

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

CRIMINAL WRIT PETITION NO. 697 OF 2022

PETITIONER: Chandbee w/o. Usmaan Patel,
Aged about 45 years, Occ : Housewife,
R/o. Sanjay Nagar, Mohata Mill Road,
Akola, District : Akola.

DETENU : Usmaan Chotu Patel,
aged about 52 years, Occ : Labour,
R/o. Sanjay Nagar, Mohata Mill Road,
Akola, District : Akola.

At Present : Lodged in Yerwada Central Prisons,
Yerwada, Pune.

V E R S U S

RESPONDENTS :

1. State of Maharashtra,
Through Home Department (Special),
2nd Floor, Mantralaya,
Mumbai - 400 032.
2. District Magistrate,
District - Akola.
3. Sub Divisional Police Officer,
Akola City Division, Akola,
District - Akola.
4. Police Inspector, Police Station,
Ramdaspath, District - Akola.

Shri S. G. Joshi, Advocate for petitioner.

Shri M.J. Khan, Additional Public Prosecutor for respondent Nos.1 to 4.

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

RESERVED ON : 13/02/2023.

PRONOUNCED ON : 03/03/2023.

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

1. **Rule.** Rule made returnable forthwith. Heard finally with the consent of learned counsel appearing for the parties.

2. This is a writ petition filed under Article 226 of the Constitution of India challenging the order bearing D.O.No. Desk-2/HA/HOME/WS-244/2022 dated 24/06/2022 passed by the respondent No.2, District Magistrate, Akola 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 (hereinafter referred to as "the Act"); the petitioner further takes exception to the order dated 04/07/2022 passed by the respondent No.1, Home Department (Special) of the Government of Maharashtra, which confirmed the order dated 24/06/2022.

The impugned orders have resulted the detention of the detenue - Usman Chotu Patel, who is presently lodged at Yerwada Prison, Pune for a period of 12 months from the date of his first detention i. e. from 24/06/2022.

3. Heard learned counsel for the parties, perused the record.

4. The main grounds urged by the learned counsel for the petitioner in the petition and during the arguments are as under ;

a] That five cases, which form the basis for the detention order, were falsely filed to create criminal antecedents against the detainee since all five matters pertain to bootlegging, pursuant to raids conducted on 27/04/2022, 29/04/2022 and 30/04/2022; that these cases all being under the Maharashtra Prohibition Act, 1949, wherein there was no conviction secured by the State, the same could not form the basis for the present detention order.

b] That, in all five prohibition cases, relied upon for passing the impugned order of detention, the concerned police issued a notice to the detainee under Section 41(1)(a) of the Code of Criminal Procedure, the Investigating Authority having felt that no arrest of the detainee was required, on this count also, it is evident that the authorities having felt that arrest of the detainee was not required, there could be no cause for proceeding under Section 3 of the Act; that to assume jurisdiction under Section 3 of the Act, the Detaining Authority must record its subjective satisfaction on material, which can constitute grounds on the basis of which the detainee can be considered a threat to "public order", and since none of the five cases relied upon were of a nature

where arrest was required to be effected, they could not constitute a ground to proceed under Section 3 of the Act.

c] That two in-camera statements recorded of Secret Witness were both incidents which do not record particulars of the place where the incident has occurred, and in any event, the incidents were not of a nature which could be considered to cause such fear in the minds of the public as to invite an order under Section 3 of the Act; that the findings recorded by the Detaining Authority as to its satisfaction on the basis of the verification recorded of the Higher Police Officer were recorded in a mechanical fashion without actually discussing the contents of the in-camera statements or verifying the authenticity of such statements. That the impugned orders are contrary to the following Judgments/orders passed by Hon'ble Supreme Court and this Court :

- i] Kasam Kalu Nimsurwale Vrs. State of Maharashtra and another dated 26/07/2022 in Criminal Writ Petition No.269/2022.
- ii] Shaikh Usman Shaikh Maheboob Vrs. The State of Maharashtra dated 19/12/2022 passed in Criminal Writ Petition No.690/2022.

