

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 221 OF 2023

Mujib s/o Abdul Shaikh,
Age 40 years, Occ. Agriculture,
R/o. Sanav Tq. Gangapur,
District Aurangabad.

... **Petitioner**

VURSUS

- 1) District Magistrate Aurangabad,
District Aurangabad.
- 2) The State of Maharashtra
Through :
The Addl. Chief Secretary,
Government of Maharashtra,
Home Department, Mantralaya,
Mumbai-32.
- 3) The Jail Superintendent,
Central Prison, Harsool,
Aurangabad, Dist. Aurangabad.

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Advocate for the Petitioner : Mr. Satej S. Jadhav
APP for the Respondent Nos. 1 to 3 : Mr. M.M. Nerlikar

CORAM : **MANGESH S. PATIL &
ABHAY S. WAGHWASE, JJ.**

RESERVED ON : **28.04.2023**
PRONOUNCED ON : **03.05.2023**

JUDGMENT : (MANGESH S. PATIL, J.)

Heard.

2. Rule. Rule is made returnable forthwith. At the request of the both the sides, the matter is heard finally at the stage of admission.

3. By invoking powers of this Court under Article 226 of the Constitution of India, the petitioner is impugning the order of preventive detention passed by the respondent No. 1-District Magistrate, and approved by the respondent No. 2-State, dated 02.06.2022 under Section 3(2) 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 (herein after **MPDA Act**). The order along with grounds was served to the petitioner on 04.06.2022. The respondent No. 2-State granted initial approval to it on 09.06.2022. The petitioner submitted his representation on 14.06.2022. Advisory board heard him on 07.07.2022 and the respondent No. 2-State confirmed the order of detention for a period of 12 months by its order dated 21.07.2022.

4. Apparently, the respondent No. 1-District Magistrate has reached subjective satisfaction about activities of the petitioner being prejudicial to the public order on the basis of his persistent involvement in several crimes for stealing sand, the latest being dated 25.02.2022 and 06.03.2022 of Sillegaon Police Station District Aurangabad bearing Crime No. 59/2022 and 72/2022 for the offences punishable under Sections 379, 186 read with Section 34 of the Indian Penal Code and under Section 21(1) to 21(5) of Mines and Minerals (Development and Regulation) Act, 1957. In substance he is being perceived as a 'sand Mafiya'. Statement of couple of witnesses have been recorded who have stated about the individual incidents occurred with them involving the petitioner wherein they allege about he having threatened them which statements the respondent No. 1-District Magistrate got verified from police inspector of Local Crime Branch.

5. We have heard the arguments of both the sides finally.

6. The learned advocate Mr. Jadhav for the petitioner would vehemently submit that the detention order has been passed mechanically sans

application of mind and is illegal. He would submit that the detention order is bearing a number of the year 2021 but has been actually passed in 2022 which demonstrates that the order suffers from vice of prejudice. He would submit that with a view to some how detain the petitioner systematically both the offences have been registered in succession barely within a span of 10 days which itself is demonstrative of prejudicial mind with which the respondent No. 1-District Magistrate has acted. He would submit that the respondent No. 1 District Magistrate has himself not verified the genuineness of the statements of two witnesses recorded in-camera. He did undertake that exercise through subordinates but conspicuously omits to state the satisfaction about unwillingness of these witnesses to record their statements in open court.

7. Mr. Jadhav would further submit that even the respondent No. 1-District Magistrate ignored the fact that in both the offences the petitioner was enlarged on bail and failed to justify his order by demonstrating as to how being at large the ordinary law of land was insufficient to prevent his activities. It is not even the case even in the affidavit in reply that the petitioner has been involved in a similar activity after he was granted bail, more so when he was released on bail in the first half of April 2022 and the order of detention has been passed on 02.06.2022 and the affidavit in reply has been filed on 28.03.2023. In the absence of such grounds, the subjective satisfaction arrived at by the respondent No. 1-District Magistrate is fanciful.

8. Mr. Jadhav would, lastly, submit that the impugned order was not placed before the advisory board as is required by Section 10 of the MPDA Act as interpreted by this court within three weeks from the date of detention and even this would vitiate it.

9. The learned A.P.P. Mr. Nerlikar would strenuously submit that this Court cannot sit in appeal while examining the legality of the impugned order of detention. When the law enables and empowers the respondent

No. 1-District Magistrate to pass the order of preventive detention on the basis of a subjective satisfaction, the circumstances relied upon by him cannot be scrutinized threadbare as if this Court is sitting in appeal. If the subjective satisfaction is based on plausible appreciation of the material that should suffice.

