



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL WRIT PETITION NO.400 OF 2023

PETITIONER : Jumma @ Munna Burhan Hiriwale,
aged about 60 years, Occ: Labour,
(Presently lodged in Central District
Prison, Akola), R/o. Gawalipura,
Chikhali, Tq. Chikhali, District.
Buldhana.

..VERSUS..

RESPONDENTS : 1 The State of Maharashtra, Through
its Secretary, Home Department
(Special), Mantralaya, Mumbai.
2 The District Magistrate and
Collector, Buldhana, District
Buldhana.
3 The Police Inspector, Police Station
Chikhali, District Buldhana.

Shri S. B. Gandhe, Advocate for Petitioner.
Shri V. A. Thakare, Addl. P. P. for Respondents.

CORAM : **VINAY JOSHI AND**
VALMIKI SA MENEZES, JJ.

RESERVED ON : **9th AUGUST, 2023**

PRONOUNCED ON : **6th OCTOBER, 2023.**

JUDGMENT : (PER : VALMIKI SA MENEZES, J.)

. Heard. **Rule.** Rule made returnable forthwith.

Heard finally by consent of the learned Counsel appearing

for the parties.

2. By this Petition, under Article 226 of the Constitution of India, the Petitioner seeks to quash and set aside the impugned order dated 20.02.2023 passed by the District Magistrate, Buldhana (Respondent No.2) under Section 3(1) 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 referred to as “MPDA”); the Petitioner further lays challenge to order dated 19.04.2023 passed by the Respondent No.1 – Secretary, Home Department (Special) under sub-section 1 of Section 12 of the MPDA, confirming the order dated 20.02.2023 passed by the District Magistrate, Buldhana, detaining the Petitioner for a period of twelve months.

3. Two main grounds raised in challenge to these orders in the Petition are :

(a) That, the twenty four offences relied upon by the Detaining Authority, forming basis for passing the detaining order cannot be termed as acts which is detrimental to the maintenance of the public order; the acts alleged in those offences can be at most termed as acts which are disruptive of law and order; that all the offences are registered under Section 65(D) of the Maharashtra Prohibition Act, 1949, of which offences from Serial No.1 to offence at Serial No.22 of the chart at para 3.24 of the order all relate to the period from 31.03.2016 to 15.04.2021 and they being stale and more than two years prior to the impugned orders, could not be considered as material for arriving at a subjective satisfaction; further that in thirteen of the twenty four crimes relied upon, the concerned Magistrate has stopped proceedings therein under Section 258 of the Code of

Criminal Procedure (the Code) and has discharged the Petitioner. None of the orders, passed by the concerned Magistrate, were placed before or considered by the Detaining Authority, thus vitiating the entire process of arriving at a subjective satisfaction.

(b) That, the two in-camera/anonymous statements relied upon by the Detaining Authority both dated 05.01.2023 relate to incidents of March-2021; there was unexplained delay of one year and nine months in recording the statements. That, there is no satisfaction recorded in the impugned order that these two in-camera statements have been verified by the Sub-Divisional Police Officer, their authenticity and contents have been verified by interacting with the concerned Officer or verifying Authority. The impugned order having been passed on 20.02.2023, almost one year and

eleven months after the date of the incident referred to in these statements, there was no live link established between the incident and the requirement for detention under the impugned order.

4. In answer to the allegations made in the Petition, the Respondents have filed an Affidavit-in-reply dated 14.07.2023, through the District Magistrate, Buldhana reiterating their stand that the Petitioner was considered as a “dangerous person” and a “bootlegger” under the MPDA and sought to justify his detention and support the impugned orders.

5. We have heard the learned Counsel Mr S. B. Gandhe for the Petitioner and Mr V. A. Thakare, learned Additional Public Prosecutor for the Respondents, recorded their submissions, perused the record of the Detaining Authority, and both the impugned orders.

