

(2019) 03 BOM CK 0082

In the Bombay High Court

Case No : Criminal Writ Petition No. 155 Of 2019

Balu

APPELLANT

Vs

Commissioner Of Police And Ors

RESPONDENT

Date of Decision : 26-03-2019

Acts Referred:

Maharashtra Prevention Of Dangerous Activities Of Slumlords, Bootleggers, Drugoffenders And Dangerous Persons, Video Pirates, Sand Smugglers And Persons Engaged In Black-marketing Of Essential Commodities Act, 1981 — Section 2(a), 2(a)(i), 2(a)(ii), 2(a)(iii), 2(a)(iv), 2(9)(i), 2(9)(ii), 2(9)(iii), 2(9)(iv), 2(b1), 3, 3(1), 3(2), 3(3), 8, 8(2), 9, 10, 11, 11(1), 11(4), 12, 12(1), 12(2), 13
Bombay General Clauses Act 1904 — Section 21
Indian Penal Code, 1860 — Section 34, 149, 307, 323, 325, 392, 436
Scheduled Caste And Scheduled Tribe (Prevention Of Atrocities) Act, 1989 — Section 3(1)(x)
Code Of Criminal Procedure, 1973 — Section 110(e)(g)
Bombay Police Act, 1951 — Section 122
Constitution Of India, 1950 — Article 14, 19, 21, 22, 22(3), 22(4), 22(5), 22(6), 22(7), 226

Citation : (2019) 03 BOM CK 0082

Hon'ble Judges : T.V. Nalawade, J; Mangesh S. Patil, J

Bench : Division Bench

Advocate : R.D. Sanap, S.J. Salgare

Final Decision : Allowed

Judgement

T.V. Nalawade, J

(1) Rule. Rule made returnable forthwith. By consent, heard both the sides for final disposal.

(2) The petition is filed under Article 226 of Constitution of India for relief of quashing and setting aside the order dated 15.10.2018 passed by the learned Commissioner of Police, Aurangabad under section 3 (1) and (2) of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders and Dangerous Persons, Video Pirates, Sand Smugglers and Persons

Engaged in Black-marketing of Essential Commodities Act, 1981 (hereinafter referred to as 'the Act' for short) and also to challenge the order of confirmation of the order of detention made by the State Government.

(3) The petitioner is a citizen of India and he is a resident of village Wadgaon Kolhati, Tahsil and District Aurangabad. By the order dated 15.10.2018 the learned Commissioner, detaining authority directed to detain the petitioner under the Act and since 15.10.2018 the petitioner is kept in Central Prison, Harsul, Aurangabad as detenu. The grounds of detention were informed to the petitioner on 15.10.2018.

(4) It is the contention of the respondent detaining authority and the State Government that the petitioner is 'dangerous person'. In the grounds, the particulars of the activities of the petitioner noticed by the concerned police station, sponsoring authority are mentioned. His place of residence comes within the local jurisdiction of M.I.D.C. Waluj Police Station, Aurangabad. It is the contention of respondents that due to the activities of the petitioner, the citizens of adjoining area remained under constant fear and terror and the petitioner has become a serious threat and source of danger to the life of law abiding and peace loving citizens and he has become threat to a public order. Following activities are mentioned in the grounds for detention.

Sr. No.

Police Station

C.R.No. & Under section

Present status

1

MIDC Waluj

54/2016 u/s.307, 341, 504, 34 IPC, r/w. 4, 25 Arms Act, 135 Maharashtra Police Act

Pending trial

2

MIDC Waluj

131/2018 u/s. 452, 325, 323, 504, 506 IPC

Pending trial

3

MIDC Waluj

277/2018 u/s. 392, 323, 504, 506, 34 IPC

Pending Investigation

Preventive Action

Sr. No.

Police Station

Chapter Case No. & U/s.

Disposal

1

MIDC Waluj

12/2016 u/s 110(e)(g) Cr.P.C.

Released on final bond of Rs.20,000/-

2

MIDC Waluj

11/2018 u/s. 110(e)(g) Cr.P.C.

Chapter case dropped as action taken under MPDA Act, 1981

Externment Proceeding

Sr. No.

Police Station

Externment Order No.

Under Section

1

MIDC Waluj

Order No. DCP/Externment/11/ 3071/2001 Office of the Dy. Commissioner of Police, Zone Aurangabad. Dt. 28/08/2001

56(1)(a)(b) of Bombay Police Act, 1951. Extended from Aurangabad City for six months.

Detention Proceeding

Sr. No.

Police Station

Detention Order No.

