

(2014) 07 BOM CK 0221

In the Bombay High Court

Case No : Criminal Writ Petition No. 390 of 2014

Ashish

APPELLANT

Vs

The Commissioner of Police

RESPONDENT

Date of Decision : 30-07-2014

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3, 5A
Constitution of India, 1950 — Article 22(5), 226
Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders and Dangerous Persons Act, 1981 — Section 3(1)

Citation : (2014) 07 BOM CK 0221

Hon'ble Judges : S.S. Shinde, J;P.R. Bora, J

Bench : Division Bench

Advocate : U.N. Tripathi and R.D. Sanap, Advocate for the Appellant; G.K. Naik Thigale, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

S.S. Shinde, J

1. Rule. Rule made returnable forthwith. By consent heard finally.
2. By way of this Writ Petition, under Article 226 of the Constitution of India, the petitioner takes exception to the detention order being No. DET/MPDA/Zone-IV/PCB/14/2013 dated 17.10.2013 issued u/s 3(1) of Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders and Dangerous Persons Act, 1981 by the Commissioner of Police, Nagpur.
3. Though the petitioner has taken nine grounds in the Petition, during the course of hearing the learned counsel appearing for the petitioner restricted his arguments to the grounds (c), (d), (f), (g), (j) and (k). The learned counsel appearing for the petitioner relying upon the ground (c) in the Petition would contend that, the representation dated 12th February, 2014 of the detenu was handed over to the State Government by his Lawyer on his behalf for expeditious

consideration and revocation of the order of detention as well as requesting for supplying him certain documents relied on by the detaining authority, to the detenu to make further effective representation. It is submitted that, the petitioner or his lawyer did not receive any communication as regards to the consideration of the said representation of the detenu, thereby the said respondent authority has delayed in consideration of the representation of the detenu. As such, the right to make representation of the detenu guaranteed under Article 22(5) of the Constitution of India is violated. The learned counsel appearing for the petitioner in support of his contention that, the representation of the detenu deserves to be considered and decided expeditiously, pressed into service, the exposition of the Supreme Court in the case of Rama Dhondur Borade Vs. V.K. Saraf, Commissioner of Police and Others, and also in the case of Harshala Santosh Patil V/s. State of Maharashtra and others reported in (2006) 12 S.C. 211.

4. In reply to the ground (c) in the Petition, in an affidavit filed by one Bajrang Digambar Umate, Deputy Secretary, Government of Maharashtra, Mantralaya, Mumbai in para 2, it is stated that, the representation of the petitioner i.e. detenu was received by MPDA Desk on 12th February, 2014. The Deputy Secretary, after his endorsement forwarded the same on 13th February, 2014 to the Additional Chief Secretary (Home). It is stated in the affidavit in reply that, on 14th February, 2014, the Additional Chief Secretary (Home) was busy in the meetings regarding Atrocity Act, Policy of Senior Citizen and Maharashtra State, Scheduled Caste Advisory Board. On 15th February, 2014 the Additional Chief Secretary (Home) was engaged in important office work and in the preparation of meeting regarding Police Establishment Board. On 16th February, 2014 was a public holiday. On 17th February, 2014, the Additional Chief Secretary (Home) was involved in the issues with Chief Secretary regarding Adarsh Cooperative Housing Society, Higher Level Secretary Committee and Screening of Selection Grade IPS officers for promotion. On 18th February, 2014, the Additional Chief Secretary (Home) perused the representation and sought for remarks from the Detaining Authority, Commissioner of Police, Nagpur City. On 19th February, 2014 was a public holiday. The file containing the instructions of the Additional Chief Secretary (Home) was received in the Desk on 20th February, 2014. The remarks were called from Detaining Authority, Commissioner of Police, Nagpur City vide letter dated 20th February, 2014. The Detaining Authority was asked to submit his remarks till 27th February, 2014. The detaining authority was reminded on 28th February, 2014 for the same. The remarks of the detaining authority were received on 12th March, 2014 vide letter dated 6th March, 2014. The Assistant submitted file containing remarks of detaining authority along with the representation of the detenu to the Deputy Secretary on 12th March, 2014. The Deputy Secretary endorsed the file on 13th March, 2014 and forwarded the same to the Additional Chief Secretary (Home) on the same day. The Additional Chief Secretary (Home) considered the representation on 15th March, 2014 and rejected it. The file received in Desk on 15th March, 2014 and the rejection of

representation was communicated to the detenu vide letter dated 15th March, 2014. On 16th March, 2014 and 17th March, 2014 were Sunday and Public holiday. The said letter was dispatched on 19th March, 2014 from the Home Department.

