

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

**CRIMINAL WRIT PETITION NO.1118 OF 2022
WITH
CRIMINAL APPLICATION NO.3900 OF 2022
(for intervention)
IN
CRIMINAL WRIT PETITION NO.1118 OF 2022**

Vijay Baburao Avhad
Age: Major, Occu. Business,
R/o: Jambhali, Tq. Pathardi
District Ahmednagar

... **PETITIONER**

VERSUS

1. The State of Maharashtra
Through its Secretary,
Home Department,
Mantralaya, Mumbai-32
2. The Section Officer,
Home Department,
Hutatma Rajguru Chowk,
Madam Kama Road, Mantralaya
Mumbai - 32
3. Rajendra Bhosale (District Magistrate)
Age : Major, Occu: Service
R/o. District Collector Office,
District Ahmednagar.
4. The Superintendent of Police,
Superintendent of Police Office
Tq. & Dist. Ahmednagar
5. The Police Inspector
Pathardi Police Station
Tq. Pathardi Dist. Ahmednagar

{name deleted as per the
Court's order dated 22.08.2022}

... **RESPONDENTS**

...
Advocate for Petitioner : Mr. Suvidh S. Kulkarni
APP for respondent - State : Mr. S.J. Salgare
Advocate for Applicant in APPLN/3900/2022 : Mr. Nitin Bhavar Patil
...

**CORAM : MANGESH S. PATIL AND
M.M. SATHAYE, JJ.**

Reserved on 16.03.2023

Pronounced on : 24.03.2023

JUDGMENT (MANGESH S. PATIL, J.) :

Rule. Rule is made returnable forthwith. Heard both the sides finally, by consent.

2. The petitioner is impugning the order dated 19.05.2022 passed by the respondent No.3 District Magistrate, Ahmednagar under Section 3(2) of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons, Video Pirates Sand Smugglers and Person Engaged in Black Marketing of Essential Commodities Act, 1981 (herein after MPDA Act), and the order dated 21.07.2022 passed by the respondent No.1 i.e. the Secretary of the Home Department of the State confirming the petitioner's detention.

3. The learned advocate for the petitioner would advert attention to the grounds in the petition on the basis of which the order of detention is being challenged. He submits that the registration of Crime No. I-977/2021 of Pathardi Police Station for the offence Punishable Under Section 328, 420, 465, 468, 470, 471 of the Indian Penal Code and Section 65 (a) to 65(f) of the Maharashtra Prohibition Act which has been relied upon by the respondents to pass the impugned order. After filing of the charge sheet and its committal to the Sessions Court it is numbered as Sessions Case No.79/2022. But the respondents failed to consider the fact that the

petitioner was granted bail by the Sessions Court on 10.03.2022. He would refer to the decision in the matter of **Rushikesh Tanaji Bhoite Vs. State of Maharashtra; 2012 Cri.L.J. 1334** and **Vishal Waman Mhatre Vs. The Commissioner of Police and Ors.; 2013 All MR (Cri) 42**. He would submit that in both these matters, failure to take into consideration order of bail was held to vitiate the order of detention.

4. According to the learned advocate there is no proximity in the registration of the aforementioned offence and the order of detention which is considered to be vital in the matter of **Rushikesh Tanaji Bhoite** (supra) as also a division bench of this Court in the matter of **Sachin Mane Vs. Commissioner of Police; 2022 All. M.R. (Cri) 2566**. He would submit that the offence was registered on 21.12.2021 and the order of detention has been passed on 19.05.2022, after about five months.

5. Mr. Kulkarni would then submit that contrary to the decision in the matter of **Shivkumar Devendra Vs. State of Maharashtra; 2022 All M.R. (Cri.) 2634**, the respondents have taken into consideration the crimes registered against the petitioner to demonstrate his criminal antecedents which were old and stale and in most of which he was either released on bail or acquitted.