5. In reply to the petition, the respondent No.2 has filed an affidavit-in-reply dated 19/12/2022 supporting the impugned orders averring therein that there was satisfaction recorded by the

Verifying Authority i.e. S.D.P.O., Akola as to the truthfulness of the statements of the in-camera witnesses and subjective satisfaction of the Detaining Authority was based upon these verified statements, which were seen by the Detaining Authority.

Learned Additional Public Prosecutor for the respondents in addition to taking us through the affidavit-in-reply of the respondent No.2 has argued that though it is true that, in all five criminal cases, which form the basis of the detention order, the detainee was issued notice under Section 41(1)(a) of the Code of Criminal Procedure and was not arrested, the Investigating Officer had no choice since, though the provisions of Section 65(B) of the Maharashtra Prohibition Act makes the offence cognizable, the sentence that can be imposed for conviction of the detainee under that provision is below 7 years, hence, procedure under Section 41(1)(a) of the Code of Criminal Procedure was required to be followed.

He further argues that the Detaining Authority has made reference to the in-camera statements and recorded its findings thereon after going through the record and as such, the subjective satisfaction recorded needs to be sustained. Learned APP then cites the following Case Law in support of his submissions :

i] Harpreet Kaur (Mrs) Harvinder Singh Bedi Vrs State of Maharashtra, reported in (1992) 2 SCC 177;

ii] Machindra Dnyanoba Jadhav Vrs. The State of Maharashtra and others dated 05/01/2021 delivered in Criminal Writ Petition No.1191/2020.

6. Before we proceed to examine the specific facts in the present case, we would make a reference to the Judgment of the Hon'ble Supreme Court in Harpreet Kaur (supra), which was a case where the detenue refused to stop his car on a public road, when a police party signalled him, and instead, hurled abuses at the members of the police party, stating that he will kill them, attempted to run over some of the members of the police party, dashed against some vehicles in the vicinity and attempted to escape. In that case, the detenue escaped and could not be arrested and was eventually traced about four days later and arrested, and released on bail by the concerned Magistrate for offence under Sections 307 and 324 r/w Section 34 of the Indian Penal Code. Thereafter, the detenue did not comply with the conditions of bail, which led to cancellation of his bail; a large consignment of the illicit liquor was also recovered from the car involved in the incident. In the backdrop of these facts, the Hon'ble Supreme Court has considered two arguments, the first being that

the activities of that detainee could not be considered to be prejudicial to the maintenance of "public order" and had no impact on the general members of the community, while the second argument taken in that matter was based upon the proviso to Section 3 (2) of the Act, which prohibited the State Government to make an order of detention in the first instance, beyond three months.

The second argument was rejected by holding that the maximum period of detention prescribed in Section 13 of the Act and under the powers delegated to the District Magistrate, imposing a detention for a period of beyond 3 months was permissible. As far as the first argument is concerned, on the question of whether the nature of the incident was one, which could be considered a breach of "public order", the Hon'ble Supreme Court has held as under :

"10. "Public Order" or "Law and Order" are two different and distinct concepts and there is abundance of authority of this Court drawing a clear distinction between the two. With a view to determining the validity or otherwise of the order of detention, it would be necessary to notice the difference between the two concepts.

11. In *Ram Manohar Lohia v. State of Bihar*, speaking for the majority, Hidayatullah, J. pointed out the distinction in the following words : (SCR p. 746 D-E)

"One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State."

12. In *Arun Ghosh v. State of W.B.*, again Hidayatullah, J. speaking for the Court, pointed out that what in a given situation may be matter covered by law and order, on account of its impact on the society may really turn out to be one of 'public order'. It was observed : (SCC p. 100, para 3)

"Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chambermaids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its effect upon the public tranquility there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies."

28. The explanation of Section 2(a) (supra) brings into effect a legal fiction as to the adverse effect on 'public order'. It provides that if any of the activities of a person referred to in clauses (i)-(iii) of Section 2(a) directly or indirectly causes or is calculated to cause any harm, danger or alarm or a feeling of insecurity among the general public or any section thereof or a grave or a widespread danger to life or public health, then public order shall be deemed to have been adversely affected. Thus, it is the fall-out of the activity of the "bootlegger" which determines whether 'public order' has been affected within the meaning of this deeming provision or not. This legislative intent has to be kept in view while dealing with detentions under the Act.