6. Apart from the submissions made by the learned Counsel for the Petitioner on the facts contained in the record, in support of his arguments that the Detaining Authority has not considered the orders of discharge in favour of the Petitioner for the purpose of arriving at subjective satisfaction, the judgments rendered by this Court in Chandbee and Ors. vs. State of Maharashtra and Ors. dated 03.03.2023 passed in Criminal Writ Petition 697 of 2022 and Elizabeth Ranibhai Prabhudas Gaikwad vs. The State of Maharashtra and Ors., dated 15.02.2021 passed in Criminal Writ Petition No.677 of 2020 and the judgments of the Hon'ble Supreme Court in Abdul Sathar Ibrahim Manik and Ors. vs. Union of India and Ors., reported in 1992 (1) SCC 1 and Dharamdas Shamlal Agarwal vs. Police Commissioner and Ors., reported in 1989 (2) SCC 370.

7. Countering the submission of the Petitioner, Mr V. A. Thakare, learned Addl. P. P. has supported his submissions citing three judgments of this Court in

Machindra Dnyanoba Jadhav vs. The State of Maharashtra and Ors. dated 05.01.2021 in *Criminal Writ Petition No.1191 of 2020, Baliram Namdeo Bedke vs. The State of Maharashtra and Ors.* dated 03.08.2020 in *Criminal Writ Petition No.539 of 2020* and *Atahar Khan Amir Khan vs. State of Maharashtra and Anr.* dated 21.04.2023 in *Criminal Writ Petition No.856 of 2022.*

8. At the outset, we quote the judgment of the Hon'ble Supreme Court in *Kanu Biswas Vs. State of West Bengal*, reported in *(1972) 3 SCC 831* on the question of what constitutes breach of "public order" as opposed to breach of "law and order" :

"6. The distinction between the concept of public order and that of law and order has been adverted to by this Court in a number of cases. In the case of Dr. Ram Manohar Lohia v. State of Bihar, [1966] 1 S.C.R. 709, Hidayatullah J. (as he then was) said that any contravention of law always affected order, but before it could be said to affect public order, it must affect the community at large. He considered three concepts, law and order, public order and the security of the State, and observed that to appreciate the scope and extent of each one of them, one should imagine the concentric circles. The largest of them represented law and order, next represented public order and the smallest represented the security order, just as an act might affect public order but not the security of the State. In the subsequent case

of Arun Ghosh v. State of West Bengal, [1970] 3 S.C.R. 288, the Court dealt with the matter in the following words: "Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance, of public tranquility. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An Act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different.

7. The question where a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance, of the public order, according to the dictum laid down in the above case is a question of degree and the extent of the reach of the act upon the society. Public order is what the French call "order publique" and is something more than ordinary maintenance of law and order. The test to be adopted in determining whether an act affects law and order or public order, as laid down in the above, case, is : Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order, or does it affect merely an individual leaving the tranquility of the society undisturbed ? ”

9. In *Banka Sneha Sheela Vs. State of Telangana*, reported in *(2021) 9 SCC 415*; the Hon'ble Supreme Court has considered the very same question and has set down the distinction between what acts constitute of breach of public order and those which are, in contradistinction, to be in contravention of law and order in the following terms:

“13. There can be no doubt that for ‘public order’ to be disturbed, there must in turn be public disorder. Mere contravention of law such as indulging in cheating or criminal breach of trust certainly affects ‘law and order’ but before it can be said to affect ‘public order’, it must affect the community or the public at large.

14. There can be no doubt that what is alleged in the five FIRs pertain to the realm of ‘law and order’ in that various acts of cheating are ascribed to the Detenu which are punishable under the three sections of the Indian Penal Code set out in the five FIRs. A close reading of the Detention Order would make it clear that the reason for the said Order is not any apprehension of widespread public harm, danger or alarm but is only because the Detenu was successful in obtaining anticipatory bail/bail from the Courts in each of the five FIRs. If a person is granted anticipatory bail/bail wrongly, there are well-known remedies in the ordinary law to take care of the situation. The State can always appeal against the bail order granted and/or apply for cancellation of bail. The mere successful obtaining of anticipatory bail/bail orders being the real ground for detaining the Detenu, there can be no doubt that the harm, danger or alarm or feeling of security among the general public spoken of in Section 2(a) of the Telangana Prevention of Dangerous Activities Act is make believe and totally absent in the

facts of the present case.”