10. Mr. Nerlikar would further submit that the respondent No. 1 District Magistrate has verified the genuineness of the statements of the witnesses, both of whom, on their individual experience have castigated the petitioner to be dangerous, demonstrating as to how they are apprehensive of his activities and harbour a fear. There is no reason to disbelieve them. All the necessary steps leading to the confirmation of the order of detention have been duly followed within the time line prescribed under the MPDA Act. The very reference in the order to the bail granted to the petitioner is sufficient to indicate that the bail order was considered by the respondent No. 1-District Magistrate. In fact the compilation of papers which were before him contained the order of bail and it cannot be said that he was oblivious of the grounds on which the bail was granted.

11. Lastly, Mr. Nerlikar would submit that Section 10 of the MPDA Act has to be interpreted pragmatically more so when by virtue of Section 11 the advisory board is supposed to take a decision within seven weeks from the date of detention. The period of three weeks prescribed by Section 10 will have to be read in the context of Section 11. No prejudice has been caused to the petitioner even if it is assumed that the impugned order was placed before the advisory board beyond three weeks, once it is demonstrated that the decision was taken by the advisory board within seven weeks of the date of detention as is required by Section 11. Mr. Nerlikar would rely on the following decisions :

(1) Harish Patil Vs. State of Maharashtra;
2016 DGLS(Bom.) 457

(2) **Magar Pansingh Pimple Vs. State of Maharashtra and another; 2006(1) Maharashtra Law Journal (Cri.) 28.**

12. We have carefully considered the rival submissions and perused the papers.

13. The submission of Mr. Nerlikar that this Court has inherent limitations in examining the correctness or otherwise of the impugned order of detention on the ground that it is trite that this Court cannot sit in appeal while examining the order of detention is indeed a trite legal position. One need not delve deep. A reference to **Magar Pansingh Pimple** (supra) would suffice.

14. If it can be demonstrated on the basis of the material which was available with the respondent No. 1-District Magistrate that the statements of the witnesses were genuine and indicated that indeed the petitioner's activities were prejudicial to the public order because of the threat perception being entertained by them, it would again be a sufficient ground to reach a subjective satisfaction.

15. However, simultaneously, by various decisions of the Supreme Court as well as this Court scope of the powers of this Court to examine the detention order have been elaborately considered. Suffice for the purpose to refer to the observations of a division bench of this Court in the matter of **Magar Pansingh Pimple (supra)** which takes a roving enquiry and refers to the catena of judgments including that of Supreme Court in the matter of **Smt. Hemlata Kantilal Shah Vs. State of Maharashtra; A.I.R. 1982 Supreme Court 8** and a decision of another division bench of this Court in the matter of **Vijaya Raju Gupta Vs. R.H. Mendonca; 2001 (2) Maharashtra Law Journal 437.**

16. One cannot but be guided by the catena of judgments which lay down different circumstances to be examined by this Court whenever an order of

preventive detention is challenged.

17. In the matter of **Rushikesh Tanaji Bhoite Vs. State of Maharashtra and others; 2012 Cri.L.J. 1334** importance of placement of order of bail before the detaining authority has been considered by the Supreme Court. We had an occasion to consider that aspect and even to consider similar arguments of Mr. Nerlikar in similar set of facts where there was a passing reference in the order of detention to indicate that the detaining authority was aware about passing of the bail orders. In the matter of **Avinash @ Balu Atmaram More Vs. State of Maharashtra in Cri. Writ Petition No. 1745/2022**, a similar observation was made by the detaining authority about even after release on bail the activities of the detenu were likely to continue. The observations in the present order under challenge in paragraph No. 10 are as under :

“10. I have carefully gone through the material placed before me and I am subjectively satisfied that you are acting in a manner prejudicial to the maintenance of public order. I am aware that now you are on bail. In view of your tendencies and inclination towards criminal activities reflected in the offences committed by you as stated above, I am satisfied that you are likely to revert to similar activities prejudicial to the maintenance of public order in future and that it is necessary to detain you 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” to prevent you from acting in such prejudicial manner in future.”

It does appear from these observations that the respondent No. 1- District Magistrate was aware about the fact that the petitioner was on bail.

