HIGH COURT OF BOMBAY

Double Bench: Justices Mangesh S. Patil and Shailesh P. Brahme

Date of Decision: 29 February 2024

Criminal Writ Petition No. 1820 / 2023

Nilesh Sunil Pendulkar ..... Petitioner

Versus

1. **The District Magistrate, Ahmednagar**
2. **State of Maharashtra through Secretary, Home Department, Mantralaya, Mumbai**
3. **The Superintendent, Nashik Central Prison, Nashik .... Respondents**

Legislation and Rules Involved:

Section 8 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders, Dangerous Persons, and Video Pirates Act, 1981 (MPDA Act)

Articles 22(5) of the Constitution of India

Sections 307, 143, 147, 148, 149, 323, 324, 504, 506 of the Indian Penal Code (IPC)

Subject: Challenge to the detention order dated 06.10.2023 under the MPDA Act, for being declared a 'dangerous person' based on a sole offense (C.R. No.210/2023).

Headnotes:

Criminal Law – Quashing - Preventive Detention – Challenge to Detention Order – validity of a detention order issued under the Maharashtra Prevention of Dangerous Activities Act (MPDA Act) against the petitioner, Nilesh Sunil Pendulkar. The order was challenged on several grounds, including delay in issuance, non-consideration of bail orders, and violation of constitutional rights. [Para 2-5, 10-14]

Delay in Issuance of Detention Order – held – significant delay in passing the detention order after the registration of the offence was not satisfactorily explained, resulting in a lack of promptitude by authorities, which rendered the detention order questionable. [Para 10-11]

Non-consideration of Bail Order – held – failure of the detaining authority to consider the petitioner's bail order and the reasoning provided by the Additional Sessions Judge vitiated the detention order. The detaining authority’s lack of consideration indicated a lack of proper application of mind. [Para 12-13]

Violation of Constitutional Rights under Article 22(5) – held – the petitioner's constitutional rights were infringed as the rejection of his representation was not communicated to him, and the documents served to him in detention were largely illegible, impairing his ability to make an effective representation. [Para 14-15, 19-20, 22-23]

Decision – Quashing of Detention Order – The Court quashed the detention order dated 06.10.2023 passed against the petitioner by the District Magistrate, Ahmednagar, holding that the order was vitiated by procedural improprieties and violation of constitutional rights. The petitioner was ordered to be set at liberty. [Para 24]

Referred Cases:

- Pradeep Nilkant Paturkar Vs. S. Ramamurthi & Ors., AIR 1994 SCC 656
- Austin William Luis Pinto Vs. Commissioner of Police, Greater Mumbai and Ors., 2005 ALL MR (Cri.) 28
- Jaggu Sardar @ Jagdish Tiratsingh Labana Vs. Commissioner of Police Thane, Criminal Writ Petition Stamp No.15876/2023
- Digambar @ Digambar Vitthal Dagdade Vs. District Magistrate, Latur, Cri. Writ Petition No.1736/2023
- Rushikesh Tanaji Bhoite Vs. State of Maharashtra, 2012 Cri. L.J. 1334
- Lakhan Rohidas Jagtap Vs. Commissioner of Police Pune, 2019 ALL MR (Cri) 5261
- Abdul Sathar Ibrahim Manik Vs. UOI and Ors., 1991 Cri. L.J. 3291
- Vishal Waman Mhatre Vs. Commissioner of Police, 2013 ALL MR (Cri) 42
- Harish Pahwa Vs. State of U.P., (1981) 2 SCC 710
- Mahesh Kumar alias Banti Vs. UOI and Ors., (1990) 3 SCC 148
- S. Amutha Vs. Govt. of Tamil Nadu, 2022 LiveLaw (SC) 25
- Chandra Shekhar Ojha Vs. A.K. Karnik, (1981) ALL MR ONLINE 492
- Mrs. Jayshree Waghmare Vs. Commissioner of Police, Criminal Writ Petition NO.10685/2023
- Shri Shadab Siddiq Khan Vs. R.H. Mendonca, 1998 ALL MR Cri. 1344
- Ramchandra A. Kamat Vs. UOI, 1980 ALL MR ONLINE 119 (SC)
- Rupesh Ram Thakur Vs. Commissioner of Police, Thane, 2018 ALL MR Cri. 2264
- Mrs. Nafisa Khalifa Ghanem Vs. UOI, (1982) 1 SCC 422

Representing Advocates:
Petitioner: Mr. Rupesh A. Jaiswal
Respondents/State: Mr. K.N. Lokhande

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

. Rule. Rule is made returnable forthwith. Heard both the sides finally with their consent.

