



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

CRIMINAL WRIT PETITION NO.504 OF 2023

PETITIONER : Shama W/o. Fayaz Shaikh
Aged about 39 years, Occupation-
Housewife, R/o. At Post. Dhanki, Tah.
Umarkhed, Dist. Yavatmal

DETENU : Sheikh Faiyaz Sheikh Rahemat
Aged about 42 years, R/o. At Post.
Dhanki, Tah. Umarkhed, Dist.
Yavatmal.

AT PRESENT : Lodged in District Prison, Yavatmal.

..VERSUS..

RESPONDENTS : 1 State of Maharashtra,
Through Home Department (Special),
2nd Floor, Mantralaya, Madam Cama
Road, Mumbai.
2 District Magistrate, District –
Yavatmal.
3 Sub Divisional Police Officer, Sub
Division Umarkhed, Tah. Umarkhed,
District-Yavatmal.
4 Police Inspector, Police Station
Bitargaon, District-Yavatmal.

Mr P. V. Navlani, Advocate for Petitioner.

Mr S. S. Doifode, Addl. P. P. for Respondent Nos.1 to 4.

CORAM : NITIN W. SAMBRE AND
VALMIKI SA MENEZES, JJ.

DATE : 15th SEPTEMBER, 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 30.04.2023 passed by the District Magistrate, Yavatmal (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 20.06.2023 passed by the Respondent No.1 – Secretary, Home Department (Special) under sub-section 1 of Section 12 of the MPDA, confirming the order dated 30.04.2023 passed by the District Magistrate, Yavatmal, detaining the Petitioner for a period of twelve months.

3. We have referred to the Detenu herein as “Petitioner” though the Petition has been filed on his behalf by his Wife Shama Fayaz Shaikh.

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

(a) That, the two offences relied upon by the Detaining Authority, forming basis for passing the detaining order concern an alleged act 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 both offences are registered under Section 379 of the Indian Penal Code, 1860, for theft of sand, one of which was pending investigation, and there is no subjective satisfaction recorded by the Authority on the basis of these acts that they would amount to causing disturbance of life in the community so

as to affect public order.

(b) That, the two in-camera/anonymous statements relied upon by the Detaining Authority dated 26.02.2023 and 01.03.2023, respectively relate to incidents of November-2022 and December-2022; there was unexplained delay of two months in recording the statements. That these two in-camera statements are purported to have been verified by the Sub-Divisional Police Officer, only on 11.03.2023 i.e. more than three months after the incident was alleged to have taken place. The Detaining Authority has not verified the authenticity of the content of the statements by interacting with the concerned Officer or verifying Authority. The impugned order having been passed on 30.04.2023, almost five 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. That in any event, the contents of the statements are vague, not reliable and do not disclose acts which could be considered prejudicial to maintenance of public order.

5. In answer to the allegations made in the Petition, the Respondents have filed an affidavit-in-reply dated 05.09.2023, through the District Magistrate, Yavatmal reiterating their stand that the Petitioner was considered as a “dangerous person” and “sand smuggler” under the MPDA and sought to justify his detention and support the impugned orders.

6. We have heard the learned Counsel Mr P. V. Navlani, for the Petitioner and Mr S. S. Doifode, learned Addl. P. P. for Respondents, perused the record of the Detaining Authority, and both the impugned orders.

7. The main contention of the Petitioner is, that the two crimes which form the basis of passing the detention order are under Section 379 of the IPC in which the Petitioner was given notice under Section 41(1)(a) of the Code of Criminal Procedure in the first Crime No.386/2022, while the second case bearing Crime No.79/2023 was still under investigation, and therefore, there was no cause for the Authorities to proceed with any action, in terms of the MPDA since the matters would proceed under regular penal laws. It is further the Petitioner's contention that there is delay in passing the impugned order from the alleged incident in November-2022 in the in-camera statement, and similar delay from the last offence under Section 379 of the IPC, and thus, there is no live link established between the incidents alleged to be the basis for the order, and the requirement of detention of the Petitioner.

