

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.3141 OF 2021

Manoj Bakku Mithapure

.... Petitioner

versus

State of Maharashtra & Ors.

.... Respondents

.....

- Mr.Rahul Kadam a/w Mr.Santosh Musale, Advocate for Petitioner.
- Ms.S.D. Shinde, APP for State/Respondent.

CORAM : NITIN JAMDAR &
SARANG V. KOTWAL, JJ.

DATE : 17 DECEMBER 2021

ORAL ORDER : (PER : NITIN JAMDAR, J.) :

. Rule. Rule made returnable forthwith. Taken up for disposal.

2. The Petitioner has challenged the order dated 29 June 2021 passed by the District Magistrate, Satara, the detaining authority, placing the Petitioner under detention.

3. The Respondent No.2 passed the order of detention against the Petitioner categorizing the Petitioner as a dangerous

person under Section 2(b-1) of the 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 (the Act).

4. In these grounds in support of the detention order the detaining authority referred to a crime registered against the Petitioner and In Camera statements of witnesses. After the order of detention was passed on 30 June 2021, the order was reported to the State Government under Section 3(3) of the Act. On 2 July 2021, the order of detention was approved by the State Government as per the provisions of the Act. On 7 July 2021, reference was made to the Divisional Court under Section 10 of the Act.

5. The Petitioner made a representation to the State Government as regard the detention on 4 August 2021. On 2 September 2021, the detaining authority received representation seeking remarks. On 2 September 2021 itself the detaining authority forwarded the remark of the Superintendent of Police, which the Superintendent of Police received on 3 September 2021. On 6 September 2021, the report was received by the Superintendent of Police, Satara, from Shahupuri Police Station, which was forwarded by the Superintendent of Police, to the detaining authority on 7

September 2021, which was received on the same day by the detaining authority. The remarks were forwarded to the Home Department by detaining authority on 16 September 2021. The file was put up before the Deputy Secretary on 16 September 2021 and on 17 September 2021 the same was forwarded to the Additional Secretary. On 20 September 2021 the representation of the Petitioner was rejected and outcome was communicated by speed post.

6. The main ground of the Petitioner to challenge the order of detention is based on protection accorded under Article 22(5) of Constitution of India as regard the delay in deciding representation from 4 August 2021 to 20 September 2021. The learned Counsel submitted that in spite of the replies filed, there is no explanation coming forth for the delay. The learned Counsel for the Petitioner in that regard has relied upon decision of the Division Bench of this Court in the case of *Srinivas Kishor Sanga Vs. Commissioner of Police and others*¹, and of the Supreme Court case *Rama Dondu Vs. V.K. Saraf and Rajmal Vs. State of T.N.*³

7. As regard the time period between 6 September 2021 to 15 September 2021, the detaining authority was on leave. This explanation is sufficient and bonafide and same is not seriously

1 2019 SCC Online Bom 493

2 (1989) SCC 173

3 (1999) SCC 417

challenged before us. 18 September 2021 and 19 September 2021 were Saturday and Sunday. The main challenge is for the delay between 4 August 2021 and 2 September 2021. That is of 28 days, which according to the Petitioner is completely unexplained.

8. Two reply affidavits have been filed on behalf of the State and two by the detaining authority. First reply affidavit of the State is dated 18 October 2021. It is sworn by Deputy Secretary, Home Department (Special). It is stated that the representation dated 4 August 2021 was received by Special Branch 3-B Desk of Home Department on 4 August 2021 and thereafter remarks were called for from the detaining authority on 4 August 2021 i.e. the same day and remarks of detaining authority were received by email dated 16 September 2021. This is not an explanation for the delay and simply states that remarks were received belatedly from the detaining authority.

9. In response to assertion made in the Petition regarding this period of delay in ground 10(XII) the Petition, the affidavit filed by the detaining authority on 13 October 2021 stated that this ground does not pertain to the detaining authority. At that time, the learned APP had submitted that this is a mistake and opportunity to be given to the detaining authority.

10. Thereafter, not only detaining authority has filed an additional affidavit, but also the Deputy Secretary. In the additional affidavit filed by the detaining authority on 13 December 2021, the detaining authority has stated that the representation of detaining authority was received by the office of detaining authority on 2 September 2021 and thereafter it was sent on 16 September 2021 to the State Government. Therefore the detaining authority has categorically asserted that it did not receive the representation of the Detenu stated to have been sent to it as per the State Government on 4 August 2021.

11. In the additional affidavit on 9 December 2021 filed by the Deputy Secretary, it is stated in paragraph No.2 as under;

“2. With reference to Para 10 (XII) of Writ Petition and Public Prosecutor office letter dated 07.12.2021, it is submitted that the representation dated 04.08.2021 was received in the Special Branch-3B Desk of Home Department on 04.08.2021. Thereafter, remarks were called via Email from the Detaining Authority i.e. The District Magistrate, Satara on the same day i.e. 04.08.2021 by Special Branch-3B Desk and the same was also informed to the concenced office telephonically. When enquired concened office about the reply the said office informed that they haven't received the email. Then the same representation was again sent to The District Magistrate, Satara via email on dated 02.09.2021. The remarks of the Detaining

Authority were received via e-mail on 16.09.2021 vide letter dated 15.09.2021. The concerned Section Officer submitted the file to the Deputy Secretary on 16.09.2021. The Deputy Secretary endorsed it on 17.09.2021 and forwarded it to the Additional Chief Secretary (Home) on the same day. As there were holidays on 18.09.2021 (Saturday) and 19.09.2021 (Sunday), The Additional Chief Secretary (Home) considered the representation of the detenu and the remarks of the Detaining Authority and rejected the representation on 20.09.2021 by applying his mind. The rejection of representation was communicated by speed post to the detenu vide letter dated 20.09.2021 through the Registry section of Home Department. Thus, the representation of the detenu was considered by the State Government as expeditiously as possible.”

(Emphasis supplied)

This is the only explanation for the period of 28 days. It is stated that enquiry was made with the office of detaining authority as to whether email was received or not, but no particulars are given what prompted the authority to write to the detaining authority to find out whether representation was received. The explanation is bereft of any particulars. It is clear that there is no explanation for the delay of 28 days in deciding the representation.

12. Therefore, the delay of 28 days has completely unexplained and the guarantee provided under Article 22(5) of the Constitution of India to the Petitioner has been breached.

13. The Division Bench of this Court in the case of *Srinivas Sanga (cited supra)* after taking the review of the law on the subject has observed as under;

“31. 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 representation at the earliest for its expeditious consideration.

32. 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.”

33. 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.”

The decision squarely applies to the facts of the case. The view taken in this decision and considering the law led down in *Srinivas Sanga (cited supra)* it is clear that the detention order is liable to be set aside.

14. Accordingly the Petition deserves to be allowed and is allowed in terms of prayer clause (a). Rule made absolute in above terms.

15. The Petitioner be released forthwith if not required in any other offence.

(SARANG V. KOTWAL, J.)

(NITIN JAMDAR, J.)