2. The petitioner is assailing order dated 06.10.2023 passed by the respondent no.1/District Magistrate, Ahmednagar under Section 3(1) of the Maharashtra Prevention of Dangerous Activities of Slumlords Bootleggers,

Drug-Offenders, Dangerous Persons and Video Pirates Act, 1981 (hereinafter referred to as the MPDA Act for the sake of brevity and convenience).

3. Learned Advocate for the petitioner tenders across the bar additional affidavit/rejoinder to affirm that even till date he has not been communicated with the decision on his representation dated 20.10.2023. He places on record the order below Exhibit(1) in Criminal Miscellaneous Bail Application No.1183/2023, granting him bail in C.R.
No.210/2023.

4. The respondent no.1 has considered an offence bearing C.R. No.210/2023 registered on 11.04.2023 with Bhingar Police Station and in-camera statements of witnesses. The petitioner has been declared to be a 'dangerous person'. Considering his illegality activities, detrimental to the public order, impugned order was passed on 06.10.2023. He was committed on
07.10.2023. It was approved under Section 3(2) of the Act on 13.10.2023.
The respondent no.2 confirmed order on
11.04.2023.

5. Learned Counsel for the petitioner would assail the impugned order on following grounds :

(i) There is delay of about five months from registration of offence and the impugned order.

(ii) Order enlarging the petitioner on bail has not been considered by the detaining authority.

(iii) The representation dated 20.10.2023 by the petitioner has not been considered, thereby violating article 22(5) of the Constitution of India.

(iv) The documents served upon the petitioner was illegible causing prejudice to right under article 22(5) of the
Constitution of India.

(v) Grounds of detention have not been communicated to the petitioner.

6. Learned Counsel for the petitioner seeks to rely on following judgments :

(i) Pradeep Nilkant Paturkar Vs. S. Ramamurthi & Ors.
AIR 1994 SCC 656

(ii) Austin William Luis Pinto Vs. Commissioner of Police, Greater Mumbai and Ors. 2005 ALL MR (Cri.) 28

(iii) Jaggu Sardar @ Jagdish Tiratsingh Labana Vs. Commissioner of Police Thane
Criminal Writ Petition Stamp No.15876/2023

(iv) Digambar @ Digambar Vitthal Dagdade Vs. District Magistrate, Latur in Cri. Writ Petition No.1736/2023.

(v) Rushikesh Tanaji Bhoite Vs. State of Maharashtra
2012 Cri. L.J. 1334

(vi) Lakhan Rohidas Jagtap Vs. Commissioner of Police Pune
2019 ALL MR (Cri) 5261

(vii) Abdul Sathar Ibrahim Manik Vs. UOI and Ors.
1991 Cri. L.J. 3291

(viii) Vishal Waman Mhatre Vs. Commissioner of Police
2013 ALL MR (Cri) 42

(ix) Harish Pahwa Vs. State of U.P.
(1981) 2 SCC 710

(x) Mahesh Kumar alias Banti Vs. UOI and Ors.
(1990) 3 SCC 148

(xi) S. Amutha Vs. Govt. of Tamil Nadu
2022 LiveLaw (SC) 25

(xii) Chandra Shekhar Ojha Vs. A.K. Karnik
(1981) ALL MR ONLINE 492

(xiii) Mrs. Jayshree Waghmare Vs. Commissioner of Police
Criminal Writ Petition NO.10685/2023

(xiv) Shri Shadab Siddiq Khan Vs. R.H. Mendonca
1998 ALL MR Cri. 1344

(xv) Ramchandra A. Kamat Vs. UOI
1980 ALL MR ONLINE 119 (SC)