Under Section

MIDC Waluj

No.2004/MPDA/DET-02/CB-17, Office of the Commissioner of Police,
Aurangabad Dt. 03/06/2004

Detained for one year u/s. 3(1) of MPDA Act, 1981

(5) In the grounds of detention the particulars of C.R. No. 53/16, C.R. No. 131/18 and 277/18 are given, but the particulars of chapter proceedings are not given. Similarly, the particulars, the reasons for making the externment order in the year 2001 and also the detention order in the year 2004, are not mentioned. In the grounds, there is the mention of confidential enquiry conducted by police inspector of M.I.D.C. Waluj Police Station. It is mentioned that three persons had come forward to disclose about the activities of the petitioner, subject to condition that their identity is not disclosed. These three persons have given account of three separate incidents which had taken place about two months prior to the date of detention order and they have made allegations that they were robbed of cash amount of Rs.350/-, Rs.600/- and Rs.700/- in the night time when they are passing by public road. Their statements show that they knew the petitioner and they have contended that they knew that he is Gunda by nature and so, they did not dare to give reports in respect of those incidents to police. In all 56 documents with list were supplied to the petitioner along with the grounds of detention and these documents contain the record like statements of these three persons, copies of aforesaid three F.I.Rs., copy of externment order and copy of detention order. As per the directions given by this Court a file which was prepared by the detaining authority is produced before this Court.

(6) The file produced by the respondents shows that by report dated 8.9.2018 Police Inspector of M.I.D.C. Waluj Police Station proposed to Police Commissioner, Aurangabad to issue order of detention against the petitioner. In this proposal, the aforesaid circumstances were mentioned. This proposal was processed by the Assistant Commissioner, then Deputy Commissioner. The verification of the statements of aforesaid three persons (A, B, C) was done by the Deputy Commissioner of Police on 18.9.2018 and on the same day as per the record, he recommended for making order of preventive detention. His report shows that on the same day, he had visited the various places mentioned by these three persons to ascertain as to whether the allegations were true. In the file, on first few pages, there are noting of the officers like Assistant Commissioner and Deputy Commissioner, but those noting do not bear the dates under their signatures.

(7) In the noting present in the file, there is written order of learned Commissioner of Police dated 15.10.2018. In the order, he has mentioned that the activities of the petitioner are dangerous and they are prejudicial to the maintenance of public order.

(8) The aforesaid file shows that the petitioner was found in M.I.D.C. Waluj area at 15.30 hours on 15.10.2018 itself and so, first he was served with order of detention and grounds of detention and then he was taken in custody for his detention. The file shows that on 16.10.2018 proposal was sent by the Commissioner, detaining authority to the State Government for approval of the detention order dated 15.10.2018. The file shows that on 17.10.2018 the State Government gave approval. The noting dated 22.10.2018 and further noting show that approval order was served on petitioner in jail on 23.10.2018. The noting shows that on 25.10.2018 it was informed to the petitioner that the matter was kept before the Advisory Board for hearing on 1.11.2018 at 14.00 hours.

(9) The file contains statement of petitioner dated 15.10.2018 recorded after actual detention. The petitioner had requested to supply the grounds of detention and accompanying documents in Marathi language. There is list of 56 documents bearing signatures of accused in token of having received such documents on 16.10.2018.

(10) There is copy of order dated 17.10.2018 of the State Government signed by Section Officer, Home Department showing that order dated 15.10.2018 made by Commissioner, Aurangabad was approved by the State Government. Copy of this order was served as per the record, on petitioner. There is certificate prepared by Superintendent of Central Jail that it was explained to the petitioner that the detention order made by the Commissioner was approved by the Government. The certificate contains one more thing that it was informed to the petitioner that his right to make representation to police had come to an end as the approval was given to the order of Commissioner by the Government on 17.10.2018. In the record, there is communication of the State Government showing that such right of the petitioner was 'terminated'.

(11) There is copy of communication of Secretary of Advisory Board dated 17.10.2018 showing that the Desk Officer of the Home Department had referred the matter to Advisory Board. There is copy of report dated 1.11.2018 of Advisory Board. The file in respect of report of Advisory Board was produced for perusal of this Court and it contains the report in two parts viz. Part I and II. Part I is mentioned as Confidential Report and in part II, there is opinion of the Advisory Board. There is copy of communication of Secretary of Advisory Board dated 22.10.2018 showing that it was informed to the petitioner that it was open to him to make representation to Chairman of Advisory Board under the Act.

(12) The Advisory Board gave opinion that there was sufficient cause for preventive detention of the present petitioner and it was given on 2.11.2018. Copy of order dated 3.11.2018 of the State Government signed by Section Officer of the Home Department runs as under :-

"ORDER

Home Department (Special)

Second Floor, Main Building,
Mantralaya, Mumbai-32.