It was further argued that none of the offences relied upon could constitute an act which is to the

detriment of maintenance of public order, and therefore, the impugned orders are passed in total absence of jurisdiction under Section 3 read with Section 12 of the MPDA. It is further the Petitioner's contention that the two in-camera statements, appear from the record, to be verified only on 11.03.2023, almost four months after the date of the alleged incident. Thus, the impugned order was passed with gross unexplained delay as from the date of the alleged incident and there was no live link established between the incident and the need for detention of the Petitioner. The Petitioner relies upon the recent judgment of the Hon'ble Supreme Court passed on 04.09.2023 in *SLP (Criminal) No.8510 of 2023 (Ameena Begam vs. State of Telangana)*, to reiterate the defence between acts which are prejudicial to "maintenance of public order" and those which are contrary to "law and order".

8. Per contra, learned Additional Public Prosecutor Mr S. S. Doifode appearing for the Respondents has supported the impugned orders contending that the

Petitioner had indulged in acts of “sand smuggler” and as such, the acts of Petitioner are detrimental to the environment and conservation of water thus causing disruption of the daily lives of the citizens and detrimental to the maintenance of public order. He further submits that a perusal of the in-camera statements “A” and “B” disclose that the involvement of the Petitioner in sand smuggling and the violent behaviour of the Petitioner referred to in the statements has caused alarm to the people in the vicinity. It was further submitted that the in-camera statements were relied upon by the Detaining Authority only after being verified and an endorsement to that effect “opened and seen by me” has been recorded on the statements. The learned Addl. P. P. has relied upon the judgment of this Court in Harish Patel vs. State of Maharashtra, reported in 2016(6) Mh.L.J. (Cri.) 226 and in Baliram Namdeo Bedke vs. State of Maharashtra, reported in 2021 (2) Mh.L.J. (Cri.) 484 to contend that sand smuggling has been held to be an activity which is

prejudicial to the maintenance of public order.

9. 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 tranquillity of the society undisturbed ? ”

10. 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.”

11. 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 situations ought 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.”

12. 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 “sand smuggler” as defined under the MPDA.

The first crime relied upon under Crime No.386/2022 was registered on 15.11.2022 under Section 379 of the IPC and is pending before the concerned Court. A perusal of the record of this case, reveals that on receiving confidential information, the Police detained the tractor belonging to the Petitioner containing one brass of sand which was seized under Panchanama and notice under Section 41(a) of Cr.P.C. was issued to the Petitioner for investigation. There was no incident of violence reported as from the narration itself that the Petitioner was not present when the tractor was seized.

The second crime registered under Crime No.79/2023 on 13.02.2023 under Section 379 of the IPC alleging that on confidential information, a tractor containing one brass of sand seized from the driver to disclose that the same belonged to the Petitioner. This crime is still under investigation. Perusal of the record of both these crimes reveals that there was no untoward incident or any act of violence attributable to the

Petitioner, except that there was seizure of sand, which the Authorities claimed were illegally extracted at the behest of the Petitioner. The act of theft by the Petitioner would require to be established in the trial before the concerned Court.

13. Referring to the in-camera statement of “witness A”, perusal of the statement discloses that the same was recorded on 26.02.2023 but, however, the witness refers to an incident two months prior to its recording, without specifying any date. There is no explanation in the record as to why it took two months for the statement to be recorded. That apart, the statement refers to an incident near the farm of complainant, when the complainant told the Petitioner not to take his tractor through the complainant’s farm. The complainant alleged that the Petitioner pushed him. The statement appears to have been verified only on 11.03.2023. However, there is no endorsement on the statement or its verification by the Detaining Authority that it has interacted with the

verifying Authority or with the Police Inspector to 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 dated 01.03.2023 refers to an even earlier incident of November-2022 discloses that the witness was threatened, when he stated to complaint to a police that the Petitioner was trespassing through his field by night. The narration in the statement does not disclose any act which could be said to cause alarm in the locality or a sense of panic amongst the residents of the area, such as to disrupt public life. In this statement too, the verification has been done on 11.03.2023, but there is no endorsement of the Detaining Authorities that it has interacted with the concerned Officer and ascertaining the truth and reliability of the statement. The only endorsement on both the statements is “opened and seen by me”.