(xvi) Rupesh Ram Thakur Vs. Commissioner of Police, Thane
2018 ALL MR Cri. 2264

(xvii) Mrs. Nafisa Khalifa Ghanem Vs. UOI (1982) 1 SCC 422

7. Learned APP supports impugned order. He would rely on affidavit-in-reply as well as additional affidavit of the respondent no.1 as well as respondent no.2. He submits that the period consumed in taking impugned action has been adequately explained in paragraph no.7 of the reply. Order enlarging petitioner on bail was considered by the detaining authority. The representation was rejected by the respondent no.1 on 10.11.2023 and was communicated to the Jail Authorities as well as to the petitioner. The relevant

documents were supplied to the petitioner on 06.10.2023 and he was not taken by surprise.

8. It is further submitted that there is cogent material against the petitioner. The respondent no.1 has arrived at the subjective satisfaction by considering every aspect of the matter. Even the Advisory Board considered papers and confirmed the order by furnishing opinion to the respondent no.2. A reliance is placed on judgment in the matter of Hasan Khan Ibne Haider Khan Vs. R.H. Mendonca, (2000)3 SCC 511.

9. We have considered rival submissions of the parties advanced across the bar. Only offence considered by the detaining authority is C.R. No.210/2023 registered on 11.04.2023 under Sections 307, 143, 147, 148, 149, 323, 324, 504, 506 of the Indian Penal Code. On 13.07.2023, the petitioner was arrested. In-camera statements of the witnesses were recorded on 18.07.2023 and 19.07.2023. Those were verified on 25.07.2023. The detaining authority received proposal on 07.10.2023. On 06.10.2023, impugned order was passed. Petitioner made representation on 20.10.2023.

10. The solitary offence considered by the detaining authority was registered on 11.04.2023. There is delay of five months in passing the impugned order therefrom. Our attention is invited to paragraph no.7 of the affidavit-in-reply. It refers to recording of in-camera statements on 18.07.2023 and
19.07.2023. There is no explanation for the delay from 11.04.2023 to 18.07.2023, though, thereafter further steps were taken with some speed. The detaining authority received proposal on 07.08.2023. Again the matter appears to have lingered till 06.10.2023, before the impugned order was passed, for which there is no explanation in the reply.

11. When the respondents are taking drastic action under the Act against the petitioner, they are expected to be diligent because personal liberty of the proposed detenue is at stake. Without conducting trial, detaining authority has been empowered to direct detention. If the detaining authority fails to proceed against detenue with promptitude then the action is liable to be quashed. This is a settled principle of law. Learned Counsel for the petitioner has rightly relied upon the following judgments :

(i) Pradeep Nilkant Paturkar
(ii) Austin William Luis Pinto (paragraph no.7 and 8)
(iii) Jaggu Sardar @ Jagdish Tiratsingh Labana

(paragraph no.15)

(iv) Digambar @ Digambar Vitthal Dagdade
(paragraph no.17 and 18)

. It would suffice to refer to the principles laid down by the Supreme Court in the matter of Pradeep Nilkant Paturkar (supra) which are as follows :

"We feel that it is not necessary to refer to all the decisions on this point.

. Countering the argument of Mr. Gupte, the learned Additional Solicitor General drew our attention to 'Rajendrakumar Natvarlal Shah v. State of Gujarat, in which this Court held that the non-explanation of the delay between 2nd February and 28th May, 1987 could not give rise to legitimate inference that the subject of satisfaction arrived by the District Magistrate was not genuine. In the same decision, the learned Judges have pointed out "It all depends on the nature of the acts relied on, grave and determined or less serious and corrigible, on the length of the gap, short or long, on the reason for the delay in taking preventive action, like information of participation being available only in the course of an investigation". A perusal of the various decisions of this Court on this legal aspect shows that each case is to be decided on the facts and circumstances appearing in that particular case.

. Coming to the case on hand, the detention order was passed after 5 months and 8 days from the date of the registration of the last case and more than 4 months from submission of the proposal. What disturbs our mind is that the statements from the witnesses A to E were obtained only after the detenu became successful in getting bail in all the prohibition cases registered against him, that too in the later part of March, 1991. These statements are very much referred to in the grounds of detention and relied upon by the detaining authority along with the registration of the cases under the Act.

