

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

CRIMINAL WRIT PETITION NO.1548 OF 2022

Sayyed Mushtaq @ Builder s/o
Sayyed Gafur, Age 40 years,
Occu. Business, R/o Near Hari Masjid,
Juna Mondha, Jafar Gate, Aurangabad ... **PETITIONER**

VERSUS

- 1) The State of Maharashtra
through the Section Officer,
Home Department, Mantralaya,
Mumbai – 32
- 2) The Commissioner of Police,
Aurangabad,
Police Commissioner Office, Aurangabad
- 3) The Superintendent,
Harsul Central Jail, Aurangabad ... **RESPONDENTS**

(copies to be served on Police Prosecutor,
High Court of Judicature of Bombay,
Bench at Aurangabad)

.....
Mr. N.S. Ghanekar, Advocate holding for
Mr. Afzal Hussain M. Vakil, Advocate for petitioner
Mr. M.M. Nerlikar, A.P.P. for respondents
.....

**CORAM : R.G. AVACHAT AND
SANJAY A. DESHMUKH, JJ.**

Date of reserving judgment : 16th June, 2023

Date of pronouncing judgment : 22nd June, 2023

JUDGMENT (PER R.G. AVACHAT, J.) :

Rule. Rule made returnable forthwith and taken up for

final hearing at admission stage with the consent of learned counsel for the parties.

2. The challenge in this Writ Petition is to an order of detention passed by the Commissioner of Police, Aurangabad on 28/7/2022 and confirmed by the State Government vide its order dated 14/9/2022. Vide the orders impugned herein, the petitioner was detained for a period of 12 months w.e.f. 30/7/2022 under Section 3 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 (M.P.D.A. Act for short) on the ground of being a dangerous person.

3. Learned counsel for the petitioner would submit that, the order/s of detention have been passed without application of mind. The crimes registered against the petitioner and the in-camera statements of witnesses recorded by the authorities concerned would in no way constitute grounds for detention of petitioner branding him to be a dangerous person. According to learned counsel, the crime, C.R. No.52/2022, registered against the petitioner at the instance of one Govind Kanji Patel was in fact arising out of a property dispute. The petitioner is the grandson of Inamdar and Mutawalli of Syed Zahur and the Dargah Hazrat Sadat Auliya. The Dargah has a service inam land, admeasuring 5 acres

and 28 gunthas in Survey No.38, situated at Aurangabad. The great-grandfather of the petitioner leased out some portion thereof for a ginning factory for 80 years to one Govindji. The period of lease came to an end in 2001. The possession of lessee post expiry of lease became unlawful. The status of the lessee in possession of the leased property was no less than an encroacher, in view of Section 54 of the Wakf Act. Civil Suits have been pending between the lessees and the heirs of the original lessor. The crime (C.R. No.52/2022) has been lodged with false contentions. The informant therein had every reason to grind an axe against the petitioner.

4. The other crime (being C.R. No.53/2022) taken into consideration was about the petitioner to have committed breach of an order externing him from the city of Aurangabad. The Revenue Commissioner, the appellate authority has subsequently set aside the order of externment. The in-camera statements of the witnesses are false and fabricated. The order of detention has been passed about four months after the registration of the crime against the petitioner and recording of in-camera statements. Even the entire material forming foundation for passing of the impugned order is taken as true and correct, the same would not lead to hold the activities of the petitioner to be likely to affect adversely the maintenance of public order. The learned counsel assailed the

impugned orders on very many grounds, for which there is, however, no foundation in the petition. He ultimately urged for allowing the petition.

5. The learned A.P.P. would, on the other hand, submit that, past criminal activities of the petitioner have been recorded in the impugned order as a foreword or a history making mention thereof in the order of detention, although not relied on to pass the impugned order, in no way denude the order of its legal efficacy. According to him, this Court, in exercise of jurisdiction under Article 226 of the Constitution of India, cannot sit in appeal against such orders. The learned A.P.P. first read out the impugned order and the grounds in support thereof to submit the detaining authority to have rightly arrived at a subjective satisfaction. Learned A.P.P. relied on the following authorities :-

- (1) Ashok Kumar Vs. Delhi Administration & ors.
1982 AIR (SC) 1143
- (2) Istiyak Ahmed Siddiqui Vs. A.N. Roy & ors.
2005 ALL MR (Cri) 2367
- (3) The Collector & District Magistrate, W.G. Dist. Elura,
Andhra Pradesh Vs. Sangala Kondamma
2005(1) ALL MR (Cri) 772
- (4) Santosh Bhagwan Patil Vs. State of Maharashtra & ors.
2013(3) Bom.C.R. (Cri.) 231
- (5) Phulwari Jagdambaprasad Pathak Vs.R.H. Mendonca
2000 AIR (SC) 2527

- (6) Santosh Kashinath Kamble Vs. State of Maharashtra & ors.
(2016) 4 BOMCR (CRI) 733
- (7) Mohd. Salim Khan Vs. Shri C.C. Bose, Deputy Secretary to
the Government of West Bengal & anr.
1972 AIR (SC) 1670

Relying on the judgment of the Apex Court in case of Ashok Kumar (supra), he would submit that, the true distinction between the areas of 'public order' and 'law and order' lies not in the nature or quality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of 'law and order' and 'public order' is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order, while in another it might affect public order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order.

