
]
2. The State of Maharashtra]
]
3. The Superintendent of Jail]
Nasik Central Prison, Nasik]
]
4. The Secretary,]
Advisory Board (MPDA),]
Mantralaya, Mumbai]....RESPONDENTS

Ms. Misbaah Solkar for the Petitioner.
Mrs. M.H. Mhatre, APP for Respondent/State.

CORAM : S. S. SHINDE &
V. G. BISHT, JJ.

Reserved on : 20th FEBRUARY 2020
Pronounced on : 28th FEBRUARY 2020

JUDGMENT :- (PER S. S. SHINDE, J)

1 Rule. Rule made returnable forthwith and heard finally with the consent of learned counsel for the parties.

2 The Petitioner Mohamad Ishaq Mohamad Ismail Shaikh, who is the father of Detenu Haji Mohammad Ashfaq Mohammad Isak Shaikh, has preferred this Petition questioning the preventive detention order passed against the detenu on 17th October, 2019 by Respondent No. 1 – Commissioner of Police, Brihan Mumbai. The said detention order has been passed under the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug offenders, Dangerous persons and Video Pirates Act, 1981 (hereinafter referred to as ‘MPDA Act’). The said detention order has been issued as, according to the Detaining Authority, the Detenu is a Dangerous person whose activities are prejudicial to the maintenance of public order. The detention order is based on one Crime i.e. C.R. No. 137/2019 occurred on 03/07/2019 registered with V P Road Police Station for the offences punishable under Sections 392, 506(ii) of the Indian Penal Code read with Section 37(1)(a) read with 135 of the Maharashtra Police Act and two in-camera statements of witnesses ‘A’ and ‘B’, recorded.

3 Though number of grounds have been raised in the present Petition whereby the detention order has been assailed, however, the learned counsel appearing for the Petitioner / Detenu has pressed only seven grounds before us i.e. Ground Nos. ‘A’, ‘B’, ‘F’, ‘L’, ‘O’, ‘P’ and ‘Q’. Those grounds are reproduced herein below in verbatim:-

A. The Petitioner says and submits that the orders annexed

and marked at Exhibits “A” and “B” are manifestly erroneous and patently illegal in as much as the same are based in total defiance to the facts of the case, and the said orders also display a complete non-application of mind and is malafide on the part of the Detaining Authority.

- B. The Petitioner says and submits that by no stretch of imagination can it be said that the activities of the detenu are prejudicial to the maintenance of public order entailing his detention under the provisions of the said Act. None of the activities of the detenu, as mentioned in the grounds of detention, can be said to be disturbing the maintenance of public order and as such the orders are obviously illegal, bad in law, malafide, unconstitutional and unsustainable.*

- F. The Respondent No. 1 is bound to produce for the scrutiny of this Hon’ble Court the proposal and the findings for the detenu’s detention, relied upon by Respondent No. 1 in formulating the grounds of detention. If the grounds of detention are no more than a repetition of the proposal with minor grammatical and consequential variations, there cannot be a greater proof of non-application of mind. It is well settled that the liberty of a Subject is a serious matter and the same cannot be trifled with any such casual, indifferent and routine manner. The Respondent No. 1 is called upon to state whether before formulating the grounds of detention, he did go through the opinion of different subordinate officers, if any, written on the said proposal. The Respondent No. 1 having gone through the opinion of his subordinate Officers and having been influenced by them in formulating the grounds of detention and in the passing of the detention order, then the said detention order suffers from non-application of mind and is illegal, malafide, unconstitutional, null and void.*

- L. The Petitioner says and submits that the Sponsoring Authority having been satisfied that the detenu’s activities were prejudicial to the maintenance of public order and*

also his being at large was danger to the society at large, ought to have opposed the bail application, tooth and nail and thereafter ought to have challenged the bail order before the superior courts rather than resorting to an action under Preventive Detention. The Petitioner says and submits that the Sponsoring Authority did not even oppose the bail application nor ask for stay of the said bail order so as to move the superior courts against the same rather than taking resort to action under Preventive Detention. Having not done so the order of detention smacks of malafide rendering it to be quashed and set aside.

