

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 326 OF 2023

Gayaj @ Sohel Aslam Bagwan
Age : 30 years, Occu : Business,
R/o. House No. 356, Mahada Colony,
Karba Nagar, Garkheda Aurangabad,
Tq. and Dist. Aurangabad

.. Petitioner

Versus

- 1] The State of Maharashtra,
Through its Secretary,
Home Department (Special),
Government of Maharashtra,
Mantralaya, Mumbai – 32
- 2] The Commissioner of Police,
Aurangabad Tq and Dist Aurangabad
- 3] The Deputy Commissioner of Police,
(Parimandal-1), Aurangabad City,
Tq. and Dist. Aurangabad
- 4] The Assistant Police Commissioner,
Division Chhavani, Aurangabad
Tq. And Dist. Aurangabad
- 5] The Police Inspector,
Chhavani Police Station, Aurangabad
Tq and Dist. Aurangabad
- 6] The Superintendent,
Central Prison Jail, Harsool,
Tq. Dist. Aurangabad

.. Respondents

...
Advocate for petitioner : Mr. Rahul D. Khadap
APP for the respondent – State : Mr. M.M. Nerlikar
...

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

**RESERVED ON : 27 APRIL 2023
PRONOUNCED ON : 03 MAY 2023**

JUDGMENT (MANGESH S. PATIL, J.) :

Rule. Rule made returnable forthwith. By the consent of the parties, the petition is heard finally. By this petition under Article 226 and 227 of the Constitution of India, the petitioner is impugning the order passed by the respondent no. 2 Commissioner of Police, Aurangabad dated 26-07-2022 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 (hereinafter **MPDA Act**) dated 07-06-2022 thereby directing his detention which has been approved by the State government on 26-07-2022. The opinion of the Advisory Board was obtained on 14-09-2022 and on the basis of its report, the order of detention was confirmed on 14-09-2022 for a period of 12 months.

2. The learned advocate Mr. Khadap for the petitioner assails the impugned order on the ground that the statement of the witnesses recorded in-camera, cannot form the basis for passing the detention order. There is delay in recording their statements. These witnesses claim the incidents to have taken place in May 2022 but their statements have been recorded on 12/13 June 2022. Besides, the statements of these witnesses are vague. They do not disclose the exact date and place and only roughly mention about the incidents to have taken place in second and last week of May 2022. He would then

submit that the petitioner has been deprived of making a proper representation having been misled by the errors committed in translating the grounds of detention which are in English, in Marathi. He places reliance on ***Rohit Sidram Khatal Vs. Commissioner of Police, Solapur and others; 2021(3) Mh.L.J. (Cri) 3421*** and ***Noor Mohamed Khan V. M.N. Singh and others; 2021 BCI 144***. He would submit that such incorrect translation deprived the petitioner of making effective representation under Article 22(5) of the Constitution of India.

3. Learned advocate Mr. Khadap would then submit that so far as delay in initiating the preventive action, the offence being relied upon for initiation of the action bearing crime no. 140 of 2022 with Chhawani Police Station was registered on 22-04-2022 and the order of detention has been passed after three months and, therefore, it is not sustainable. In support of his such submission, he would place reliance on the decision in the matter of ***Pradip Nilkanth Paturkar Vs. Ramamurthi; AIR 1994 S.C. 656***. He would submit that the impugned order does not reflect application of mind by the respondent no. 2 who has failed to explain the delay.

4. Mr. Khadap would then submit that the impugned order does not indicate and demonstrate as to how registration of the crime and the statements of the witnesses indicate the actions of the

petitioner could be called as prejudicial to the maintenance of the public order.

5. Lastly, Mr. Khadap would submit that there is no strict compliance of the provisions of section 10 of the MPDA Act inasmuch as the grounds of detention together with the petitioner's representation was not placed before the Advisory Board within three weeks of the actual detention. He would place reliance on the decision of this Court dated 21-04-2023 in the matter of **Avinash @ Balu Atmaram More Versus The State of Maharashtra and others** (Criminal Writ petition no. 1745 of 2022) dated 21-04-2023. He would also submit that the order granting bail was also not placed before the respondent no. 2 which also goes to the root of the legality of the order.