Dated : 03rd November, 2018

No. MPDA-1018/CR.216/Spl-3B:- Whereas, the Commissioner of Police, Aurangabad City in exercise of the powers conferred by 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 'said Act'), issued an order on 15th October, 2018 directing that Shri. Balu Waman Patole, r/o. Wadgaon Kolhati, Tq. Dist. Aurangabad, be detained under the said Act;

And whereas, the Advisory Board appointed under the said Act, has opined that there is sufficient cause for detention of the said detenu;

And whereas, the Government of Maharashtra after considering the opinion/report of the Advisory Board, has decided that it is necessary to confirm the detention of the said detenu;

Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 12 of the said Act, the Government of Maharashtra hereby confirms the detention order issued by the Commissioner of Police, Aurangabad City and directs that the detention of the said detenu Shri. Balu Waman Patole, be continued for a period of one year from the date of detention.

By order and in the name of Governor of Maharashtra.

Sd/-

Section Officer to the Government of Maharashtra,
Home Department (Special)"

(13) Before appreciating the rival contentions and the record and before considering the provisions of the Act, it is necessary to consider Articles 21 and 22 of the Constitution of India as both the power to make such law and the conditions or restrictions in respect of such laws are mentioned in these articles. Article 21 of Constitution of India is as under :-

"21. Protection of life and personal liberty.- No person shall be deprived of his life or personal liberty except according to procedure established by law."

In Article 21 itself, there is mention that a person cannot be deprived of his personal liberty unless procedure established by law is followed. Article 22 of the Constitution of India is as under :-

"22. Protection against arrest and detention in certain cases. - (1) No person who is arrested shall be detained in custody without being informed, as soon as

may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of magistrate.

(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention;

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(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.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

(14) If Articles 21 and 22 are read together, it can be said that Article 22 is supplementary provision for Article 21 and Article 22 shows that preventive law shall not contravene the conditions implied by Article 22. Article 22 (4) shows that ordinarily, the period of the detention can be of three months and within that period, the opinion of the Board must be obtained by the Government. Thus, if the Government wants to keep a person in detention for the period of more than three months, it is incumbent on the Government to obtain the opinion of Advisory Board. Thus Article 22 shows the maximum period for which a person can be detained and it also shows the necessity of laying down of the procedure by the Advisory Board for enquiry. As per Article 22, by legislation in this regard, the period can be less than three months.

(15) In Articles 21 and 22, there is mention of basic procedure which needs to be followed for restricting the rights shown in Article 21. As the restriction on fundamental right which is possible is subject to the conditions laid down in the Article, it needs to be ascertained as to what kind of procedure needs to be laid down and then how it should be followed by the Executive. Article 14, 19 and 21 are not mutually exclusive and they jointly aim at reasonableness and fairness. Article 14 runs as under :-

"14. Equality before law. - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Though it is true that the term 'equal protection' used in Article 14 means the right to equal treatment in similar circumstances, this Article comprehends non arbitrariness and compliance of minimum requirement like rules of natural justice even in civil matters. So, the executive action should not have the smell of irrationality. Arbitrariness is contrary to the rule of law, equality, fair play and justice. Action can also be called as arbitrary if it is not based on sound reasons. So, even in case of preventive detention, the executive action should be reasonable. Reasonableness and fairness can be judged on factual matrix of each case. Restrictions on fundamental right can be for interest of public at large and so, the preventive detention law must be used for society and not in private disputes. That reasonableness should be there in executive action.

(16) In section 3 (2) of the Act, there is mention that after considering the circumstances prevailing or likely to prevail in any area with relation to the matter like present one are required to be considered by the State Government for delegating the powers to the officers like Police Commissioner and District Magistrate. Similarly, the prevailing circumstances of that area may be affecting human conduct including the conduct of a person like petitioner. These circumstances influence the executive action also and so, the Court cannot remain oblivious of such circumstances. Unless these circumstances are kept in mind, it will not be possible for the Court to ascertain as to whether the action

was reasonable, rational that is, it was not arbitrary. Though it is true that executive is expected to act fairly and Court needs to go with the presumption that executive has acted fairly, the Court cannot ignore the probability of exercise of influence by the persons in power or the persons who can influence the executive due to set up of the society.