10. The above view has been further reiterated by the Hon'ble Supreme Court in its recent judgment of 04.09.2023 passed in SLP (Criminal) No.8510 of 2023 (Ameena Begam vs. State of Telangana), where the following has been held :

“39. In fine, what we find is that the order of detention impugned in that writ petition failed to differentiate between offences which create a “law and order” situation and which prejudicially affect or tend to prejudicially affect “public order”. The present Detention Order fares no better. Even if the offences referred to in the Detention Order, alleged to have been committed by the Detenu have led to the satisfaction being formed, still the same are separate and stray acts affecting private individuals and the repetition of similar such acts would not tend to affect the even flow of public life. The offence in respect of the minor girl did exercise our consideration for some time but we have noted that the Detenu was not arrested because of an order passed by the High Court on an application under section 438 of the Criminal Procedure Code (“Cr. PC”, hereafter). The investigating agency not having elected to have such order quashed by a higher forum, the facts have their own tale to tell. Even otherwise, the gravity of the offences alleged in Arun Ghosh (supra) was higher in degree, yet, the same were not considered as affecting ‘public order’. The only other offence that could attract the enumerated category of “acting in any manner prejudicial to the maintenance of public order” and an order of preventive detention, if at all, is the stray incident where the Detenu has been

charged under section 353, IPC and where the police has not even contemplated an arrest under section 41 of the Cr. PC.

40. On an overall consideration of the circumstances, it does appear to us that the existing legal framework for maintaining law and order is sufficient to address like offences under consideration, which the Commissioner anticipates could be repeated by the Detenu if not detained. We are also constrained to observe that preventive detention laws an exceptional measure reserved for tackling emergent situationsought not to have been invoked in this case as a tool for enforcement of “law and order”. This, for the reason that, the Commissioner despite being aware of the earlier judgment and order of the High Court dated 16th August, 2021 passed the Detention Order ostensibly to maintain “public order” without once more appreciating the difference between maintenance of “law and order” and maintenance of “public order”. The order of detention is, thus, indefensible.

49. The other aspect requiring some guidance for detaining authorities and on which we wish to comment is that there is no requirement in law of orders of detention being expressed in language that would normally be considered elegant or artistic. An order of detention, which is capable of comprehension, has to precisely set forth the grounds of detention without any vagueness. The substance of the order and how it is understood by the detenu determines its nature. An order in plain and simple language providing clarity of how the subjective satisfaction was formed is what a detenu would look for, since the detenu has a right to represent against the order of detention and claim that such order should not have been made at all. If the detenu fails to comprehend the grounds of detention, the very purpose of affording him the opportunity to make a

representation could be defeated. At the same time, the detaining authority ought to ensure that the order does not manifest consideration of extraneous factors. The detaining authority must be cautious and circumspect that no extra or additional word or sentence finds place in the order of detention, which evinces the human factor - his mindset of either acting with personal predilection by invoking the stringent preventive detention laws to avoid or oust judicial scrutiny, given the restrictions of judicial review in such cases, or as an authority charged with the notion of overreaching the courts, chagrined and frustrated by orders granting bail to the detenu despite stiff opposition raised by the State and thereby failing in the attempt to keep the detenu behind bars.

57. It requires no serious debate that preventive detention, conceived as an extraordinary measure by the framers of our Constitution, has been rendered ordinary with its reckless invocation over the years as if it were available for use even in the ordinary course of proceedings. To unchain the shackles of preventive detention, it is important that the safeguards enshrined in our Constitution, particularly under the 'golden triangle' formed by Articles 14, 19 and 21, are diligently enforced."

11. Keeping in mind the principles laid down in the above case law, we proceed to examine the material before the Detaining Authority, which has led it to record its subjective satisfaction for arriving at a conclusion that the acts of the Petitioner constituted an act prejudicial to maintenance of public order or that the Petitioner could be considered to be a "bootlegger" as defined under the

MPDA.

The detention order refers to report of the Police Officer, Chikhali alleging details of twenty four crimes said to have been committed by the Petitioner from the period 31.03.2016 (Crime No.149/2016) to the period 28.11.2022 (Crime No.927/2022), all under Section 65(D) of the Maharashtra Prohibition Act. The twenty four crimes are detailed in a chart at para 3.24 of the impugned order. The Detaining Authority has not made any effort to segregate the crimes of recent origin which could constitute material for arriving at subjective satisfaction, from the crimes of old origin which could be considered stale and not having any live nexus with the purpose of detaining the Petitioner.