- O. The Petitioner says and submits that the recording of “In-Camera” statements seems to be fabricated and got-up statements in order to put the detenu behind bars under Preventive Detention. The Petitioner says and submits that, even otherwise, the incidents mentioned therein are stale, remote and not proximate in time and, therefore, the order of detention smacks of malafides.*
- P. The Petitioner says and submits that the incident which has been the basis of passing the impugned order concerns only with specified individuals and they have nothing to do with the members of the public at large. The Petitioner says and submits that these incidents at best are breaches of law and order and do not disturb the even tempo of the public or public tranquility at large and therefore the detention and/or continued detention is illegal, malafide, unconstitutional and void.*
- Q. The Petitioner says and submits that the incidents mentioned in the “In-camera” statements concerns only with specified individuals and they have nothing to do with the members of the public at large. The Petitioner says and submits that these incidents at best are breaches of law and order and do not disturb the even tempo of the public at large and therefore the detention and/or continued detention is illegal, malafide, unconstitutional and void.*

4 The learned counsel appearing for the Petitioner relying upon Grounds A, B, F, L, O, P, and Q submits that there was non-application of mind by the Detaining Authority while passing the order of detention; there was delay in passing the order of detention and submitting the proposal to the Mantralaya by the Detaining Authority seeking approval of detention of Detenu; the alleged in-camera statements are fabricated and not properly verified by the Detaining Authority, the activities of the detenu as mentioned in the grounds of detention cannot be said to be disturbing the public order; and though the sponsoring authority satisfied that the activities of the detenu were prejudicial to the maintenance of public order, they did not challenge the bail order obtained by the detenu before the superior courts. In support of the aforesaid contentions, the learned counsel appearing for the Petitioner relied upon the following judgments :- 1] Judgment of the Bombay High Court in the case of Sagar @ Lalu Bhoju Rathod v/s. The Commissioner of Police, Solapur and ors decided on 19/06/2018 in Criminal Writ Petition No.1619 of 2018 (Coram : S C Dharmadhikari & Smt. Bharati H Dangre, JJ); 2] Anil vs State of Maharashtra and ors.¹ 3] Lallan Prasad Chunnilal Yadav v/s. B Ramamurthi and ors.² 4] Balu v/s. The Commissioner of Police, Aurangabad and ors.³ 5] Niyazuddin v/s. State of Maharashtra and ors.⁴

1 2000(2) Mh.LJ 400

2 AIR 1993 SC 396

3 MANU/MH/0492/2019

4 MANU/MH/2055/2013

5 On the other hand, learned APP appearing for the Respondents/State submits that the Detaining Authority after proper application of mind has passed the impugned order of detention; there is no delay in passing the order of detention, that the detenu was involved in the criminal activities, and there was proper application of mind by the detaining authority to the material placed before him and the said authority has taken note of the fact that, the detenu applied for bail and obtained a bail order from the concerned Court, that the in-camera statements were verified by the ACP, Girgaon Division, and after scrutinizing and verifying the truthfulness and genuineness of the said two in-camera statements, the order of detention came to be issued by the detaining authority, that the noting in the original file would make it clear that the Detaining Authority has personally seen those statements; that the ground of delay in passing the order of detention has not been specifically raised by the Petitioner in the Petition and therefore the said ground orally agitated by the learned counsel appearing for the Petitioner may be kept out of consideration. In support of the aforesaid contentions, the learned APP pressed into service the exposition of the Division Bench of the Bombay High Court at Aurangabad in the case of Magar s/o Pansingh Pimple v/s. State of Maharashtra & others decided on 27/07/2005 in Criminal Writ Petition No.268 of 2005 (Coram : N V Dabholkar & S B Deshmukh, JJ).

6 We have given careful consideration to the rival submissions. With

the able assistance of the learned counsel appearing for the Petitioner and the learned APP appearing for the Respondents/State, we have carefully perused pleadings in the Petition and specifically the grounds A, B, C, F and O raised by the learned counsel for the Petitioner.