(17) The cases of present nature are very serious as they affect fundamental rights guaranteed by the Constitution and so, the Court needs to ascertain as to whether the executive decision is in accordance with the object behind the legislation. If the decision is taken without considering the object behind the legislation and without considering the relevant material facts, it can be called as arbitrary decision which violates Article 14 of Constitution of India. In Article 19 of Constitution of India the term 'public order' is used. But, the restrictions mentioned in Article 19 can be 'in the interest of public order'. In Article 22, there is no mention of such condition and Article 22 has used only the term 'preventive detention'. The classes of cases need to be ascertained by the legislature for using this power. It can be said that preventive detention imposes more restrictions than the restrictions mentioned in Article 19 of Constitution of India and so, more precaution is required to be taken in case of preventive detention than the precaution which is required to be taken as per Article 19 of Constitution of India. It can be said that like Article 14 of Constitution of India, Article 19 of Constitution of India has also connection with Articles 21 and 22 of Constitution of India and the law developed on Article 19 of Constitution of India on interpretation, meaning of public order etc. and also reasonableness can be used for matters involving preventive detention.

(18) If Articles 14, 19, 21 and 22 are considered together, some minimum safeguards can be culled out for the present purpose.

(i) Preventive detention cannot be ordered by the Executive without the authority of law and law should be in accordance with the provisions of Article 22 of Constitution of India.

(ii) Preventive detention cannot be ordered unless it is in conformity with the procedure laid down by the law providing for preventive detention.

(iii) For long preventive detention, it is obligatory to have Advisory Board which can give opinion on the confirmation of detention.

(iv) The procedure laid down by such law must be followed by sponsoring authority, Advisory Board, detaining authority and also the Government.

(v) The person who is detained has right to get information as to the grounds of his detention unless it is provided in law itself that such information cannot be disclosed in public interest (as per Articles 22 (6) of Constitution of India).

(vi) Irrespective of the period of detention, the detenu has right to make representation to protest against the order of preventive detention made against him and immediately after his arrest and detention, it needs to be informed to

him as per Article 22(5) that he has right of making such representation. Such representation is against the detention order and so, it is incumbent on the detaining authority to comply this provision.

(vii) Entire relevant material, either supporting preventive detention or favouring the person against whom order of detention is made must be placed by sponsoring authority before detaining authority and such material needs to be made available to Advisory Board and also to the State Government.

(viii) The safeguards given by Constitution need to be read in to the provisions of law even if they are not there and if there is non compliance of those safeguards, the order cannot sustain in law. Thus, even if relevant provision or law is not declared ultra-virus, the executive action can be set aside by the Court by exercising power given under Article 226 of Constitution of India when the action is not in accordance with Article 22 of Constitution of India.

(19) It is up to the State to take decision about the nature of activity which needs to be prevented by using the power to make law of preventive detention. Such law needs to be in accordance with the aforesaid provisions of Constitution of India and in that law, there can be more safeguards.

(20) The object of the Act is as under :-

"An Act to provide for preventive detention of Slumlords, Bootleggers, Drugs-offenders, Dangerous persons Video Pirates, Sand Smugglers and persons engaged in Black-marketing of Essential Commodities for preventing their dangerous activities prejudicial to the maintenance of public order

WHEREAS public order was adversely affected every now and then by the dangerous activities of certain person, who are known as Slumlords, Bootleggers and Drug-offenders;

AND WHEREAS, both Houses of the State Legislature were not in session;

AND WHEREAS, having regard to the resources and influence of the persons by whom, the large scale on which, and the manner in which, the dangerous activities were being clandestinely organised and carried on in violation of law by them, as Slumlords, Bootleggers or Drug-offenders in the State of Maharashtra, and particularly in its urban areas, the Governor of Maharashtra was satisfied that circumstances existed which rendered it necessary for him to take immediate action to have a special law in this State to provide for preventive detention of these three classes of persons and for matters connected therewith and, therefore, promulgated the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug-offenders Ordinance, 1981 (Mah. Ord. III of 1981), on the 11th June 1981;"

Thus, only inference from object of the Act is that the 'activity' must be affecting public order, public at large.

(21) Section 3 of the Act shows the power which the State Government can

exercise for preventive detention and it runs as under :-

"3. Power to make orders detaining certain persons. (1) The State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, it is necessary so to do, make an order directing that such person be detained.

(2) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may be order in writing, direct, that during such period as may be specified in the order such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (1), exercise the powers conferred by the said sub-section:

Provided that the period specified in the order made by the State Government under this sub-section shall not, in the first instance, exceed six months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding six months' at any one time.

(3) When any order is made under this Section by an officer mentioned in Sub-section (2), he shall forthwith report the fact to the State Government, together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter, and so such order shall remain in force for more than twelve days after the making thereof, unless, in the meantime, it has been approved by the State Government."