. Under the above circumstances, taking into consideration of the unexplained delay whether short or long especially when the appellant has taken a specific plea of delay, we are constrained to quash the detention order. Accordingly we allow the appeal, set aside the judgment of the High Court and quash the impugned detention order. The detenu is directed to be set at liberty forthwith. "

12. Only offence pitted against the petitioner is C.R. No.210/2023. He was arrested on 13.07.2023. We have gone through the FIR. He is alleged to have quarreled and scuffled with informant and his friends in a procession of Mahatma Phule Birth Anniversary. He is alleged to have assaulted informant by wooden-log. Another accused alleged to have assaulted other persons. It was plea of the petitioner before Criminal Court that CCTV footage

showed that the informant had fallen from the tractor. It is recorded by the Additional Sessions Judge while granting bail to the petitioner that there was free fight between two groups and Section 307 of IPC was added later. There was no chance of petitioner jumping the bail. These are relevant inputs to be considered by the detaining authority.

13. We do not find any application of mind by the detaining authority, to the reasons assigned by the Additional Sessions Judge in granting bail. It is settled position of law that nonconsideration of order releasing detenue on bail would vitiate detention order. We are in agreement with submission advanced by the petitioner in this regard, which is inconsonance with following judgments :

(i) Digambar @ Digambar Vitthal Dagdade (supra) (Paragraph Nos. 25 to 35)
(ii) Rushikesh Tanaji Bhoite (supra) (Paragraph Nos. 36 to 41)

(iii) Lakhan Rohidas Jagtap (supra)
(Paragraph Nos. 42 to 46)

(iv) Abdul Sathar Ibrahim Manik (supra)
(Paragraph Nos. 47 to 55)

(v) Vishal Waman Mhatre (supra)
(Paragraph Nos. 56 to 59)

14. The petitioner made representation on 20.10.2023. The grievance is that neither any decision was taken, nor was it conveyed to him. Our attention is invited to affidavit-in-reply stating that the representation was rejected on 10.11.2023. The respondents did not place on record any acknowledgment to show that the decision of rejection was actually served on the petitioner. When plea has been taken in the memo of Writ Petition in Paragraph No.6(c), it was expected of respondents to demonstrate communication of the decision. It is tried to be submitted by the learned APP that by sending mail, decision was conveyed to respondent no.3. We do not find anything to show that the petitioner was ever apprised of the decision. We have no alternative than to infer that there is infringement of constitutional right of petitioner envisaged by Article 22(5) of the Constitution of India.

15. The judgments cited by the petitioner in this regard in the matter of Harish Pahwa (paragraph no.3), S. Amutha and in Digambar @ Digambar Vitthal Dagdade (Paragraph No.10 & 11) (supra) are aptly applicable to the case in hand. We concur with the submissions of learned Counsel for petitioner in this regard.

16. Learned Counsel for the petitioner would submit that the documents supplied to the petitioner were illegible. The petitioner was unable to make effective representation. Learned APP would repel this submission by stating that the petitioner was aware of the record comprising of papers of investigation of solitary offence pitted against him. He is not said to have been surprised by the papers, though they are illegible.

17. In the present case only a solitary offence is pitted against the petitioner. Paragraph no.8 of the affidavit-in-reply reads as follows :

"8. The deponent submits that in view of the offences registered against the petitioner and statements of witnesses, convinced that petitioner is a Dangerous Person as defined" " in MPDA Act, 1981 as he has committed serious offences i.e. assault on public servant to deter from discharge of his duty, voluntarily causing hurt to deter public servant from his duty, voluntarily causing hurt, disobedience to order duly promulgated by public servant, riots, voluntarily causing hurt by dangerous weapons, dacoity, voluntarily causing grievous hurt by dangerous weapons, attempt to murder, intentional insult with intent to provoke breach of the peace, criminal intimidation etc. Due to his criminal and dangerous activities the persons residing in the jurisdiction of Police Station Bhingar Camp, Dist. Ahmednagar and adjoining areas remain under constant fear and terror."