Clearly, the first twenty two crimes referred to in a chart relate to a period as far back as 31.03.2016 (Crime No.149/2016) to 15.04.2021 (Crime No.179/2021). These crimes relating to a period more than two years prior to passing of the detention order could certainly not form part of the material to be considered for arriving at its subjective

satisfaction on the question of their impact on maintenance of public order.

12. As far as Crime No.688/2022 dated 18.08.2022 and Crime No.927/2022 dated 28.11.2022, which are of recent origin, the same have not been discussed nor has their impact and the manner in which they could be considered as acts which could disturb public order being assessed. From the record it appears that both these crimes are pending investigation and no reference is made to any chemical analysis of the content of the cans allegedly containing liquor, to arrive at subjective satisfaction, that such substance could affect human life or health and had adverse effect on the public at large, thus being an act affecting public order.

13. From a further perusal of the record, it has been brought to our notice that in thirteen of the twenty four crimes relied upon, the concerned Magistrate has stopped proceedings therein under Section 258 of the Cr.P.C. and

has discharged the Petitioner. None of the orders passed by the concerned Magistrate were placed before or considered by the Detaining Authority. To our mind, this is a serious flaw on the part of the proposing Authority to either suppress or avoid placing these orders on record, since of the twenty four cases relied upon as material, thirteen cases had ended in discharge of a Petitioner and could not have been considered for the purpose of passing a detention order. Of these thirteen cases, as pleaded in Ground-E of the petition, Crime No.591/2020 was one such last case in which a discharge order was passed on 08.03.2023. All other discharge orders relate to the period 02.06.2017 to 07.02.2023 which are all prior to the date of the impugned order and much available.

In this context, we refer to the judgment of the Hon'ble Supreme Court in Abdul Sathar Ibrahim Manik (supra), wherein at para 25, the following conclusions have been recorded:

“25. 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 circumstances 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.”

14. Thus, applying the ratio of Abdul Sathar Ibrahim Manik (supra) to the facts of the present case, the reliance upon the thirteen crimes in which orders of discharge have been passed and not been brought to the notice of the Authority itself would vitiate the entire process of arriving at a subjective satisfaction; this more so, since the Court discharging the Petitioner in thirteen cases had specifically recorded that there was no Chemical Analysis Report filed before the Court to substantiate the allegation made in the

crime, which prompted the Court to exercise powers under Section 258 of the Code and to discharge the Petitioner for offence punishable under Section 65(D) of the Prohibition Act. For this reason alone, we must hold that the recording of the subjective satisfaction by the Authority was on the basis of incorrect material as the discharge orders in thirteen of the twenty four crimes were not even brought to the notice of the Authority. This vitiates the entire process of arriving at subjective satisfaction on the part of the Authority.

15. Referring to the in-camera statement of “witness A”, perusal of the statement discloses that the same was recorded on 05.01.2023 but, however, the witness refers to an incident more than two years prior to its recording, of March-2021. There is no explanation in the record as to why it took two years for the statement to be recorded. There is no reference made in the order to the fact that the statement was verified by the Detaining Authority that it has interacted with the verifying Authority or with the

Police Inspector, who record the statement to ascertain the genuineness of its content as well as to determine whether the anonymous witness was in fact so fearful of the repercussions of making a formal complaint.

The second in-camera statement which is also dated 05.01.2023 refers to an incident of March-2021. There is no statement of the Detaining Authority in its order that it has interacted with the concerned Officer and ascertaining the truth and reliability of the statement.

Thus, clearly there is no application of mind demonstrated by the Detaining Authority whilst dealing with the in-camera statements and placing reliance upon them as is clear from the contents of the portion of the order, wherein it records that the content of the statements demonstrates the Petitioner's gang like behaviour. No reference is made to the fact that the two statements refer to a period more than two years prior to the order, and they being stale material, having no live link with the action of detention sought by the Authority, could not be considered

for arriving at subjective satisfaction.