(22) Section 3 of the Act shows that the power of the State Government can be delegated to Commissioner of Police or District Magistrate for taking immediate steps considering the urgency of the situation. The provision provides that after making the order of preventive detention, the detaining authority needs to refer the matter to State Government for approval of the order made by it. The provision shows that the order needs to be approved by the State Government within 12 days from the date of detention. This portion shows that the detaining authority has no power to fix the period of detention and only due to the provision of section 3 (3) of the Act, it can be said that the order can remain in existence for 12 days and if during that period the Government does not approve the order, after that the order shall automatically lapse. In that case, after 12 days, the detenu must be released forthwith.

(23) In the present matter, the petitioner is described as 'dangerous person'. In section 2 (b-1), the definition of 'dangerous person' is given and it runs as under :-

"(b-1) "dangerous person" means a person, who either by himself or as a member or leader of a gang, habitually commits, or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter

XVII of the Indian Penal Code or any of the offences punishable under Chapter V of the Arms Act, 1959 (LIV of 1959);"

(24) In section 3 (1), the term 'acting in any manner prejudicial to the maintenance of public order' is used and this term gives basic condition, requirement for use of power mentioned in section 3 of the Act. The definition of this term is given in section 2(a)(i) to (iv) and it runs as under :-

"2. Definitions.- In this Act, unless the context otherwise requires.-

(a) "acting in any manner prejudicial to the maintenance of public order" means-

(i) in the case of a slumlord, when he is engaged, or is making preparations of engaging, in any of his activities as a slumlord, which affect adversely, or are likely to affect adversely, the maintenance of public order;

(ii) in the case of a bootlegger, when he is engaged, or is making preparations for engaging, in any of his activities as a bootlegger, which affect adversely, or are likely to affect adversely, the maintenance of public order;

(iii) in the case of a drug-offender, when he is engaged, or is making preparations for engaging, in any of his activities as a drug- offender, which affect adversely, or are likely to affect adversely, the maintenance of public order;

(iv) in the case of a dangerous person, when he is engaged, or is making preparation for engaging, in any of his activities as a dangerous person, which affect adversely, or are likely to affect adversely, the maintenance of public order."

Explanation given to sub-section (a) of section 2 is applicable to all the definitions given in this section. The explanation is as under :-

"Explanation.- For the purpose of this clause (a), public order shall be deemed to have been affected adversely, or shall be deemed likely to be affected adversely, inter alia, if any of the activities of any of the persons referred to in this clause directly or indirectly, is causing or 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 widespread danger to life or public health or disturbance in public safety and tranquility or disturbs the day to day life of the community by black-marketing in the essential commodities which is resulting in the artificial scarcity in the supply of such commodities and rises in the prices of essential commodities which ultimately causes inflation or disturbs the life of the community by producing and distributing pirated copies of music or film products thereby resulting in a loss of confidence in administration;"

The aforesaid explanation makes it clear that the activity should be such that it affects (i) general public or (ii) section of general public or (iii) the activity is grave or widesprade, dangerous to life of public health. In section 2 (b-1) the provisions of I.P.C., Chapter XVI, XVII and the provisions of Chapter V of Arms Act are mentioned. But this section needs to be read with the provision of section

2(a) (i) to (iv) and section 3 (1) of the Act and they are subject to the provisions of sections 3 (1), 2(9)(i) to (iv) of the Act.

(25) As already observed, the provisions of the Act need to be in accordance with the provisions of Article 22 (3) to 22 (7) of the Constitution of India and so, the interpretation of the aforesaid provisions must be made by the Court which is in consonance with the object behind the Act and also aforesaid portion of Article 22 of the Constitution of India. Further, the procedure for enforcement needs to be in accordance with Articles 14, 19 and 21 of Constitution of India to the extent already mentioned. If these conditions are satisfied, then the Court needs to see whether the provisions of the Act are strictly followed for ensuring the enforcement of the aforesaid constitutional rights.

(26) The provision of section 8 of the Act shows the rights of the detenu and it runs as under :-

"8. Grounds of order of detention to be disclosed to persons affected by the order .-(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.

(2) Nothing in sub-section (1) shall require the authority to disclose facts which considers to be against the public interest to disclose."

Though in section 8 (2), there is mention about restriction on the right of the detenu to get some information, that provision cannot come in the way of Court to get that information from the detaining authority and also the Government. To get and consider that information is not only the power of the Court, but it is also the duty of the Court to go through that material. It is up to the Court to ascertain as to whether the information falls under section 8 (2) of the Act and also to ascertain as to whether the said material was made available to Advisory Board. Section 8 is only in respect of the right of detenu and it also shows the restriction on his rights. Section 9 of the Act shows that Advisory Board consist of Hon'ble Judges of High Court or the persons who are eligible to be appointed as the Judges of High court and their opinion is binding on the Government when it is to the effect that there is no sufficient cause for order of detention.