18. It reveals that earlier criminal antecedents of the petitioner have been taken into account albeit it is represented that the detaining authority would be considering only last offence. The principles of natural justice would demand that whatever material is to be used against detenue has to be tendered to him. It is the statutory right of the detenue as contemplated by Section 8(1) of the MPDA Act which is as follows :

"Section 8(1) : When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but not later than five days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the State Government."

19. When petitioner was in detention, he was served withthe documents, many of which were illegible. Somehow he made representation on 20.10.2023. There is every reason to believe that his right to make representation was paralyzed. While in detention, he is not expected to have relevant record with him. This being the position, we find merit in the submissions of the learned Counsel for the petitioner.

20. Normally when a person is being at large and facing any penal action on the basis of antecedents, it would be proper to contend that he could have access to the material. He would be in a position to receive and collect the material from other sources. However this is not a case when a preventive action has been taken under Section 3(1) of the Act against a person. His personal liberty to receive the documents and information from any other sources would be curtailed. The detaining authority is expected to be meticulous in serving entire record which is legible, so as to facilitate detenue to make an effective representation, else it would amount to transgression of a constitution right under Article 22(5).

21. In this regard, learned Counsel has placed on record the judgments rendered in the matter of Chandra Shekhar Ojha (supra). Paragraph Nos.8 and 9 of the judgment is as follows :

"8. In the present case, therefore, it will have to be held that the documents which were wholly illegible were not supplied at all to the detenu for all practical purposes. It is not disputed before us that all these documents were considered by the detaining authority and with the exception of one, were also relied upon for the purpose of detention. When a document is referred to in the grounds of detention, how can the Court say that only a particular entry is relied upon ? That will amount to fishing out a point against the detenu. This is more so, when in the grounds of detention or in the statements of witnesses, no reference is made to a particular entry. Further this is not a case in which it could be said that to these documents a mere casual reference was made and they were not relied upon by the detaining authority while passing the detention order. To such a case observations of Supreme Court in L. M. S. Ummu Saleema v. B.B. Gujarat cannot apply. Therefore, the only question which requires further consideration in this case is to find out as to what is the effect of the non-supply of relevant documents, which were relied upon by the detaining authority for passing the detention order. It is not possible for us to accept the contention of Mr. Kotwal that if the relevant entries are legible, then there is no denial of right of making an effective representation. It cannot be forgotten that the detenu is an old man aged about 70 years. The documents and grounds of detention were served upon him when he was in jail custody. Therefore, he had no assistance or help, nor a magnifying glass was available to him. In the statements of witnesses recorded under Section 108 of the Customs Act no reference is made to the particular or specific entry nor such a specific reference is made in the grounds of detention. Reference is made to the documents only which will mean that

document as a whole is referred to and relied upon. Therefore, even for deciding as to which is the relevant entry, the perusal and reading of the whole document was absolutely necessary. Such a perusal or reading was not possible because admittedly the remaining portion of the document was not legible. As already observed, supplying the copies of relevant documents is not an empty formality and the detaining authority cannot be permitted to take advantage of its own wrong and to indulge in this type of argument. These documents were relied upon by the detaining authority while passing the detention order and in spite of this due care and precaution was not taken to supply legible copies of the documents to the detenue. Therefore, for all practical purposes it will have to be held that copies of these documents were not supplied to detenu at all."

"9. However, it is contended by Mr. Kotwal that assuming that because of non-supply of some of the documents the grounds which are based on them are invalid for that reason, the order of detention as a whole cannot be declared as illegal in view of S. 5A of the COFEPOSA Act. According to the learned counsel, in view of the said provision it will have to be held that the order of detention was based on the remaining grounds or ground and therefore is legal and valid. Before dealing with this contention it will have to be seen as to what is the effect of non-supply of relevant documents. The Supreme Court had an occasion to deal with this aspect of the matter in various decisions. In Kamla Kanhaiyalal Khushalani v. State of Maharashtra the Supreme Court held that the documents and materials relied upon in the order of detention form an integral part of the grounds and must be supplied to the detenu pari passu the grounds of detention. If the documents and materials are supplied later, then the detenu is deprived of an opportunity of making an effective representation against the order of detention. Thus before an order of detention can be supported, the Constitutional safeguard must be strictly observed. Thus it is clear that supplying the relevant documents to enable the detenu to make an effective representation is a constitutional safeguard. Art 22(5) of the Constitution of India lays down that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. The communication of the grounds is part and parcel of the constitutional safeguard guaranteed under Art 22(5) of the Constn. As observed by the Supreme Court in various decisions the documents which form an integral part of the grounds must be supplied along with the grounds of detention. If this is not done, the detention of the detenu is liable to be declared as void. The Supreme Court in S. Gurdip

