



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

Criminal Writ Petition No. 554 / 2024

Rakesh Madhukar Koli
Age : 27 years, Occ. Labourer,
R/o Indira Nagar, Bholane,
District Jalgaon.

Through his Uncle :
Ravindra s/o Zipa Koli,
Age : 41 years, Occ. Labour. **...Petitioner**

Versus

1. State of Maharashtra
Through its Addl. Chief Secretary
to Government of Maharashtra
Home Department (Special),
Mantralaya, Mumbai.
2. The District Magistrate,
Jalgaon.
3. The Superintendent of Jail,
Central Prison, Aurangabad.
4. The Secretary,
Advisory Board (MPDA)
Mantralaya, Mumbai.

..Respondents

— — —
Advocate for the Petitioner : Mr. Deepak D.
Choudhari

A.P.P. for Respondents /State : Ms. Priya R.
Bharaswadkar

— — —

**CORAM : MANGESH S. PATIL &
SHAILESH P. BRAHME, JJ.**

RESERVED ON : 3 MAY 2024

PRONOUNCED ON : 8 MAY 2024

JUDGMENT [Per Shailesh P. Brahme, J.] :

. Rule. Rule is made returnable forthwith.
Heard both the sides finally.

2. The petitioner is challenging order dated 20.02.2024 passed by the respondent no.2/ District Magistrate, Jalgaon under Section 3(1) of the Maharashtra Prevention of Dangerous Activities of Slumlords Bootleggers, Drug-Offenders, Dangerous Persons and Video Pirates, Sand Smugglers and Persons Engaged in Black-Marketing of Essential Commodities Act Act, 1981 (hereinafter referred to as the MPDA Act for the sake of brevity and convenience). The petitioner is held to be a 'bootlegger' on the basis of five offences under the Maharashtra Prohibition Act, two preventive actions and two in-camera statements of the witnesses.

3. The petitioner seeks to challenge impugned

order on a ground that in the absence of expert's opinion and absence of report of chemical analysis in the last offence, subjective satisfaction cannot be said to be intelligible. His learned advocate would submit that all offences are under Maharashtra Prohibition Act. Therefore, his activities cannot be said to be detrimental to the public order. It is further submitted that there is delay of four months in passing impugned order and there is no live link and that would vitiate the impugned order. It is further submitted that he has been only served with notices under Section 41-A (1) of the Criminal Procedure Code meaning thereby there was no need to arrest him, as offences are of lesser gravity.

4. Per-contra, learned APP supports impugned order on the basis of affidavit-in-reply. She would submit that subjective satisfaction is founded on serious offences and other incriminating material. Considering track history, the petitioner is found to be habitual. She would further submit that due procedure of law has been followed and time line prescribed

by the Act, has been adhered to. She would rely on the judgment of **Vinod Dhannulal Jaiswal Vs. District Magistrate, Aurangabad and Ors.**, AIR Online 2024 Bom 105.

5. Having considered rival submissions of the parties, it reveals from record that the detaining authority has recorded a specific finding in paragraph no.11 on the basis of reports of chemical analysis of the contraband collected during the course of investigation that percentage of ethyl alcohol was hazardous to human consumption and would cause various diseases. Last offence pitted against petitioner was registered on 03.11.2023. The contraband seized in the offence, was sent for chemical analysis and report is awaited.

6. The grounds of detention do not spell out as to on what basis, the findings in paragraph no.11 are recorded. No expert's opinion is solicited in any of the offences pitted against the petitioner. In the absence of expert's opinion, the findings are perverse being based on conjectures and surmises. The report of chemical

analysis is awaited in the last offence. In such scenario one is not sure as to whether the contraband seized in the last offence is illicit liquor or not. Overlooking this aspect of the matter, the detaining authority has recorded findings in paragraph no.10 that the petitioner was found to be illegally manufacturing, storing and selling liquor. We are of considered view that the subjective satisfaction is perverse.

7. All the offences pitted against petitioner are registered under Maharashtra Prohibition Act. No offence has been registered falling under Chapter XVI and XVII of IPC. It is not necessary that for a drastic action of detention, there has to be some offence under IPC. In the present case, petitioner is held to be bootlegger. Obviously, the material pitted against him is in respect of bootlegging. We do not approve the submissions of learned Counsel for the petitioner in this regard.