7 We would first deal with the submission of the learned counsel for the Petitioner regarding non-application of mind by the detaining authority while arriving at subjective satisfaction before passing the order of detention. In this context, the learned APP appearing for the Respondents/State invites attention of this Court to the order of detention so also the grounds of detention and the replies filed by the respective Respondents/Authorities and submits that the Detaining Authority after proper application of mind has passed the impugned order of detention.

It is clear from the order of detention and the grounds mentioned therein that the Detaining Authority relied upon one crime i.e. C.R. No. 137/2019 registered with V P Road Police Station and two in-camera statements while passing the order of detention. It is clear from the grounds of order of detention that paragraphs 5 to 7 of the grounds of detention are merely preamble/introduction and are not the actual grounds and therefore have not been relied upon by the detaining authority for issuing the order of detention against the detenu. According to the learned APP, paragraphs 5 to 7

referred in the grounds of detention are only for the purpose of showing that the Detenu is a habitual offender and the said grounds/material referred therein have not been considered by the Detaining Authority while arriving at subjective satisfaction before passing the order of detention.

It is submitted on behalf of the Petitioner that the statements made in paragraph 2 and paragraph 9 of the order of detention are contrary to each other, and the averments made in the order of detention clearly show that the detaining authority has considered the material mentioned in paragraph 7(a) and 7(b) thereof which is clearly contradictory to paragraph 2, and therefore, there is non-application of mind on the part of the detaining authority. Affidavit in reply dated 06/02/2020 filed by the Commissioner of Police, Brihan Mumbai is on record. We have carefully perused the averments made in the order of detention as well as the affidavit in reply filed by the detaining authority. In the context of the aforesaid submission of the learned counsel for the Petitioner, it is necessary to reproduce paragraphs 2, 3, 9 and 10 of the grounds of detention, and, the relevant excerpt of paragraphs 5 and 8 of the affidavit in reply of Respondent No.1, which read thus:-

“2 I hereby stated that paragraph 2 to 7 of the grounds of detention are merely preamble/introduction and are not the actual grounds of detention. Hence, the said grounds have not been relied upon by me for issuing the present order of detention against you.”

- “3 In pursuance of section 8 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 (Maharashtra Ct No.LV of 1981), (Amendment 1996), (Amendment 2009), (Amendment 2015) r/w Article 22(5) of the Constitution of India, I hereby communicate to you the grounds as mentioned in paragraph 8 below, on which a detention order has been made by me on this day against you under sub section (2) section 3 of the said Act.”
- “9 From the above facts and previous history chart mentioned in paragraph 7(a) to 7(b), I am satisfied that you are a dangerous person as per the section 2(b-1) of the aforesaid Act. You have unleashed a reign of terror and have become a perpetual danger to the society at large in the localities of Kolsa Galli, Masjid Galli, Patthe Bapurao Road, Girgaon and adjoining areas within the jurisdiction of V P Road Police Station in Brihan Mumbai. People residing and carrying out their daily avocations in the above localities and areas are terror stricken and their normal life is affected adversely by your criminal activities. Your activities are therefore prejudicial to the maintenance of public order in the above localities in Brihan Mumbai.”
- “10 After carefully going through the material placed before me in paragraph 8, I am subjectively satisfied that you are acting in a manner prejudicial to the maintenance of public order. I am aware that you are released on bail in connection with V P Road Police Station, C R No.137/2019, dated 03.07.2019. Considering your criminal tendencies and inclinations reflected in the offences committed by you as stated above and also you being a notorious criminal are likely to indulge in activities prejudicial to the maintenance of public order in future also. Therefore with a view to curb you from acting in such a prejudicial manner in future, it is necessary to detain you under the aforesaid Act.”

The Detaining Authority in paragraph 5 has specifically stated thus :-

“I was further satisfied that all the material on which I placed reliance was true and genuine. The said material includes the statement of in-camera witnesses and hence I placed reliance on the same.”