6. According to learned A.P.P., although the learned counsel for the petitioner raised very many grounds of challenge to the order impugned herein, but the same has no foundation in the pleadings in the Writ Petition and, therefore, could not be adverted to. He further submits that, in-camera statements of witnesses

have duly been verified by the officer of the rank of Dy.S.P. The detaining authority has also verified those statements and countersigned them on 18th June. The original in-camera statements were produced before us for perusal. He would further submit that, although the externment order of the petitioner had been set aside by the appellate authority, the detaining authority was very much justified in relying on the order of externment. According to learned A.P.P., even a criminal case in which an accused has been discharged would form one of the cases to be relied on for passing a detention order. In this regard, he relies on the judgment of the Apex Court in case of Mohd. Salim (*supra*).

7. Relying on the judgment of the Apex Court in case of Fulwari (*supra*), he would submit, only in-camera statements of witnesses could even form basis for passing the order of detention. He would further submit that, those who are responsible for the national security or for the maintenance of public order must be the sole judges of what the national security or public order requires. Preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it and to prevent him from doing it. Justification for such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. It follows that any preventive measures, even if

they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State.

The learned A.P.P. ultimately urged for dismissal of the petition.

8. Considered the submissions advanced. Perused the order of detention and the material relied on in support thereof. Also perused the authorities placed on record. There can be no two views over what has been submitted by the learned A.P.P. relying on the judgment of the Apex Court and of this Court as well. True, the High Court in its writ jurisdiction under Article 226 of the Constitution of India is to see whether the order of detention has been passed by the detaining authority on the basis of material on record, then the Court cannot go further and examine whether the material was adequate or not, which is the function of an appellate authority or the Court.

9. Section 2(a) of the M.P.D.A. Act reads as under :

“2. In this Act, unless the context otherwise requires, –

(a) “acting in any manner prejudicial to the maintenance of public order” means –

(i) to (iii)

(iv) in the case of a dangerous person, when he is engaged, or is making preparations for engaging, in any of his activities as a dangerous person, which affect adversely, or are likely to affect adversely, the maintenance of public order.

.....

(b-1) “dangerous person” means a person, who either by himself or as a member or leader of a gang, habitually commits, or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Indian Penal Code or any of the offences punishable under Chapter V of the Arms Act, 1959.”

10. The order impugned herein has been passed since the detaining authority found the petitioner to be dangerous person. A question is whether the activities of the petitioner as a dangerous person were likely to affect adversely, the maintenance of public order and, therefore, the detaining authority was justified in passing the impugned order.

11. Admittedly, the order of detention contained a list of 9 crimes registered against the petitioner in the past. First 7 crimes in the list admittedly did not form a basis for passing order of detention. Those crimes, therefore, could not be referred and relied on in justification of the impugned order. Needless to mention, those crimes could, however, be looked into in favour of the petitioner. First Information Reports of those 7 crimes would

suggest, most of the informants therein were from the family of the original lessee of the land Survey No.38. Two of the F.I.Rs. have been lodged by a police officer against two rival groups. The petitioner is said to be one of the group members. The petitioner has also placed on record certain documents to undoubtedly make out a case of the petitioner being a great-grandson of the original lessor. The land belongs to a Dargah. It is a Wakf property. Civil Suits have been pending between heirs of original lessors and the lessees. Those crimes, therefore, could be said to have taken place either between two individuals or families. Those crimes would have no ramification on an issue of public order. We, therefore, take that the detaining authority has not been influenced by those crimes. In our view, however, had the detaining authority closely read the police papers of those crimes vis-a-vis the police papers of the other two crimes relied on for passing the order of detention, he would have come to the conclusion that it was a case at the most be a maintenance of law and order and not of public order.

12. the first crime relied on is C.R. No.52/2022 registered for offences punishable under Sections 341 and 385 of the Indian Penal Code. It has not been disputed that the informant in the said case was none other than a person claiming through one of the lessees of the Wakf land. Close reading of the F.I.R. in the said

case would indicate that the said crime was allegedly committed by the petitioner alone, while in the detention order the detaining authority has observed the said crime to have been committed by the petitioner along with his associates. This suggests lack of subjective satisfaction on the part of detaining authority. By no stretch of imagination, the said crime could be said to have even a potential to affect adversely the maintenance of public order. The petitioner has every reason to contend the informant Govind Patel to have lodged a false F.I.R.

13. the other crime being C.R. No.53/2022 pertain the petitioner to have breached the order externing him from Aurangabad city. Both the crimes,C.R. No.52/2022 and C.R. No.53/2022 were bailable one and the petitioner was granted bail within a day of his arrest.

14. Then there are two in-camera statements of witnesses. We have perused those statements. Those have been verified by an officer of the rank of Dy.S.P. and counter-signed by the detaining authority as well. We cannot go into veracity of those statements. Close scrutiny of those statements indicate the petitioner had intercepted those witnesses, first one in the first week of March while the other one in the last week of the very month. He allegedly robbed them of Rs.10,000/- and Rs.14,000/- respectively with a threat of a knife point. Taking those statements to be correct, what

could at the most be found that those crimes committed against the individual, having no bearing on maintenance of public order. It may at the most be a case of maintenance of law and order. The order of detention has been passed on 20/7/2022 i.e. about three months after recording of in-camera statements. We are, therefore, of the view that, crime and the in-camera statements referred to and relied on for passing the impugned detention order has ramifications, at the most on issue of maintenance of law and order and not maintenance of public order. We are, therefore, of the view that the impugned order is, liable to be set aside.

15. In the result, the Writ Petition succeeds. Hence the order :

ORDER

- (i) The Criminal Writ Petition is allowed in terms of prayer clause (B).
- (ii) The petitioner be released immediately if not required in any other case.
- (iii) Rule made absolute in above terms.

(SANJAY A. DESHMUKH, J.)

(R.G. AVACHAT, J.)

fmp/-