(27) Section 10 of the Act runs as under :-

"10. Reference to Advisory Board.- In every case where a detention order has been made under this Act, the State Government shall within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted by it under Section 9 the grounds on which the order has been made and the representation, if any, made by the person effected by the order, and in the case where the order has been made by an officer, also the report by such officer under sub-section (3) of Section 3."

This section shows that if the Government approves the order of detention made by the detaining authority within 12 days then the Government needs to take one more decision. If the Government wants to continue the detention for the period of more than three weeks as mentioned in section 10, it must refer the matter to Advisory Board within three weeks from the date of detention. If the matter is not referred to Advisory Board within three weeks, the detention order approved by the Government shall come to an end after expiry of three weeks from the date of detention. This provision shows that if the reference is made to the Advisory Board within three weeks from the date of detention, the further period becomes available to the Government and the detention continues.

(28) The provisions of sections 11 and 12 need to be read together and they are as under :-

"11. Procedure of Advisory Boards.- (1) The Advisory Board shall, after considering the materials placed before it and, after calling for such further information as it may deem necessary from the State Government or from any person called for the purpose through the State Government or from the person concerned, and if, in any particular case, the Advisory Board considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submits its report to the State Government, within seven weeks from the date of detention of the person concerned.

(2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.

(3) When there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(4) The proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

(5) Nothing in this Section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board.

12. Action upon report of Advisory Board.- (1) In any case where the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention of a person, the State Government may confirm the detention order and continue the detention of the person concerned for such period, not exceeding the maximum period prescribed by Section 13, as it thinks fit.

(2) In any case where the Advisory Board has reported that there is, in its opinion, no sufficient cause of the detention of the person concerned, the State Government shall revoke the detention order and cause the person to be released forthwith."

Sections 11 and 12 give procedure to be followed by the Advisory Board. These sections provide as under :-

(i) Advisory Board needs to submit report within 7 weeks from the date of detention to the State Government. Thus, the Advisory Board gets at least four weeks for consideration of the matter in view of the provisions of section 10 and section 11.

(ii) In view of the provision of section 12 (2) of the Act, if the Advisory Board does not send its opinion within seven weeks from the date of detention, the detenu must be released. The provision of Article 22 shows that the Government has the power of detention for three months even without taking the opinion of the Advisory Board, but that period is maximum period given by the Constitution. The Act has reduced that period.

(iii) The part of the report of the Advisory Board which is to be treated as confidential and mentioned in section 11(4) of the Act cannot be made available to the detenu. This provision however cannot be used by the State Government against Court and the said portion of the report must be made available to the Court which is considering the matter like present one. It is also duty of the Court to see that report as the Court is expected to ascertain as to whether the entire relevant material was made available to the Advisory Board etc.

(iv) Before the Advisory Board, entire relevant material which may be against the detenu or which may be in favour of the detenu needs to be produced. In view of the provision of section 12(2) of the Act already quoted which is to the effect that the opinion of the Board that there is no sufficient cause for detention is binding on the Government, entire relevant material needs to be made available to the Advisory Board. For these reasons, the provisions of sections 11 and 12 of the Act need to be read together.

(v) In view of the weight given to the opinion of the Advisory Board in section 12 (2) of the Act and in view of the possibility that some material is suppressed or due to oversight some material is not collected by sponsoring authority and there is possibility of plausible explanation from detenu in respect of the adverse material, the Advisory Board needs to call the detenu before it.

Though the term like 'as it may deem necessary' is used in section 11(1) of the Act showing the procedure and power of the Advisory Board, in view of the weight given to the opinion of the Advisory Board and the involvement of fundamental right of the detenu, the Advisory Board must call the detenu to ascertain as to whether the contention of the sponsoring authority and the State Government is true and correct. The other part of section 11(1) of the Act makes it clear that if Advisory Board considers it essential so to do or if the person concerns desires to be heard then after hearing him, the report is to be submitted by Advisory Board. This part of section 11 also shows the duty of the Advisory Board to consider the matter before it from all possible angles. Thus, the provision apparently shows that Advisory Board does not act as adjudicating

authority, but the provisions speak about the procedure need to be adopted by the Advisory Board and that involves the duties of the Advisory Board.

(vi) The confidential part of report of Advisory Board mentioned in section 11(4) of the Act needs to be seen by the Court, though it cannot be made available to the detenu. Apparently the said part is to be kept confidential as there is a possibility of mention of some material which falls under section 8(2) of the Act. There cannot be any other reason for keeping that part of the report confidential. By perusing this part of the report also, the Court is expected to ascertain as to whether the aforesaid procedure was followed before the Advisory Board, whether entire material was made available to the Advisory Board and whether the opinion was formed by the Advisory Board after application of mind to all the relevant material. As the matter involves taking away the liberty of a citizen, detaining him without trial, no other interpretation of the provisions of sections 11 and 12 is possible.