Singh s' case has taken a view that the service of grounds of detention can be complete only if they are accompanied by the documents and materials on which the order of detention is based. For then alone will the detenu be able to make an effective representation. In other words, if the documents which form the basis of the order of detention are not served on the detenu along with the grounds of detention, in the eye of law there will be no service of the grounds of detention and that circumstance would vitiate his detention and make it void ab initio. From this decision it is clear that non-supply of relevant documents will render the detention itself void ab initio. Therefore, once it is held that the supply of wholly blank or illegible documents amounts to non-supply of copies of the relevant documents which are relied upon for passing the detention order, then we have no other alternative but to hold that the detention of the detenu is void ab initio. If the detention is void ab initio, then the question of sustaining such a void order under Section 5A of the COFEPOSA Act cannot arise. S. 5A of the COFEPOSA Act will come into operation after the communication of grounds and following the constitutional safeguards. In our opinion, S. 5A of the COFEPOSA Act will have no application if the grounds themselves are not communicated. Other wise the constitutional safeguard guaranteed under Ar. 22(5) will have no meaning. From the various decisions of the Supreme Court, it is clear that nonsupply of the grounds of detention or relevant documents must have an effect of invalidating the detention itself. In that case the detention cannot be said to be according to the procedure prescribed by law. If the detention itself is not according to the procedure prescribed by law, then the question of supporting the void order of detention by taking recourse to S. 5A of the COFEPOSA Act will not arise. An order which is void ab initio cannot be validated or supported by taking recourse to S. 5A of the COFEPOSA Act. Therefore it is not possible for us to accept this contention of Mr. Kotwal. In the view which we have taken it is not necessary to deal with the cases viz. 1981 Cri LJ NOC 20 (Raj), Hira Nand v. State of Rajasthan, 1981 Cri LJ 660 (Cal). Satyanarayan Kothari v. Supdt., Presidency Jail, Alipore and the decision of this Court in Criminal Application No. 419 of 1978 decided on 19th September, 1978 by Naik and Mehta JJ., on which reliance is placed by Mr. Kotwal."

22. Further reliance is placed on judgment in the matter of Jayshree Waghmare (paragraph nos. 9 to 11) and the judgment in the matter of Shadab Siddiq Khan (supra).

Paragraph No.4 of the said judgment is as follows :

"4. We wish to emphasize that the right of the detenu to make a representation under Article 22(5) of the Constitution of India stipulates the

right of making an effective representation and not a illusory one. And when illegible copies of documents are supplied to the detenu, as is the case here, the right to make an effective representation is whittled down to an illusory one. And this is in clear violation of the mandate of Article 22(5) of the Constitution of India.

Since in the instant case the detenu's right of making an effective representation under Article 22(5) of the Constitution of India was violated, his continued detention is rendered illegal in law and the detention order would have to be set aside. "

23. Learned APP would rely on judgment in the matter of Hasan Khan (supra). We are of the considered view that the facts in the present case are distinguishable. The judgment is not helpful to the respondents.

24. Our above analysis would demonstrate that there is a substance in all the submissions for quashing the impugned order. We are inclined to allow the petition :

ORDER

(i) The Criminal Writ Petition is allowed.

(ii) The detention order dated 06.10.2023 passed by the respondent no.1/District Magistrate, Ahmednagar is quashed and set aside.

(iii) The petitioner shall be set at liberty.

(iv) Rule is made absolute in the above terms.