5. Therefore, upon careful perusal of the contents of the affidavit in reply filed on behalf of the respondent it is crystal clear that, though the representation was received in the Department on 12th February, 2014, the Additional Chief Secretary (Home) perused the said representation only on 18th February, 2014. If the Additional Chief Secretary (Home) was of the opinion that, the parawise remarks from the detaining authority are necessary, on receiving such representation, he should have acted with promptitude. It is also not explained in the affidavit in reply why, the parawise remarks from the detaining authority were necessary. Parawise remarks sent by the detaining authority were received by the Department on 12th March, 2014. It is also not explained in the affidavit in reply that, why the detaining authority had taken about 21 days time in sending the parawise remarks to the Department of Home, Government of Maharashtra. The provisions of Article 22(5) of the Constitution of India reads thus:-

22(5) 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.

Upon careful reading of the above provision, it imposes twin obligations on the authority making the order of detention in respect of the detenu. Firstly, to communicate to such person the grounds on which the order of detention has been made and secondly, to afford him the earliest opportunity of making a representation against the order. The Constitution Bench of the Supreme Court in the case of K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others, and the Bombay High Court in the case of Shabbirbhai Bookwala and Mustafa Sabbirbhai Bookwala Vs. The State of Maharashtra and The Superintendent of Prison, has held that, unexplained delay in the disposal of the representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal. In the case of Harshala Santosh Patil V/s. State of Maharashtra and others reported in (2006) 12 S.C.C. 211 in the facts of that case the Supreme Court held that, State Authority was not justified in taking five days time to dispose of the representation. In fact, the Additional Chief Secretary could do so in course of the day nay in few hours. Yet in another case i.e. in the case of Rama Dhondur Borade (supra), the Supreme Court in the facts of that case held that, delay attributed of 14 days in respect of further information and occurrence of certain holidays thereafter up to disposal of the representation was not properly explained and the said delay was unreasonable and such delay could

vitiating the order of detention.

6. As already observed in the facts of the present case, the Additional Chief Secretary (Home), took about 7 days in attending the said representation and it is only on 18th February, 2014 called the remarks from the detaining authority. The detaining authority took time to send the remarks till 12th March, 2014. Firstly, Additional Chief Secretary (Home) did not peruse the representation till 18th February, 2014 for cogent reasons though it was submitted on 12th February, 2014 and secondly, there is no explanation why the detaining authority did not send its parawise remarks immediately.

In the case of *Rajammal Vs. State of Tamil Nadu and Another*, the Apex Court in para 9 held thus:

9. The position, therefore, now is that if delay was caused on account of any indifference or lapse in considering the representation such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned.

7. Yet in another case of *Harish Pahwa Vs. State of U. P. and Others*, , the Apex Court in para 5 held thus:-

5. In our opinion, the manner in which the representation made by the appellant has been dealt with reveals a sorry state of affairs in the matter of consideration of representations made by persons detained without trial. There is no explanation at all as to why no action was taken in reference to the representation on 4th, 5th and 25th of June, 1980. It is also not clear what consideration was given by the Government to the representation from 13th June, 1980 to 16th June, 1980 when we find that it culminated only in a reference to the Law Department, nor it is apparent why the Law Department had to be consulted at all. Again, we fail to understand why the representation had to travel from table to table for six days before reaching the Chief Minister who was the only authority to decide the representation. We may make it clear, as we have done on numerous earlier occasions, that this Court does not look with equanimity upon such delays when the liberty of a person is concerned. Calling comments from other departments, seeking the opinion of Secretary after Secretary and allowing the representation to lie without being attended to is not the type of action which the State is expected to take in a matter of such vital import. We would emphasise that it is the duty of the State to proceed to determine representations of the character above mentioned with the utmost expedition, which means that the matter must be taken up for consideration as soon as such a representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu. This not having been

done in the present case we have no option but to declare the detention unconstitutional. We order accordingly, allow the appeal and direct that the appellant be set at liberty forthwith.

8. Therefore, in the light of discussion in a foregoing paragraphs, in our opinion, the delay in disposing of the representation has not been explained satisfactorily by the Respondent Authorities.