6. The learned APP Mr. Nerlikar strenuously opposed the petition by referring to the affidavit in reply filed by the respondent no. 2. He submitted that this Court in exercise of the powers under Articles 226 and 227 of the Constitution of India, cannot sit in appeal while examining the legality of the order passed under the MPDA Act. It is the subjective satisfaction reached by the detaining authority based on some objective material that is sufficient to pass the order of detention. The authority has taken a plausible view on the basis of an offence registered against the petitioner coupled with the statements of the witnesses recorded in anonymity. He would then submit that there

is no delay in taking the preventive action from registration of the last crime.

7. Mr. Nerlikar would also point out that the impugned order indicates that even the respondent no. 2 has taken into consideration the fact of grant of bail which order was available before him. He has also expressly pointed out as to how the order granting bail is unlikely to prevent the activities of the petitioner which would be prejudicial to the public order.

8. He would then submit that minor error in translation of the grounds of detention from English to Marathi which do not misled the petitioner, will have to ignored. Petitioner has been unable to point out as to which of such discrepancy in the translation has the potential of misleading him. Such errors are minor.

9. He would lastly submit that there is strict compliance with the timeline laid down under the MPDA Act in taking steps. The petitioner was detained on 30-07-2022 and the papers were transmitted to the Advisory Board on 05-08-2022 i.e. within three weeks of the date of detention, as is required by section 10 of the MPDA Act. The provision merely requires the papers to be transmitted to the Advisory Board. Section 11 allows the Advisory Board to take

decision within 7 weeks from the date of detention and there is no error.

10. Taking the grounds being raised on behalf of the petitioner to challenge the impugned order of detention in *seriatim*, admittedly, the last offence being relied upon by the respondents was registered on 22-04-2022. The statements of the witnesses were recorded on 12 and 13 June 2022. On 15 June 2022, the proposal was forwarded to the respondent no. 2 who passed the impugned order on 26-07-2022. The order was served to the petitioner on 30-07-2022. On 1 August 2022, he was served with the grounds. The petitioner did not make any representation. The papers were transmitted for being placed before the Advisory Board on 05-08-2022. The Advisory Board conducted the hearing and heard the petitioner on 24-08-2022 and submitted its report on 26-08-2022 and the respondent no. 1-State confirmed order of preventive detention on 14-09-2022.

11. True it is, as has been consistently held in several matters (**Pradip Nilkanth Paturkar** etc.) delay in taking preventive action promptly vitiates the order. However, in our considered view, there cannot be straight jacket formula and it would depend upon the facts and circumstances of each case as to how much delay in initiating preventive action from the alleged prejudicial activity can be called as a reasonable delay. To our mind, the afore-mentioned timeline is not

sufficient to reach a conclusion that the delay in taking the preventive action is as would be sufficient to go to the root of its validity.

12. As far as the statements of the witnesses are concerned, the witnesses have narrated the individual episodes involving the petitioner and do not disclose the exact date of such incidents. However, mere failure to put the precise date cannot *per se* be sufficient to discredit their stand. If both these witnesses have had an experience with the petitioner as they have been narrating, the subjective satisfaction arrived at by the respondent no. 2 based on the statements of these witnesses cannot be said to be perverse or arbitrary.

13. This takes us to the next ground regarding non-application of mind by the respondent no. 2 and his failure to take into account the grounds which had weighed with the criminal Court while granting bail to the petitioner in the matter which forms the basis for initiation of the preventive action which has been held to be a vital aspect. Though the respondent no. 2 has taken pains to explain as to how in spite of granting bail there is likelihood of petitioner indulging in some criminal activity prejudicial to the public order, he has not expressly mentioned by referring to the order of bail as to how when the criminal Court has granted bail, obviously subject to certain conditions, the order of bail would not act as a preventive measure. It is not that the respondent

no. 2 has noticed some activity of the petitioner after he was released on bail. The subjective satisfaction cannot be blind-folded. There must be some material which would justify it. The very fact that the ground which the respondent no. 2 has furnished to the petitioner for justifying the order of preventive detention does not expressly mention about the bail order having been placed before him and he having gone through it *albeit* its copy is available in his file, clearly demonstrates lack of application of mind.