16. We also make reference to a judgment of the Hon'ble Supreme Court in Mallada K. Sri Ram vs. The State of Telangana, reported in MANU/SC/0444/2022, wherein the Hon'ble Supreme Court has held that the detention order on the basis of stale material, and failure on the part of the Authority to probe the existence of live and proximate link between the past cases and the need to detain the Petitioner, was contrary to the provisions of Article 22 of the Constitution of India and required to be quashed. We quote from the judgment as under :

"11. At this stage, it would also be material to note that the first case was registered on 15 October 2020, while the second case was registered on 17 December 2020. Bail was granted on 8 January 2021. The order of detention was passed on 19 May 2021 and was executed on 26 June 2021. The order of detention was passed nearly seven months after the registration of the first FIR and about five months after the registration of the second FIR. The order of detention is evidently based on stale material and demonstrates non-application of mind on the part of the detaining authority to the fact that the conditions which were imposed on the detenu, while granting bail, were duly fulfilled and there was no incidence of a further violation. In the counter affidavit which was filed before the High Court, the detaining authority expressed only an apprehension that the acts on the basis of which the FIRs were registered were likely to be repeated in the future,

thereby giving rise to an apprehension of a breach of public order. The High Court has failed to probe the existence of a live and proximate link between the past cases and the need to detain the detenu after seven months of registration of the first FIR and nearly five months of securing bail.

15. A mere apprehension of a breach of law and order is not sufficient to meet the standard of adversely affecting the “maintenance of public order”. In this case, the apprehension of a disturbance to public order owing to a crime that was reported over seven months prior to the detention order has no basis in fact. The apprehension of an adverse impact to public order is a mere surmise of the detaining authority, especially when there have been no reports of unrest since the detenu was released on bail on 8 January 2021 and detained with effect from 26 June 2021. The nature of the allegations against the detenu are grave. However, the personal liberty of an Accused cannot be sacrificed on the altar of preventive detention merely because a person is implicated in a criminal proceeding. The powers of preventive detention are exceptional and even draconian. Tracing their origin to the colonial era, they have been continued with strict constitutional safeguards against abuse. Article 22 of the Constitution was specifically inserted and extensively debated in the Constituent Assembly to ensure that the exceptional powers of preventive detention do not devolve into a draconian and arbitrary exercise of state authority. The case at hand is a clear example of non-application of mind to material circumstances having a bearing on the subjective satisfaction of the detaining authority. The two FIRs which were registered against the detenu are capable of being dealt by the ordinary course of criminal law.”

As held by the Hon’ble Supreme Court in Mallada K. Sri Ram (supra), even an apprehension of a breach of law and order is not sufficient to meet the standard of adversely affecting the maintenance of public

order. As further held, apprehension of a disturbance to public order owing to a crime that was reported several months prior to the detention order has no basis in fact, and apprehension of an adverse impact to public order is a mere surmise of the detaining authority. The submission of the learned Addl. P. P. that a mere apprehension that the Petitioner may cause a disturbance of public order, based upon the reliance in judgment of this Court in *Machindra Dnyanoba Jadhav* (supra), *Baliram Namdeo Bedke* (supra) and *Atahar Khan Amir Khan* (supra), runs contrary to the above ratio laid down by the Hon'ble Supreme Court in *Mallada K. Sri Ram* (supra).

17. Applying the ratio laid down in *Mallada K. Sri Ram* (supra), *Ameena Begam* (supra), *Kanu Biswas* (supra) and *Banka Sneha Sheela* (supra) to the facts of the present case, we are clearly of the opinion that there is no material on the record of the Detaining Authorities which could be considered as an act that would bring the Petitioner for the purpose of MPDA under the definition of “bootlegger” or

could be considered to be the acts which are prejudicial to the maintenance of public order or which necessitate the detention of the Petitioner under the MPDA.

18. For reasons stated above, we quash and set aside the impugned orders dated 20.02.2023 and 19.04.2023 and make rule absolute in terms of prayer Clauses (A) and (B) of the Petition. No costs.

(VALMIKI SA MENEZES, J.) (VINAY JOSHI, J.)