9. The learned counsel for the petitioner relying upon the ground (d), (e), (f) and (g) in the Petition submitted that, the petitioner detenu has made a specific written request in his representation dated 12th February, 2014 to the State Government for furnishing him certain true and correct copies of five incomplete and vague documents to enable him to make further effective representation. The respondents in their reply have admitted that, there is a document purporting to be a panchnama recorded by two panchas Rakesh and Sachin in presence of Police Sub-Inspector, Imamwada Police Station, Nagpur, a document referred to and relied on by the detaining authority. It is also not disputed that, there is no date, month and year as to when the panchnama is recorded on the said document. However, it is typographical error. It is further not disputed by the detaining authority that, in para 12(a) of the arrest form it is stated that, the detenu is not a dangerous person. However, it is a typographical error. It is further admitted that, the statement of Ashish Robert Felix i.e. the petitioner, found at page 111 at the compilation do not bear any date, month and year of recording the said statement even though it is certified as true copy. It is also not disputed that, at page no. 113, there is a PCR and at page no. 144 there is an order passed by the J.M.F.C. Court No. 1, Nagpur being a judicial order is a vital document which does not bear any date, month and year of passing of the order. It is further stated that, in the original English order, the date of order i.e. 16th April, 2013 was mentioned, however, due to oversight it was not mentioned on the true copy of the said order. The Respondent No. 1 in his affidavit has admitted that, while translating the medical legal certificate due to typographical error the word alleged offence was typed as "prakar ka arop" and the date of issue of the certificate i.e. 9th May, 2013 in English was not typed on the Hindi translated copy of the said certificate. Therefore, the respondent no. 1 has given vital admissions in his affidavit as discussed hereinbefore. The Division Bench of Bombay High Court in the case of Shri Shailesh Kumar B. Rajpurohit Vs. Shri R.H. Mendonca and Others, in para 6 held as under:

6. We have reflected over the rival submissions. In our view absence of year is certainly not a minor mistake or omission. We feel that as consequence of it the detenu could have been wholly confused and at a loss to understand as to which prejudicial act of his the detaining authority was referring to. For the same reason, in our opinion, the variation in time is also material.

Therefore, the learned counsel appearing for the petitioner is right in contending that, the petitioner could not prepare effective representation for non-supply of proper documents.

10. The learned counsel relying upon the ground (j) and (k) submitted that, the detaining authority did not verify truthfulness of the incidents in Camera Statement, and therefore, the satisfaction of the detaining authority vitiated for non-verification of the truthfulness of the incidents by the detaining authority.

In the affidavit of the respondent no. 1, while replying ground no. (j) and (k) has stated that, the secret complaints i.e. the in-camera statements of witness "A" and witness "B" have been recorded by Police Inspector, Police Station, Imamwada Nagpur, who is a gazetted officer and the truthfulness of these complaints have been verified by the Police Officer rank of Assistant Commissioner of Police, Ajni division, who has found the in-camera statements to be true. However, their in-camera statement have been recorded after assuring them that they would not be called upon to give evidence against the petitioner/detenu in any court or any other open forum. The Respondent No. 1 after going through each and every documents including in-camera statement of witness "A" and witness "B" and after being subjectively satisfied, had passed the detention order. However, there is no statement in the affidavit that, the detaining authority himself has verified the truthfulness of in camera statements. In this respect the Division Bench of the Bombay High Court in the case of Smt. Vijaya Raju Gupta Vs. Shri R. H. Mendonca, Commissioner of Police Brihan Mumbai and Others, in para 6 held that, the detaining authority has to apply his mind about the truthfulness of the assertions made in camera statements.

11. The Division bench of Bombay High Court in the case of Chandra Shekhar Ojha Vs. A.K. Karnik and others, while interpreting the provisions of Sections 3 and 5A of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, held as under:-

supply of wholly blank or illegible documents amounted to non-supply of copies of the relevant documents which were relied upon for passing the detention order and non-supply of relevant documents rendered the detention itself void ab initio. If the detention was void ab initio, then the question of sustaining such a void order u/s. 5A in respect of those grounds which were based on illegible documents could not arise. If non-supply of the grounds of detention or relevant documents had the effect of invalidating the detention itself, then in that case the detention could not be said to be according to the procedure prescribed by law. If the detention itself was not according to the procedure prescribed by law, then the question of supporting the void order of detention by taking recourse to Section 5A of the COFEPOSA Act could not arise. An order which was void ab initio could not be validated or supported by taking recourse to S. 5A of the COFEPOSA Act. S. 5A could come into operation only after the communication of grounds and following the constitutional safeguards. Supplying the relevant documents to enable the detenu to make an effective representation was a constitutional safeguard S. Gurdip Singh Vs. Union of India (UOI) and Others, and Kamla Kanyalal Khushalani Vs. State of Maharashtra and another, Rel. on 1981 Cri. LJ 889(SC), Disting.

12. In the light of discussion in a foregoing paragraphs an irresistible conclusion is that, the order of detention deserves to be set aside and accordingly same stands quashed and set aside. The Respondent authority to release the petitioner forthwith, if not required in any other case.

13. Rule made absolute to the above extent.

14. Criminal Writ Petition is disposed of in the above terms.