18. But then the case would be still worse for the State to defend if he was really aware about the order of bail, then it was imperative for him to have examined the grounds and conditions on which the bail was granted and should have recorded a satisfaction as to how, in spite of that order of bail passed by the Court, the activities of the petitioner would continue. If those had not so continued that would run on the face of the observation in this paragraph No. 10. If the petitioner has been involved in such activities prejudicial to the public order after he was released on bail then it would have been imperative for the respondent No. 1-District Magistrate to demonstrate as to why the ordinary law of land of applying for cancellation of bail was insufficient to prevent the petitioner's activities. The importance of all these facts have been elaborately considered by the Supreme Court in the matter of **Rushikesh Tanaji Bhoite**. Therefore, mere technical compliance of availability of bail order in the papers before the respondent No. 1-District Magistrate and his being alive to the fact that ground of bail is not sufficient. The absence of application of mind to the above facts would go to the validity of the detention order as has been held in the matter of **Rushikesh Tanaji Bhoite**.

19. Again, so far as the compliance with Section 10 of the MPDA Act is concerned, it requires the detention order to be placed before the advisory board together with the representation if any preferred by the detenu within three weeks from the date of detention. A Similar submission of Mr. Nerlikar that transmission of papers to the Secretariat/ office of the advisory board is sufficient has been dispelled by us in few matters the first being **Avinash @ Balu Atmaram More (supra)**. Paragraph Nos. 16 to 19 of which read as under :

“16. Section 10 of the MPDA Act reads as under :-

“**10. Reference to Advisory Board -**

In every case where a detention order has been made under this Act, the State Government shall, within three

*weeks from the date of detention of a person under the order, **place before the Advisory Board** constituted by it under section 9 the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in the case where the order has been made by an officer, also the report by such officer under sub-section (3) of section 3.” (emphasis supplied)*

A plain reading of this provision and particularly the words in bold would indicate that State government has to place before the advisory board the detention order and the grounds on which such order is passed together with the representation of the detainee as well as the report of the officers under section 3(3) of the MPDA Act within three weeks from the date of detention.

17. There is no dispute about the fact that though the impugned order of detention was passed on 07-06-2022, the petitioner was actually detained on 11-06-2022. The affidavit in reply does not expressly mention the date on which the order of detention together with the grounds and other annexures mentioned herein-above was placed before the advisory board as is required by section 10 of the MPDA Act. We had requested the learned A.P.P to ascertain the fact. On instructions, he submits that such compliance was made and the matter was placed before the advisory board on 07-07-2022. Which means it was so placed before the advisory board beyond three weeks from the date of detention. If this is so, there is a gross violation of the provision of section 10 of the MPDA Act.

18. Mr. Nerlikar would strenuously submit that considering the heading of section 10, reference to the advisory board is contemplated and the provision should be interpreted by bearing in mind the heading. The word ‘placing’ used in the provision would comprehend sending of the detention order along with the grounds and other annexures to the advisory board. According to him it is not necessary that the matter is actually placed before the advisory board within three weeks. Even such transmission of the papers would be due compliance. He placed reliance on the decision in the matter of ***Bhinka and others V***

Charan Singh; 1959 AIR (SC) 960. Mr. Nerlikar submitted that, if the provision together with the heading are considered harmoniously, the interpretation which he suggested was deducible.

19. Though ingenious, we cannot accept the submission for the simple reason that there is no ambiguity in the substantive provision of section 10 of the MPDA Act so that any aid can be had from the head note. The provision clearly requires placing of the detention order before the advisory board and not its mere transmission. In *Bhinka* (supra), it has been clearly laid down that only if there is any doubt in the interpretation of the words in the section that the heading helps to resolve the doubt. When section 10 of the MPDA Act is clear and unambiguous, we cannot refer to the heading, to interpret the provision as is submitted by Mr. Nerlikar.”

20. Conspicuously, the affidavit in reply is silent as to the exact date on which Section 10 compliance was made by placing the matter before the advisory board. Admittedly, the advisory board heard the petitioner on 07.07.2022 whereas he was detained with effect from 02.06.2022. The affidavit in reply being silent as to if the advisory board had an occasion to consider the petitioner’s case prior to 07.07.2022 and consequently that date being beyond the period of three weeks, there is clear non compliance with the mandatory requirement of Section 10.