In paragraph 8 of the affidavit in reply, the detaining authority has stated thus :-

“It is submitted that while issuing order of detention, I as Detaining Authority, have considered 3 incidents viz. Incident occurred on 03.07.2019 vide C.R.No.137 of 2019 registered at V P Road Police Station for the offences punishable under Section 392, 506(II) of Indian Penal Code read with under Section 37(1)(a), 135 of Maharashtra Police Act, and the two statements of in-camera witnesses ‘A’ and ‘B’ recorded on 16.7.2019 and 24.7.2019 respectively.”

A conjoint reading of the aforesaid paragraphs 2, 3, 9, and 10 of the order of detention, and relevant excerpt of paragraph 5 and 8 of the reply affidavit filed by the detaining authority, it is abundantly clear that the detaining authority has not placed reliance on the material referred to in paragraphs 7(a) and 7(b) while arriving at subjective satisfaction before passing order of detention and only relied upon the material placed in paragraph 8 of the grounds of detention. It is also clear that the detaining authority has referred the material mentioned in paragraphs 7(a) and 7(b) of the order of detention only for the purpose of passing the order of detention and satisfying himself that the detenu fell within the definition of a particular category i.e. dangerous person which is provided in Section 2(b-1) of the Act. Therefore there is no substance in the submission made by the learned counsel

for the Petitioner that the detaining authority has not applied his mind properly while arriving at subjective satisfaction before passing the detention order.

8 The next ground on which the order of detention has been challenged is that though the sponsoring authority satisfied that the activities of the detenu were prejudicial to the maintenance of public order, they did not challenge the bail order obtained by the detenu before the superior courts.

From the affidavit in reply it is clear that the Respondents-Authorities have taken note of the fact that, the detenu applied for bail in the said CR No.137/2019, and a strong objection was taken by the prosecution with a prayer for rejection of bail. However, after considering the nature of offence, the learned Additional Chief Metropolitan Magistrate has released the detenu on bail on furnishing P R bond of Rs.10,000/-. Therefore it cannot said that the prayer for bail was not opposed by the authorities. As rightly argued by the learned APP that challenging the bail order in higher courts and issuance of the order of detention are two entirely independent proceedings not affecting the subjective satisfaction recorded by the detaining authority.

9 The next submission of the learned counsel for the Petitioner is that the recording of in-camera statements seems to be fabricated and got up

statements and the incidents mentioned therein are stale remote and not proximate in time and, the said two in-camera statements alleged to have been recorded in the said C R No.137/2019 only to fill up the lacuna and to make the ground to explain the delay as the detenu has been obtained bail order in the said CR from the concerned Court and was bail out on 06/07/2019. The original statements of witnesses A and B recorded in camera are placed before us. We have perused the same. It is clear that there is an endorsement on the in-camera statements of witnesses "A" and "B" made by the ACP, Girgaon Division which shows that the ACP has verified the truthfulness and genuineness of the said statements. It is also important to note that there is an endorsement on the original statements made by the detaining authority showing that the said statements have been seen by him.

Though technically the Respondents Authorities have completed procedural aspect, however, upon careful perusal of the said statements, the same appears to be stereotype and vague.

10 We have serious doubts about the contention of the Respondents that Crime i.e. CR No.137/2019 and two so called statements are sufficient and can be construed to mean that the alleged activities of detenu are prejudicial to the maintenance of public order entailing his detention under the provisions of said Act. In this connection it will be fruitful to refer to a decision

of the Supreme Court in *Pushker Mukherjee v/s. State of West Bengal*⁵ where the distinction between “law and order” and “public order” has been clearly laid down. The Court observed as follows :-

“Does the expression "public order" take in every kind of infraction of order or only some categories thereof. It is manifest that every act of assault or injury to specific persons does not lead to public disorder. When two people quarrel and fight and assault each other inside a house or in a street, it may be said that there is disorder but not public disorder. Such cases are dealt with under the powers vested in the executive authorities under the provisions of ordinary criminal law but the culprits cannot be detained on the ground that they were disturbing public order. The contravention of any law always affects order but before it can be said to affect public order, it must affect the community or the public at large. In this connection we must draw a line of demarcation between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals and only in a secondary sense public interest. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Preventive Detention Act but a disturbance which will affect public order comes within the scope of the Act.