6. Mr. Kulkarni would further submit that though a reference is made to the statements of couple of witnesses recorded in-camera, those statements were never verified by the respondent No.3. Even the statements did not give particulars. He ought to have verified whether the

apprehension being entertained by these witnesses was the basis for their unwillingness to depose before the Court of law which fact has also been overlooked by the respondent No.1 while confirming the detention. He also pointed out that the statements of these witnesses were recorded a month after the petitioner was granted bail. To buttress his submission he would refer to the decision in the matter of **Shri Yash Tekam Vs. State of Maharashtra; 2022 All M.R. (Cri.) 2490.**

7. Lastly, Mr. Kulkarni would submit that the spot where the raid was effected and alleged spurious liquor was seized for implicating the petitioner though belongs to him, by a notarized document he and his brother had leased out that property to one Ajinath Avhad who was in exclusive possession of the property. In the absence of any other material demonstrating that the petitioner was indulging in selling spurious liquor, he could not have been ordered to be detained as laid down in the matter of **Shri Vinod Subhas Chavan Vs. Himmatrao Deshbhartar and Ors.; 2013 All MR (Cri.) 157.**

8. Per contra, the learned APP took us through the papers and by referring to the affidavit-in-reply filed by the respondent No.3 would submit that in view of the provisions of Section 5(A) of the MPDA Act, the petitioner is not entitled to challenge the availability of the grounds which formed the basis for passing the impugned order. He would further submit that sufficiency or otherwise of the grounds cannot be a subject matter of the petition and this Court cannot sit in appeal and examine the order as an

appellate authority as laid down in the matter of **Smt. K. Arunkumari Vs. Government of Andhra Pradesh and Ors.; 1988 SCR (1) 973**. He would submit that the petitioner is dangerous person as defined under Section 2 (b-1) of the MPDA Act. He has been involved in several crimes including rape, causing miscarriage without consent of a woman, attempt to murder, voluntarily causing grievous hurt to extort property, rioting, causing damage to the property, administering stupefying drug, cheating, disobedience of prohibitory order, criminal intimidation, using criminal force against public servant etc. He has created reign in the locality in an around Pathardi and he is being at large is certain to disturb the public order. In spite of having involved in so many crimes he has been continuing with the illegal activities. An inquiry was conducted by the respondent No.5 – Police Inspector of Pathardi Police Station. Nobody was coming forward to record statements. Statements of couple of witnesses were recorded in-camera. A detail proposal was submitted by the respondent No.5 to the respondent No.3 through the respondent No.4 – Superintendent of Police and after examining the report objectively the respondent No.3 has reached a subjective satisfaction which forms the basis of passing the detention order.

9. He would further submit that after the respondent No.1 approved the detention on 27.05.2022 the petitioner absconded and could be apprehended on 07.06.2022. He was provided the grounds of detention and the order of detention along with translation of all other papers. He also availed opportunity of putting up his case before the advisory board

which heard him on 07.07.2022 and it is thereafter that the order confirming the detention was passed on 21.07.2022. Thus according to the learned APP all the mandatory procedure was followed. There is no error or perversity in the order of detention.

10. The learned APP would further submit that unlike the matters in **Rushikesh Tanaji Bhoite** and **Vishal Waman Mhatre** (supra), the fact of grant of bail in earlier crimes was specifically considered by the respondents. The statements of the witnesses recorded in-camera clearly disclose their apprehension to come out in open. Those were got verified by the respondent No.3 through the Sub-divisional Police Officer, Shevgaon. The witnesses have given the details of the individual incidents and there is no cogent and convincing reason to interfere in the subjective satisfaction recorded by the respondent No.3.

11. We have carefully considered the rival submissions, perused the papers and the case law.

12. The Supreme Court as also this Court in the catena of cases had the occasion to consider the aspect of grant of bail in respect of the offence which forms the genesis for passing the detention order:

- i. **Abdul Sathar Ibrahim Manik and Ors. Vs. Union of India (UOI) and Ors.;** (1992) 1 SCC 1
- ii. **Sunila Jain Vs. Union of India and Anr.;** (2006) 3 SCC 321
- iii. **Rushikesh Tanaji Bhoite Vs. State of Maharashtra ;** 2012 Cri.L.J. 1334
- iv. **Vishal Waman Mhatre Vs. The Commissioner of Police and Ors.;** 2013 All MR (Cri) 42.