30. The substance of the grounds on which detention has been ordered is that the detenu is a bootlegger and in furtherance of his activities and to escape from the clutches of law, he even tried to run over, by his speeding vehicle, the police party, which tried to signal him to a stop, exhorting all the time that he would kill anyone who would come in his way. He continued to drive in a reckless speed and dashed against a pedestrian causing injuries to him, where again he had exhorted that anyone who would come in his way would meet his death. Four witnesses - A, B, C, D - who agreed to give statements to the police on conditions of anonymity, clearly stated that they would not depose against the detenu for fear of retaliation as the detenu had threatened to do away with anyone who would depose against him. The evidence of these witnesses shows that the detenu was indulging in transporting of illicit liquor and distributing the same in the locality and was keeping arms with him while transporting liquor. The activities of the detenu, therefore,

were not merely "bootlegging" as was the position in **Omprakash, Rashidmiya and Piyush Kantilal Mehta** cases but went further to adversely affect the even tempo of the society by creating a feeling of insecurity among those who were likely to depose against him as also the law enforcement agencies. The fear psychosis created by the detenu in the witnesses was aimed at letting the crime go unpunished which has the potential of the society, and not merely some individual, to suffer. The activities of the detenu, therefore, squarely fall within the deeming provision enacted in the Explanation of Section 2(a) of the Act, and it therefore, follows as a logical consequence that the activities of the detenu were not merely prejudicial to the maintenance of 'law and order' but were prejudicial to the maintenance of "public order". The first argument raised by Dr Chitale against the order of detention, therefore, fails.

7. Though Harpreet Kaur was a case which dealt with the distinction between what constitutes an act which is a "law and order" situation as opposed to "public order" infringement, was rendered in the set of facts, which we have detailed hereinabove, where the detenu had threatened a police party, caused large scale damage to private and public property, attempted to drive over police personnel, and fled from the site of offence, acts which would be considered as detrimental to "public order".

Harpreet Kaur, would, on facts, not be applicable to the situation in the present matter, as all five offences / crimes, on the basis of which the impugned orders were passed are cases where

the detainee is alleged to have indulged in bootlegging by selling alcohol in the balcony of his residence.

It is therefore, clear that **Harpreet Kaur** (supra), if at all, on its facts, would come to the aid of the detainee in the present case, where the crimes relied upon by the Detaining Authority in Paragraph No.5 of the impugned order, are based upon raids conducted on secret information received by the police, either at the residence of the detainee, or as in the first raid, near the residence of the detainee, where he was sitting in his car at the side of the road.

We are, therefore, of the opinion that all five bootlegging cases relied upon, to form the basis for passing of the detention order would not constitute a crime committed at a public place, and in any manner, that could be considered to be prejudicial to the maintenance of "public order" as held in the case of **Harpreet Kaur** (supra).

8. The next contention raised is that the five crimes relied upon by the Detaining Authority for recording its subjective satisfaction were crimes in which the police felt the need to issue notice under Section 41(1)(a) of the Code of Criminal Procedure and therefore, it could not be considered as of such serious nature that would require detention of the detainee under the Act.

The petitioner contends that the Investigating Authorities felt that arrest was not warranted in the five crimes, and instead, issued notice under Section 41(1)(a) of the Code of Criminal Procedure. This by itself would be sufficient ground for the Detaining Authority not to rely upon such crimes for arriving at its subjective satisfaction.

A perusal of the detention order would reveal that there is reference made in all five crimes that a notice as per Section 41(1)(a) of the Code of Criminal Procedure has been given to the detainee, but the Detaining Authority does not refer to the contents of those notices, which it appears from the record, were never placed before the Detaining Authority for consideration.

9. In Kasam Kalu Nimsurwale (supra), this Court was concerned precisely with this arguments, wherein two specific offences which formed the basis of issuance of the detention order were relied upon, wherein notice under Section 41(1)(a) of the Code of Criminal Procedure had been issued to the detainee, but had not been placed before the Detaining Authority for its consideration. This Court considered the impote of such a course of action and after making reference to several other judgments/orders passed by this Court on similar lines, has held as under :-

"4. In this connection, reliance placed by the learned counsel appearing for the petitioner on two judgments of the Division Bench of this Court is justified. In both the cases i.e. ***Vasudev Mahadev Surve vs. State of Maharashtra and anr. (Judgment and order dated 16.12.2021 passed in Criminal Writ Petition No.592 of 2021)*** and ***Hanif Karim Lалуwale vs. State of Maharashtra and others (Judgment and order dated 28.06.2022 passed in Criminal Writ Petition No.75 of 2022)***, in identical circumstances, it was held that when the police authorities did not even deem it necessary or appropriate to arrest the petitioner herein for offences on which reliance was placed in the impugned detention orders, and this fact was not placed before the detaining authority, the detention orders stood vitiated and deserved to be quashed.