Thus, clearly, there is no application of mind demonstrated by the Detaining Authority, whilst dealing with the statement and placing reliance upon them as referred to in paragraphs 9.1 and 9.2 of the impugned order. Apart from this, the statements having been recorded three months after the alleged incident, which delay is unexplained, and their content not having disclosed any act which could be said to cause alarm in the locality or a sense of panic amongst the residents of the area, such as to disrupt public life cannot be considered as material for arriving at a subjective satisfaction as required by Section 3 of the MPDA.

14. We now deal with the contention of Mr Doifode, learned Addl. P. P., that sand smuggling as defined under sub-section (iv-a) of Section 2(a) of the MPDA has been held by this Court, in Harish (supra) and Baliram (supra).

Harish (supra) was a case where, from the facts recorded in paras 32 and 33 of the judgment, the detenu

was indulging in acts of sand smuggling coupled with threats to members of the Public Government Officials and committing assault. Further, the facts reveal that the judgment was rendered on the premise that the detenu abused the public, who had gathered to see the quarrel and took out an iron rod from his vehicle and try to beat the witness who may be in-camera statement. The facts in that case further reveal that the statement of the second in-camera statement disclose that the detenu had threatened people from the surrounding villages and that they were living in fear, and hence, were not ready to give any complaint against the detenu for fear of their lives. There is a specific finding recorded by the High Court that these were acts which were prejudicial to and cause disturbance of public order. That case proceeded on the basis that the detenu had caused violence in the area, threatened the crowd watching the scuffle, with an iron rod and had assaulted Public Officials. Thus, Harish (supra) was a judgment rendered in a fact situation, when there was

disruption of public order and fear caused to the residents of the area.

15. Baliram (supra) was also a case in which, the in-camera witnesses deposed of assault on the witnesses by the detenu with dangerous weapons like a knife in broad view of by standers to witness the incident and ran away from the site. The three offences referred to in the judgment included offences against the human body coupled with theft. The narration of facts is found in paras 22, 23 and 24 of the judgment. Thus, Baliram (supra) was also rendered in the specific facts of the case.

However, in the present case, of the two crimes relied upon, the first did not warrant any arrest and only a notice under Section 41(a) of Cr.P.C. was issued to the detenu. The second crime was still under investigation. Clearly, therefore, the Investigating Authority did not find the allegations serious enough to arrest the Petitioner instead he was served with the notice for investigation.

That by itself would be an indication that the Authorities did not find detention of the Petitioner to be justified. Such was not the case in the judgments of Baliram (supra) and Harish (supra), where the detenu had committed acts of violence and had directly threatened by standers.

16. Applying the ratio laid down in Ameena Begam (supra), Kanu Biswas (supra) and Banka Sneha Sheela (supra), we are clearly of the opinion that there is no material on the record of the Detaining Authorities to which could be considered an act that would bring the Petitioner for the purpose of MPDA under the definition of “sand smuggler” or could be considered to be acts which are prejudicial to the maintenance of public order for the purpose of Section 3 of the MPDA or which necessitate the detention of the Petitioner under the Act.

17. For reasons stated above, we quash and set aside the impugned orders dated 30.04.2023 and 20.06.2023 and make rule absolute in terms of prayer Clause (b) of the

Petition. No costs.

18. Consequently, the Respondents are directed to release the Petitioner from detention, unless required in any other case.

(VALMIKI SA MENEZES, J.) (NITIN W. SAMBRE, J.)

TAMBE