The following paragraphs from Abdul Sathar are vital:

8. *Thus, the admitted position which emerges is that the order granting bail was not placed before the detaining authority. Moreover, the condition of attendance incorporated in the bail order is not reflected on any of the pages 126 to 132 of the compilation of documents. On this aspect, it will be necessary to make a reference to the decision of the Apex Court in the case of Abdul Sathar Ibrahim Manik v. Union of India & Others (1992)1 SCC 1. After considering the law on the aspect, reflected from the various decisions, the Apex Court has crystalised legal position in Paragraph 12 of the judgment.*

".....Having regard to the various above-cited decisions on the points often raised we find it appropriate to set down our conclusions as under:

(1) A detention order can validly be passed even in the case of a person who is already in custody. In such a case, it must appear from the grounds that the authority was aware that the detenu was already in custody.

(2) When such awareness is there then it should further appear from the grounds that there was enough material necessitating the detention of the person in custody. This aspect depends upon various considerations and facts and circumstances of each case. If there is a possibility of his being released and on being so released he is likely to indulge in prejudicial activity then that would be one such compelling necessity to pass the detention order. The order cannot be quashed on the ground that the proper course for the authority was to oppose the bail and that if bail is granted notwithstanding such opposition the same can be questioned before a higher court.

(3) If the detenu has moved for bail then the application and the order thereon refusing bail even if not placed before the detaining authority it does not amount to suppression of relevant material. The question of non-application of mind and satisfaction being impaired does not arise as long as the detaining authority was aware of the fact that the detenu was in actual custody.

(4) Accordingly the non-supply of the copies of bail application or the order refusing bail to the detenu cannot affect the detenu's right of being afforded a reasonable opportunity

guaranteed under Article 22(5) when it is clear that the authority has not relied or referred to the same.

(5) When the detaining authority has merely referred to them in the narration of events and has not relied upon them, failure to supply bail application and order refusing bail will not cause any prejudice to the detenu in making an effective representation. Only when the detaining authority has not only referred to but also relied upon them in arriving at the necessary satisfaction then failure to supply these documents, may, in certain cases depending upon the facts and circumstance amount to violation of Article 22(5) of the Constitution of India. Whether in a given case the detaining authority has casually or passingly referred to these documents or also relied upon them depends upon the facts and the grounds, which aspect can be examined by the Court.

(6) In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu. (underline supplied)

13. It will be also useful to make a reference to Sunila Jain (supra)

In Paragraphs 12 and 18 of the decision, it is held thus:-

"12. The question as to whether an offence is bailable or not is not a vital fact whereupon an order of bail can be passed. Application of mind to the averments made in a bail application may be relevant where the grounds stated therein reveal certain facts which are vital for passing an order of detention. In a case of such nature, it may be said that the application for bail was necessary to be placed before the detaining authority and non-furnishing a copy thereof to the detenu would vitiate the order of detention."

"18. The decisions of this Court referred to hereinbefore must be read in their entirety. It is no doubt true that whether a detenu on the date of the passing of the order of detention was in custody or not, would be a relevant fact. It would also be a relevant fact that whether he is free on that date and if he is, whether he is

subjected to certain conditions in pursuance to and in furtherance of the order of bail. If pursuant to or in furtherance of such conditions he may not be able to flee from justice, that may be held to be relevant consideration for the purpose of passing an order of detention but the converse is not true. Some such other grounds raised in the application for bail and forming the basis of passing an order of bail may also be held to be relevant. It would, however, not be correct to contend that irrespective of the nature of the application for bail or irrespective of the nature of the restrictions, if any, placed by the court of competent jurisdiction in releasing the detenu on bail, the same must invariably and mandatorily be placed before the detaining authority and the copies thereof supplied to the detenu." (underline supplied)"

14. A bare look at the aforementioned observations is sufficient to emphasize the relevance of the order granting bail. Obviously the order of detention and the order granting bail are incompatible. Bail grants him liberty of movement whereas detention curtails it. The detenu is granted bail simultaneously in the same offence which forms the genesis for the authorities to pass a detention order under Section 3(2) of the MPDA Act. The aspect of criminal antecedents is considered by the Court while granting the bail. If the bail is granted after considering all the material including the criminal antecedents, such objective consideration by the court granting bail would be relevant and vital for the authorities passing an order of detention.