5. A perusal of the impugned detention order does not demonstrate as to whether the fact that the police authority did not deem it necessary to even arrest the petitioner for the very same offences, was brought to the notice of the said authorities. Therefore, the position as reflected in the said judgments of the Division Benches applies to the facts of the present case also and the petitioner has made out a case for interference with the impugned orders."

10. In **Shaikh Usman Shaikh Maheboob** (supra), this Court, referring to a case where two crimes for offences punishable under Section 65(B) of the Maharashtra Prohibition Act, 1949, similar to the present case, wherein the police considered such crimes not to be serious enough to warrant the petitioner's arrest, has held that

such crimes could not be taken into consideration by the Detaining Authority to form the relevant material for preventive detention of the detainee. The relevant Paragraphs in the case of **Shaikh Usman Shaikh Maheboob** are quoted below :-

"3. We find from the grounds of detention that two crimes, bearing Crime No. 451 of 2022 for an offence punishable under Sections 65(d) of the Maharashtra Prohibition Act, 1949 and Crime No. 265 of 2022 for an offence punishable under Sections 65(k)(d)(f) of the Maharashtra Prohibition Act, 1949 both registered at Police Station Ramdas Peth, Akola were not considered to be so serious by the Police as to warrant arrest of the petitioner in each of these crimes. If this is so, in our view, the learned counsel for the petitioner is right in his submission that when a particular criminal activity of the detainee is not considered to be so serious as to warrant his arrest under the regular law, his detention under the law relating to preventive detention would be wholly unjustified. This is also the view taken by this Court and also Co-ordinate Benches of this Court in the cases as **Vasudev Mahadev Surve Vs. The State of Maharashtra and Another** in Criminal Writ Petition No. 592 of 2021, decided on 16.12.2021, **Hanif Karim Luluwale Vs. State of Maharashtra and others**, in Criminal Writ Petition No. 75 of 2022, decided on 28.06.2022, **Kasam Kalu Nimsurwale Vs. State of Maharashtra and another**, in Criminal Writ Petition No. 269 of 2022, decided on 26.07.2022 and **Akshay Kishor Madavi Vs. State of Maharashtra and others**, in Criminal Writ Petition No. 258 of 2022, decided on 19.08.2022.

4. We are, therefore, of the view that these two crimes could not have been taken by the authorities as constituting relevant material for preventively detaining the petitioner.

5. If the afore-stated two crimes are kept aside, what would remain is the material in the nature of statements of two confidential witnesses. However, even these statements would not help in any manner the authorities in this case. These statements only suggest that the petitioner is a dangerous person who regularly and habitually indulges in bootlegging activity but, the Investigating Officer of Police Station Ramdas Peth, Akola who has investigated the Crime Nos. 451 of 2022 and 265 of 2022 has different opinion. He does not think the petitioner to be such a dangerous bootlegger and criminal or otherwise he would have instead of issuing notice to him under Section 41(1-a) of the Code of Criminal Procedure arrested the petitioner in those crimes, but, he has not done so and therefore, the statements of the confidential witnesses pointing towards the same criminal activity would not be relevant in this case.

6. Thus, this is a case wherein the competent authority has relied upon something which was absolutely irrelevant in the present case and there being no other material available on record to record requisite satisfaction by the competent authority, the impugned detaining order cannot be upheld by this Court."