11 Now coming to the ground of delay. According to the learned counsel for the Petitioner, there was delay in passing the order of detention and also there was delay in submitting the proposal to the Mantralaya by the Detaining Authority seeking approval of detention of Detenu. In support of the said contention the learned counsel for the Petitioner sought to rely upon the exposition of this Court in *Niyazuddin (supra)*. Paragraph 10 of the said

5 AIR 1970 SC 852

judgment is relevant and is reproduced herein under :-

“10 It is thus clear that after last offence was registered against the Petitioner in the month of August, 2012, in-camera statements, on which reliance has been placed by the authority, were recorded on 12th and 13th October 2012 and proposal was forwarded thereafter by Police Station, Nandanwan to the respondent No.2 on 15.10.2012. It is stated that it was received by the Crime Branch on 05.11.2012. It is difficult to understand as to why a period of 20 days was required for the file to travel from Nandanwan police station to the office of Police Commissioner, which is situated hardly at a distance of 8-10 kilometers and in the same city. The said delay has not at all been explained, leave apart the same being satisfactorily explained.”

12 However, according to the learned APP, there was no delay in passing the order of detention, as the proposal was routed through the concerned government authorities and time was consumed in processing the proposal and therefore it cannot be said that there was delay in passing the order of detention against the Detenu. It is submitted that the ground of delay in passing the order of detention has not been specifically raised by the Petitioner in the Petition and therefore the said ground orally agitated by the learned counsel appearing for the Petitioner may be kept out of consideration. The learned APP submits that there was no delay in passing the order of detention, and if there is a mere delay in passing the detention order, that cannot be a ground in causing interference in detention order, if the delay is satisfactorily explained.

13 Perusal of the affidavit in reply of Respondent No.1 shows that the crime vide C.R. No.137 of 2019 has been registered on 03/07/2019 against the detenu at V P Road Police Station. The detenu was released on bail on 06/07/2019. Thereafter a confidential inquiries were made into the criminal activities of the detenu. Thereafter in-camera statements of witnesses "A" and "B" were recorded on 16/07/2019 and 24/07/2019. The said in-camera statements were verified by the ACP Girgaon Division on 17/07/2019 and 25/07/2019 by visiting personally the place of incidents. It is also stated in the affidavit in reply of Respondent No.1 that relying upon the said in-camera statements recorded by the ACP, which the detaining authority believe to be true and genuine, the order of detention came to be issued. It is also stated that the order of detention came to be passed on 17/10/2019 and immediately on 18/10/2019 the detenu was detained and the report as required under Section 3(3) of the MPDA Act, 1981 was forwarded to the Government of Maharashtra on 19.10.2019 the State Government was pleased to approve the order of detention on 23/10/2019 and confirm the order of detention on 21/11/2019.

 In the affidavit in reply of Aniruddha Venkatesh Jewlikar, Deputy Secretary (In-Charge), Government of Maharashtra, Home Department (Special), it has been stated that the file containing the report was submitted

by the concerned Section Officer to the Deputy Secretary (In Charge) on 19/10/2019, the Deputy Secretary (In Charge) endorsed it on 19/10/2019 and forwarded it to the Additional Chief Secretary (Home) on the same day. The Additional Chief Secretary (Home) who has been duly authorized to exercise the powers under the said Act, after considering all the facts of the case and police reports, approved the detention order on 23/10/2019, which was served to detenu on 25/10/2019. It is also stated that while replying to the grounds (C)(D) and (M), the deponent has stated how the file travelled from one authority to other, finally on 23/10/2019 the file containing noting was placed before the Additional Chief Secretary who in turn approved the order of detention. It is further stated that immediately on the same day the Approval order, Detention order, Committal Order, Grounds of detention and its annexures and the police report were forwarded to the Advisory Board. The report of the Advisory Board was received in the office of Additional Chief Secretary (Home) on 21.11.2019. Thereafter, the Additional Chief Secretary, Home who has been duly authorized to exercise the powers under the said Act, confirmed the order of detention for one year on 21/11/2019.