15. Bearing in mind the aforementioned position in law and the consistent view of the superior courts let us examine the order dated 19.05.2022. Admittedly, Crime No. I-977/2021 forms the basis for initiating the process of passing the detention order and on the basis of which the proposal dated 28.04.2022 was submitted by the respondent No.5 – Police Inspector of Pathardi Police Station. The criminal case was later on

committed to the Sessions Court and was registered as Sessions Case No.79/2022 and the petitioner was granted bail by the Sessions Court by the order dated 10.03.2022. It is thus apparent that even before the proposal was forwarded by respondent No.5 on the basis of which the order of detention has been passed, the petitioner was granted bail by the Sessions Court. The copy of the order granting bail to the petitioner is available in the papers of the writ petition. The learned Sessions Court *inter alia* has considered the aspect of antecedents of the petitioner which were brought to its notice in respect of registration of several crimes but has denied to rely upon it to refuse bail. It has also been observed that he was a permanent resident of the specific address having immovable and movable properties. It was also observed that there was no reason to suspect that he would flee. If such were the emphatic observations recorded by the Sessions Court even before a proposal was forwarded by the respondent No.5, as laid down in the aforementioned decisions, it was imperative for the respondents to have borne in mind the fact regarding grant of bail and should have reached the subjective satisfaction by referring to the grounds which formed the basis for grant of bail. For this reason alone, referring to the views of the superior courts in the aforementioned matters, the order of detention would vitiate.

16. It is pertinent to note that the respondent No.5 in his proposal submitted to the respondent No.3 had specifically brought to the notice that the petitioner was granted bail even in the recent criminal case that is Crime No.I-977/2021. If that was the case, the respondent No.3 was bound to call

upon to place before him the order passed by the Sessions Court granting bail which would have enabled him to go through it. But the order dated 19.05.2022 does not indicate about he having reached subjective satisfaction with the objective material that could have been looked into by him easily.

17. The learned APP made a faint attempt to advert our attention to the order dated 19.05.2022 wherein grant of bail was specifically mentioned. However, reference to bail by the court in that paragraph is made in respect of the previous crimes and not Crime No.I-977/2021 and the aforementioned order of bail by the Sessions Court. As a result, the impugned order of detention stands vitiated for the sole reason that order granting bail in the Crime No.I-977/2021 and in Sessions Case No.79/2022 was not objectively considered by the respondent No.3.

18. Apart from the above state of affairs, the alleged Crime No.I-977/2021 was committed on 22.12.2021 whereas the order of detention under challenge is passed after almost five months that too when the petitioner was granted bail in the month of March. The statements of the witnesses were recorded in-camera. Apart from the fact that the statements of these individuals are in verbatim same and equally vague and omnibus. Without disclosing the date but quoting different times of the day on which they were allegedly threatened by the petitioner. The aspect of delay in passing the order of detention after actual commission of latest crime has been considered by this Court in the matter of **Yash Vs. State of Maharashtra and Ors.**; (Criminal Writ Petition No.457/2021 dated 17.11.2021), Sheikh

Yetal Vs. State of Maharashtra and Ors.; (Criminal Writ Petition No.627/2021 decided on 21.12.2021). In these matters the delay of five months between the date of commission of the recent crime and the order of detention has been held to be sufficient to vitiate the order of detention.

19. In both these decisions, similar statements of the witnesses recorded in-camera were held to be insufficient to justify the subjective satisfaction. Like in these two matters even in the matter in hand though the respondent No.3 in his affidavit-in-reply filed in this petition has specifically mentioned about having undertaken verification of the statement of the two witnesses through SDPO, the order dated 19.05.2022 does not expressly demonstrate about he having objectively verified the fact and reached any conclusion as to how these witnesses were genuine and indeed were reluctant to come forward to record the testimony in open because of the petitioner's terror.

20. In view of the aforementioned state of affairs, the order of the detention of the petitioner is not sustainable in law.

21. The writ petition is allowed. The petitioner shall be set at liberty forthwith, if his incarceration in some other case or matter is not necessary.

22. Rule is made absolute accordingly.

23. Pending Application is disposed of.

(M.M. SATHAYE, J.)

(MANGESH S. PATIL, J.)