(vii) The provisions of section 11 and 12 of the Act show that the detenu has no right to appear before the Advisory Board by any legal practitioner. When the Advisory Board gives opportunity to sponsoring authority and also detaining authority to make submissions with regard to the material, the Advisory Board needs to allow the detenu to appear before it by legal practitioner of his choice. When the detenu has not appointed any counsel then in such case, it becomes necessary to see that some counsel is given to the detenu as legal aid.

This is because both sponsoring authority and detaining authority are well versed in the legal aspects of the matter and the detenu as a party in person may not be able to make submissions about his case with the same competency. This becomes more necessary when there is no written representation against the order of detention and when the detenu had not produced the record which in ordinary course could have been produced by him in reply to the allegations made against him.

(viii) The opinion of the Advisory Board that there is no sufficient cause for detention of the person is binding on the State Government in view of the wording of section 12(2) of the Act. However, the opinion that there is sufficient cause for detaining person given by the Advisory Board is not binding on the State Government. Thus, before or after receipt of the opinion of Advisory Board, it is always open to the State Government to revoke the detention order.

This power is also made clear in section 14(1) of the Act and it runs as under :-

"14. Revocation of detention orders. - (1) Without prejudice to the provisions of Section 21 of the Maharashtra General Clauses Act (Act NO.I of 1904), a detention order may, at any time, be revoked or modified by the State Government, notwithstanding that the order has been made by an officer mentioned in sub-section (2) of Section 3.

(2) The revocation or expiry of a detention order shall not bar the making of a

fresh detention order under Section 3 against the same person, in any case, where fresh facts have arisen after the date of revocation or expiry, on which the State Government or an officer, as the case may be, is satisfied that such an order should be made."

(29) The provision of section 8 and the scheme of the Act show that valuable right is given to detenu to make representation against the order of detention. This right comes into existence immediately after taking him in custody for execution of detention order. As per the provision of section 8 of the Act, the grounds of the detention needs to be informed in proper manner with proper record so that the detenu can exercise the right of representation effectively. All the material which was considered by the detaining authority must be sent to the State Government by detaining authority and in turn, this material needs to be made available to Advisory Board by the State Government. To enable the detenu to exercise the right to make representation, the information about the right needs to be properly given. For that, proper legal aid needs to be given to detenu immediately after execution of the detention order if the detenu is not in a position to appoint his own legal practitioner.

(30) Ordinarily, in view of the time limit given in aforesaid provisions of the Act, for submission of the matter for approval to the Government by detaining authority not much scope is left to the detenu to make representation to the detaining authority. In Article 22(5) of the Constitution, it is provided that the representation can be made to the detaining authority immediately after the service of detention order. Under the scheme of the Act, it is the State Government which is required to consider the representation of the detenu. In the case like present one, when there is the approval to the detention order by the State Government within two days of the detention, no scope is left to the detaining authority to consider the representation of the detenu. For this reason, it becomes necessary to detaining authority to see that opportunity to make representation is really afforded as mentioned in the provisions. For that, the help of legal practitioner is must and that cannot be denied to the detenu. As already observed, through legal aid the legal practitioner needs to be given to the detenu to enable him to make the representation.

(31) It is already observed that entire relevant material needs to be considered by the Advisory Board. That includes the representation of the detenu. If there is no copy of such representation forwarded to the Advisory Board by the Government, the Advisory Board is expected to ascertain as to whether there was proper compliance of provision of section 8 of the Act. Though the Advisory Board is not adjudicating authority, in view of the nature of duty which it is performing, it is necessary for the Advisory Board to ascertain that there was proper compliance of provision of section 8 of the Act. In view of the powers and also the duties of the Advisory Board already mentioned and given in section 11 and 12 of the Act, the Advisory Board can consider the say, representation first time produced before it by or for the detenu. However, on the basis of such

representation given directly to Advisory Board inference is not possible that from the detaining authority, there was proper compliance of provision of section 8 of the Act.