21. The argument of Mr. Nerlikar that this period of three weeks has to be considered in the context of period of seven weeks available with the advisory board under Section 11 to take a decision is ingenuous but is not sustainable. It needs to be borne in mind that such orders of preventive detention are indeed serious orders curtailing the fundamental right of the detenu cherished by the constitutional makers. The life and liberty of an individual cannot be put at stake except according to the procedure established by law as is mandated by Article 22 of the Constitution. When the MPDA Act or some similar statute prescribes the procedure to be

followed before a person is detained by way of a preventive action, the liberty cannot be curtailed except by strictly adhering to the procedure. When Section 10 requires the order of detention to be placed before the advisory board within three weeks of the date of detention, the legislature in its wisdom has prescribed the procedure so that everything is not left to subjective satisfaction of the detaining authority. It is mandated by Section 10 to place the order of detention before advisory board within three weeks which comprises of three members one of which is a current sitting Senior Judge of the High Court. It can be assumed that the order of detention is under active consideration of such an advisory board. Therefore, even a delay of single day in placing the order of detention before the advisory board should be treated as fatal as it runs contrary to the constitutional principles and the legislative mandate.

22. In the matter of ***Mrs. T. Devaki Vs. Govt. Of Tamil Nadu and others;*** ***AIR 1990 SC 1086***, following were the observations :

“9. Section 3(3) requires that where detention is made by the delegate of the State Government, namely, the District Magistrate or the Commissioner of Police, they should report the fact to the State Government together with the grounds on which the order may have been made and such other particulars as, in their opinion, may have a bearing on the matter. A detention order made by a District Magistrate or Commissioner of Police in exercise of their delegated authority does not remain in force for more than twelve days after the making thereof, unless in the meantime the detention order is approved by the State Government. Section 3 requires the detaining authority to communicate to the detenu, grounds on which, the order is made within five days from the date of detention to enable the detenu to make representation against the order to the State Government. Section 10 requires the State Government to place before the Advisory Board the detention order and the grounds on which such order may have been made alongwith the representation made by the

detenu as well as the report of the officers made under Section 3(3) of the Act within three weeks from the date of detention. Under Section 11 the Advisory Board is required to consider the materials placed before it and after hearing the detenu, to submit its report to the State Government within seven weeks from the date of detention of the person concerned. In a case where the Advisory Board forms opinion, that there was no sufficient cause for the detention the State Government shall revoke the detention order but if in its opinion sufficient cause was made out, the State Government may confirm the detention order and continue the detention of the person concerned for such period not exceeding the maximum period as specified in Section 13 of the Act. Section 13 provides the maximum period for which a person can be detained in pursuance of any detention order made and confirmed under the Act. According to this provision the maximum period of detention shall be twelve months from the date of detention. The State Government has, however, power to revoke detention order at any time, it may think proper.

10. Provisions of the aforesaid sections are inbuilt safeguards against the delays that may be caused in considering the representation. If the time frame, as prescribed in the aforesaid provisions is not adhered, the detention order is liable to be struck down and the detenu is entitled to freedom. Once the order of detention is confirmed by the State Government, maximum period for which a detenu shall be detained cannot exceed 12 months from the date of detention. The Act nowhere requires the detaining authority to specify the period for which the detenu is required to be detained. The expression "the State Government are satisfied that it is necessary so to do, they may, by order in writing direct that during such period as may be specified in the order" occurring in subsection (2) of S. 3 relates to the period for which the order of delegation issued by the State Government is to remain in force and it has no relevance to the period of detention. The Legislature has taken care to entrust the power of detention to the State Government, as the

detention without trial is a serious encroachment on the fundamental right of a citizen, it has taken further care to avoid a blanket delegation of power, to subordinate authorities for an indefinite period by providing that the delegation in the initial instance will not exceed for a period of three months and it shall be specified in the order of delegation. But if the State Government on consideration of the situation finds it necessary, it may again delegate the power of detention to the aforesaid authorities from time to time but at no time the delegation shall be for a period of more than three months. The period as mentioned in Section 3(2) of the Act refers to the period of delegation and it has no relevance at all to the period for which a person may be detained. Since the Act does not require the detaining authority to specify the period for which a detenu is required to be detained, order of detention is not rendered invalid or illegal in the absence of such specification.”

23. Consequently, in the absence of concrete record to demonstrate that the impugned order of detention in petitioner’s case was placed before the advisory board within three weeks from the date of his detention on 02.06.2022, there is a fundamental breach of the provision of Section 10 which goes to the root of the legality of the order.

24. Criminal Writ Petition is allowed.

25. The impugned order of detention is quashed and set aside.

26. The petitioner shall be released forthwith if not required to be detained in any other matter.

(ABHAY S. WAGHWASE, J.)

(MANGESH S. PATIL, J.)

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