14. In the matter of ***Rushikesh Tanaji Bhoite V. State of Maharashtra and others; 2012 Cri. L.J. 1334***, the Supreme Court has expressly held that non-placing of the order granting bail and non-consideration of the material which weighs with the Court granting bail is sufficient to vitiate the subjective satisfaction of the detaining authority. It was, therefore, imperative for the respondent no. 2 to have gone through the order of bail and the material referred to while granting bail. This ground, therefore, sustains.

15. There is indeed variance between the grounds communicated to the petitioner in English and its Marathi translation. We do not intend to repeat those here. The petitioner has pointed out those discrepancies in the petition. Merely because in English, the status of the pending criminal case has been shown as 'pending investigation' whereas in the Marathi translation it is mentioned as

‘पोलीस तपासावर’, in our considered view, the discrepancy is quite minor and is not of such a nature as would have misled the petitioner which is the basic parameter to be borne in mind while examining this ground challenging the order of detention. Drastic variance between the English and its Marathi translation, has been held to vitiate the detention order having potential to mislead the petitioner. The individual instances in the matter of **Noor Mohamed Khan and Rohit Sidram Khatal** (supra) are self-speaking.

16. In the matter of **Noor Mohamed Khan** (supra), in the grounds furnished in English the detaining authority had communicated to the detenue that pending approval of his detention order by the State, he had a right to make a representation to the detaining authority i.e. the Commissioner of Police whereas in Hindi translation, he was communicated that he had a right to make a representation against the detention order to the Commissioner of Police. Such discrepancy was held to be vital.

17. In the matter of **Rohit Sidram Khatal** (supra) there were as many as four discrepancies in the grounds furnished in English and its Marathi translation. There was variance in the number of cases that were pending against the detenue. There was variance about the result of the preventive action under section 107 wherein in English it was mentioned that a bond for good behaviour was taken whereas in

Marathi translation it was mentioned that the bond for maintaining peace for a period of one year was obtained. In English version, it was stated that he was a known criminal registered in Gunda register of the particular police station i.e. Faujdar Chawadi Police Station, Solapur whereas in Marathi translation it was mentioned as Salgarwasti Police Station. It was held that all these discrepancies had cumulative effect of misleading the detenue.

18. Such is not the case in the matter in hand where the discrepancy is too minor to mislead anybody.

19. This takes us to the compliance with the provision of section 10 of the MPDA Act which mandates placing of the matter before the Advisory Board. The provision 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)*

20. In the matter of **Avinash @ Balu Atmaram More** (supra) we have elaborately considered and decided the scope and ambit of this provision by referring to the decision of the Supreme Court in the

matter of ***Mrs. T. Devaki Vs. Govt. Of Tamil Nadu and others; AIR 1990 SC 1086*** and particularly observations in paragraph nos. 9 and 10, which read as under :-

“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 along with 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."

21. In the matter of **Avinash @ Balu Atmaram More** (supra), we had dispelled the submission of learned APP Mr. Nerlikar who attempted to interpret the words 'placed before the Advisory Board' as synonymous to 'transmitted to the Advisory Board'. Even we had dispelled his submission to resort to such interpretation by referring to the head note of section 10 which mentions 'Reference to Advisory Board'.

Our observations in paragraph nos. 16 to 19 of the aforesaid order 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."*

22. Admittedly, there is no whisper in the affidavit-in-reply to point out as to exactly on which date the matter was placed before the Advisory Board, as is required by section 10 of the MPDA Act. Going by the papers given to us by the learned APP, the petitioner was detained on 30-07-2022. The papers were transmitted to the Advisory Board on 05-08-2022. In-fact, the Board conducted the hearing on 24-08-2022. There is no other date indicated in the affidavit in reply or available to be gathered from the papers of the prosecution to demonstrate about the Advisory Board having considered the petitioner's matter prior to 24-08-2022. If that be so, the date of detention being 30-07-2022, if the papers were placed before the Advisory Board on 24-08-2022, it would be beyond three weeks and in breach of the mandatory provision contained in section 10 of the MPDA Act.

23. The Writ Petition is allowed.

24. The impugned order dated 26-07-2022 passed by the respondent no. 2 - Commissioner of Police, Aurangabad is quashed and set aside. The petitioner be released forthwith if not required in any other offence.

25. Rule is made absolute.

[ABHAY S. WAGHWASE]
JUDGE

[MANGESH S. PATIL]
JUDGE

arp/