In the affidavit in reply of Devendra H Chandel, Secretary, Advisory Board, it has been stated that the case report of above detenu under MPDA Act, 1981 was sent from Home Department, Spl-3B dated 23/10/2019. Thereafter, the intimation letter dated 02/11/2019 through Email was issued

through the Superintendent Thane Central Prison, Thane to the detenu by Secretary, Advisory Board on 02/11/2019 informing the detenu that the hearing before advisory board is fixed on 14/11/2019 at 2.00 pm. After considering and hearing the detenu as well as his advocate on 14/11/2019 the Board forwarded its opinion to the State Government on 21/11/2019.

14 Perusal of the record maintained by the Respondents, particularly affidavit in reply filed by the detaining authority shows that the detenu was involved in one crime i.e. CR No.137/2019 and there were two statements recorded in-camera. It is evident from the material on record that the detenu has obtained bail order and was bailed out on 06/07/2019. In camera statements of witnesses A and B were recorded on 16/07/2019 and 24/07/2019 respectively. The said statements were verified by the ACP, Girgaon Division on 17/07/2019 and 25/07/2019 i.e. after a period of 10 to 20 days after the detenu was released on bail. Therefore there is substance in the submission of the learned counsel for the Petitioner that the said statements were recorded just to fill up the lacuna and to make the ground to explain the delay. It means that the detaining authority has passed the order of detention on 17/10/2019 much belatedly after about 3 ½ months from the registration of crime i.e. C R No.137/2019 which has been registered on 03/07/2019 and after about 2 ½ months from recording the 2nd in-camera statement which has been recorded on 24/07/2019. As held by the Hon'ble

Supreme Court in the case of Pradeep Nilkanth Paturkar vs S Ramamurthi & ors.⁶, unexplained delay, whether short or long, especially when the Petitioner has taken a specific plea of delay, vitiates the detention order.

15 In Paragraph 9 of the said exposition in Pradeep Paturkar's case (supra) the Hon'ble Supreme Court has referred to its earlier judgment in T A Abdul Rahman v/s. State of Kerala; (9189) 4 SCC 741 wherein it has been observed as under :-

"The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the Court has to scrutinize whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the Court has to investigate whether the causal connection has been broken in the circumstances of each case."

So far as the said delay is concerned, there is no satisfactory or plausible explanation offered by Respondent No.1-Detaining Authority. Therefore, keeping in view the exposition of law by the Hon'ble Supreme Court

6 AIR 1994 SC 656

in the case of Pradeep Nilkanth Paturkar (Supra), and since no plausible explanation has been offered for delay in passing the order of detention, it will have to be held that there was delay in passing the order of detention.

16 In that view of the matter, an irresistible conclusion is that the order of detention impugned in this Writ Petition cannot be sustained, and therefore, the impugned order is liable to be quashed and set aside. Hence the following order is passed :-

:ORDER:

- A] The impugned order of detention bearing No.23/PCB/DP/Zone-II/2019 dated 17/10/2019 issued under Section 3 of M.P.D.A. Act, 1981 by Respondent No.1 is hereby quashed and set aside.
- B] The Detenu Haji Mohammad Ashfaq Mohammad Isak Shaikh be set at liberty forthwith, if not required in any other case.
- C] The Writ Petition is accordingly allowed and Rule is made absolute in the aforesaid terms with no order as to costs.

(V. G. BISHT, J.)

(S. S. SHINDE, J.)

**Laxmikant
G.
Chandan**

Digitally signed
by Laxmikant G.
Chandan
Date:
2020.02.28
13:47:13 +0530