8. It is a matter of record that petitioner has been served with notices under Section 41-A (1) of the Criminal Procedure Code in the offences

pitted against him. He was not required to be arrested. We have already taken a view in the matter of Vinod Dhannulal Jaiswal (supra) that serving of notice under Section 41A would not be a mitigating factor. In view of the ratio laid down in paragraph no.36, we find no substance in the submissions of the petitioner. Paragraph No.36 is as follows :

"36. It is to be noted that Section 41-A (1) of the Code of Criminal Procedure is to be resorted to by the Investigating Officer before arresting an individual and that provision would regulate his powers to arrest an individual. Needless to state that the arrest contemplated under the Code of Criminal Procedure for carrying out the investigation into a crime by resorting to custodial interrogation would be essentially for completing the investigation. Suffice for the purpose to observe that in the matter of Arnesh Kumar Vs. State of Bihar and Anr., (2014) 8 SCC 273 the Supreme Court has laid down several guidelines which have to be borne in by the investigating Officer before arresting a person. We are pointing out the law to demonstrate that the submission of the learned advocate for the petitioner that the very fact that the I.O. did not feel necessary to arrest the petitioner although the crimes were registered would be indicative of the fact that even he did not require the petitioner to be sent behind the bars, is fallacious. The arrest for carrying out investigation into a crime would be for a limited purpose of facilitating the Investigating Officer to complete the investigation. Such arrest cannot be looked upon as an action which can be aimed at preventing the accused from indulging in a similar activity rather any such approach would be inconsistent with the mandate of law laid down in Arnesh Kumar (supra). The action of preventive detention under the preventive detention laws would be aimed at abating the specific activities of an individual whereas the arrest for the purpose of investigation cannot be aimed at preventing him from indulging in any such activity. Precisely for this reason, we are not in agreement with the submission of the learned advocate for the petitioner that petitioner being not arrested in the crimes should be taken into account to draw an inference that even the I.O. did not feel it necessary to abate his unlawful activities. In short the purpose of arrest in respect of crime is aimed at conclusion of the investigation, whereas, detention of a person under the preventive detention law is to prevent him from indulging in certain activities."

9. Record reveals that the petitioner was subjected to preventive action under Section 93 of Cr.P.C. on 19.12.2020 and 16.10.2023. He was required to execute bond. If the petitioner was habitually indulging into notorious and criminal

activities, District Magistrate or Sub-Divisional Magistrate had power to forfeit the bond. It is not made clear by learned APP as to whether any such action was taken against petitioner. This aspect has neither been considered by the detaining authority nor has it been explained in affidavit-in-reply. It reveals that the necessary steps have not been taken to enforce the law and still, respondents resorted to the drastic action against the petitioner. Therefore, the findings recorded by the detaining authority that the petitioner is undeterred by ordinary penal laws would not commend us.

10. It reveals that the last offence was registered on 03.11.2023. Thereafter in-camera statements were recorded on 30.11.2023 and 02.12.2023. This inaction for 27 days is detrimental to the proposed action. The statements were verified on 08.02.2024. The proposal was processed and reached detaining authority on 13.02.2024. Thereafter impugned order was passed on 20.02.2024, with a delay of near about three months from registration of the last offence. We have considered affidavit-in-reply

so as to ascertain whether the delay has been explained or not. We find that delay has not been explained. We find that the delay vitiates impugned order. The unexplained delay indicates that drastic action was not warranted against petitioner. His being at large was not in fact detrimental to public order.

11. Learned Counsel for the petitioner refers to judgment rendered in the matter of **Vijay Baburao Avhad Vs. State of Maharashtra and Ors.**, Criminal Writ Petition No.1118/2022. We have considered paragraph no.18. We are fortified in our findings on the submissions of delay by the ratio of that case.

12. We have also examined implication of Section 5A in the present matter. We have recorded that the subjective satisfaction is not an intelligible exercise on certain grounds. We are with the petitioner on the point of delay which in our considered view goes to the root of the matter. We do not find Section 5A would be an impediment in quashing impugned order. We, therefore, pass following order :

ORDER

- i.** Criminal Writ Petition is allowed.
- ii.** The impugned order of detention is quashed and set aside.
- iii.** The petitioner shall be set at liberty forthwith.
- iv.** Rule is made absolute in above terms.

SHAILESH P. BRAHME
JUDGE

MANGESH S. PATIL
JUDGE

NAJEEB...