11. Applying the ratio of the above Judgments to the facts of the present case, we are of the opinion that apart from the conclusion that we have already arrived at the impugned orders

are unsustainable for the reason that since the Investigating Authority, in all five crimes relied upon, were of the opinion that the arrest of the detainee was not required and notice in terms of Section 41(1)(a) of the Code of Criminal Procedure was enough, this could not be considered to be material for arriving at a subjective satisfaction under Section 3 of the Act. After applying the reasoning of this Court in the case of **Shaikh Usman Shaikh Maheboob** to the facts of the present case, the five crimes could not have been considered to be so serious as to warrant the detention under Section 3 of the Act, which would be wholly unjustified.

12. Adverting to the two in-camera statements referred to in the detention order, though it is clear that both the statements have been verified by S.D.P.O. of the City, Division of Akola, the Superior Senior Officer, who has also verified the identity of the witnesses and truthfulness of the statements, we find that both the statements are vague as they do not specify the date on which the incident has taken place and have only referred to a week in the month of May, 2022. The first witness is reported to have been sitting in front of his house on the road when the detainee was passing by on his motor cycle, when he had a vehicular accident. Some graze injuries were caused to the child of the witness, and

in the resulting altercation between the detainee and the witness, due to the witness questioning the detainee about his rash driving, The detainee, out of anger, threatened the witness with a knife and extorted Rs.940/- from the witness's pocket claiming that the money was towards loss sustained by the detainee due to breakage of the Plastic Can in which he has transported illicit liquor. It is difficult to conclude that this incident was premeditated and with a view to cause a breach of public order by the detainee, even though there may have been an element of fear caused by the acts, in the hearts of public who witnessed the incident.

The second in-camera witness has deposed that while he was sitting in front of his house, the detainee along with some of his Associates passed by in a drunken state, and one of them dashed the bicycle of the witness. The witness then states that he helped the Associate of the detainee to stand up and thereafter this Associate requested the witness to drop him at home. When the witness refused, quarrel ensued, the witness stated to the detainee "तुमच्या गावठी दारूचे गुत्यामुळे येथे दुर्गंधी पसरली आहे, लोक दारू पिवुन परिसरात गोधंळ घालतात, छेडछाड करतात आणि वाहने भरधाव वेगाने चालवुन मुलांना इजा देखील करीत आहेत, वारंवार असे प्रकार घडत आहेत, त्यामुळे, तुम्ही तुमचा गुत्ता बंद करा, नाहीतर मी पालीसांकडे तक्रार करेल". This comment angered the detainee into drawing a sword, and threatening the witness. This incident also appears to be an

altercation between the witness, the detainee and his Associate, but cannot be termed to be an incident, which is premeditated, with a view to cause any prejudice to the maintenance of public order or in any manner, to generally cause fear in the locality. Such incidents could be dealt with by ordinary penal law rather than in terms of Section 3 of the Act.

13. Our findings on the contents of the two witnesses' statements are supported by observations of this Court in Shaikh Usman Shaikh Maheboob (supra), which referred to two confidential witnesses where it was held that such statements suggest that the detainee is a dangerous person, who habitually indulges in bootlegging activities. That Judgment has held such incidents to be irrelevant and unreliable for arriving at a subjective satisfaction to be recorded under Section 3 of the Act while passing the detention order.

14. The case of Machindra Dnyanoba Jadhav (supra) has been cited by the learned A.P.P. the proposition that and the finding that the detainee was a "bootlegger" under the provisions of the Maharashtra Prohibition Act, 1949 need not be arrived at on the basis of a conviction of the detainee under relevant provisions of the Maharashtra Prohibition Act, 1949, but it would be sufficient that the offences under the Prohibition Act are registered against

the detainee and material produced before the Detaining Authority shows that the petitioner was manufacturing illicit liquor.

We have no doubt that even if the present detainee was considered a bootlegger, that by itself would not be a ground to justify the detention order, which otherwise has to be based upon enough material to suggest that the detainee, by his actions would prejudice the maintenance of public order, which would justify his detention under the Act. The element of demonstrating that the "activities" of the detainee in the present case, could be considered to be acts prejudicial to the maintenance of public order, are clearly missing.

15. For the reasons cited above, we are of the opinion that the impugned orders are unsustainable and resultantly, the same are hereby quashed and set aside.

16. The accused shall be released forthwith after necessary compliance.

17. Rule is made absolute in terms of Prayer Clause (b) of the petition. No costs.

[VALMIKI SA MENEZES, J.]

[VINAY JOSHI, J.]

Choulwar