(32) The provision of section 8 of the Act shows that it is the duty of detaining authority to afford the opportunity (underline added) to the detenu to make representation to the State Government against the order. In section 8 of the Act, there is mention that representation needs to be made to the State Government, but in view of Article 22(5), the detaining authority can also consider the representation, if any, made before the approval to the detention order is given by the State Government. In view of the provision of section 8 of the Act, it becomes the duty of the State Government to verify that detaining authority had performed its duty to inform to detenu about his right to make representation was properly performed. As the State Government is expected to approve the order of detention and confirm the order of detention, it is necessary for the State Government to ascertain that there was proper compliance of provision of section 8 of the Act. The State Government needs to verify about the compliance at initial stage when it gives approval to the detention order and at later stage, when the State Government issues order of confirmation of detention and when it fixes the period of detention. There is no time limit given for making of representation by the detenu and so, if it is received before making the order of approval or order of confirmation, at both the stages, the representation needs to be considered by the State Government. In the order of approval and also confirmation, there needs to be mention about the representation, if any, made by the detenu and if it is not there, there needs to be mention about the proper compliance of the provision of section 8 of the Act. In every matter like present one, it is the duty of the Court to ascertain, whether the opportunity mentioned in section 8 was really afforded to the detenu or whether the detenu was directly or indirectly prevented from making such representation. If there are circumstances showing that the detenu was misled, he was not afforded opportunity to make representation, only on that ground also the Court can set aside the order of detention.

(33) The provisions of sections 3 and 13 of the Act read together show that the maximum period for which a person can be detained under section 13 is 12 months. The period of 12 months cannot be used in one order of confirmation of detention as in section 3 of the Act, it is provided that the period should not exceed six months at any one time. This provision is also not a mere formality. The State Government has the power to revoke the detention order and so, atleast after the period of six months, the State Government is expected to reconsider the matter and take decision as to whether the detention for further period is necessary. As the detention order has base of the requirement of particular locality in view of the circumstances prevailing in that area, there cannot be one order of detention for 12 months. If the order of detention is not in accordance with these provisions and the order is for the period exceeding six months at the time, inference is possible that there was either non application of

mind or there are malafides.

(34) The record of present matter shows that there was no representation of the petitioner before the State Government and the Advisory Board. In the grounds of detention dated 15.10.2018, there is mention in para Nos. 14, 15 and 17 about the information given to petitioner about his right to make representation. In para 14, it is mentioned that he may make representation to the detaining authority, the Commissioner. In para 15, there is mention that he may make representation to the State Government. In para 17, there is mention that he may make representation to Advisory Board. In communication dated 22.10.2018 made by the Secretary of the Advisory Board, there is mention that the petitioner can make representation to the Chairman of Advisory Board. In the communication in English language dated 17.10.2018 made by the State Government which was sent along with the order of approval of detention order, it was specifically mentioned that the right of detenu which was mentioned in para 14 of the grounds of detention was terminated. In Marathi version of this communication, no specific para of the grounds of detention was referred and it was only mentioned that the right to make representation to Police Commissioner Aurangabad had come to an end. The final order of the State Government dated 3.11.2018 shows that it was passed only on the basis of opinion of Advisory Board. That opinion was mentioned as reason for confirmation of detention and also for fixing the period of detention as one year. As there is no record of affording opportunity to make representation in real sense and as it was communicated that right to make representation may be to the Police Commissioner had come to an end and as the petitioner could not make representation, this Court holds that the opportunity to make representation as mentioned in section 8 of the Act was not really afforded to the petitioner. So, on this ground, the order is liable to be set aside. As already observed, due to circumstance that in one order, the detention period was fixed of one year, the order cannot sustain in law.

(35) To ascertain whether the petitioner can be branded as 'dangerous person' for the purpose of the Act and to ascertain as to whether his activity was prejudicial to the maintenance of the public order, this Court has gone through the record which was considered by the detaining authority. There is no specific mention about the particulars of the record in the report of Advisory board and in the order of confirmation passed by the State Government.

(36) The last incident which had taken place before the order of detention was registered as C.R. No. 277/2018 in the same police station on the basis of F.I.R. dated 27.7.2018. This report was given against the petitioner, his two brothers and father of the petitioner by one Smt. Ushabai, Sarpanch of village Wadgaon. The report was given in respect of the incident dated 11.7.2018. The incident had taken place in the office of Village Panchayat. The wife of Ram, brother of petitioner was Upsarpanch of village Wadgaon and on 11.7.2018 monthly meeting of Village Panchayat was called. Smt. Ushabai and Ram were present in

Village Panchayat Office along with some other persons. Ushabai wanted to see that the meeting was adjourned or postponed as she was thinking that Gram Vikas Adhikari was new for such meeting. Allegations were made by Ushabai that Ram, not the petitioner was insisting for holding the meeting on 11.7.2018 itself. Due to this, quarrel took place in the office of Village Panchayat. In the F.I.R. Smt. Ushabai made allegations that during incident petitioner came there and then the petitioner and his brother fetched a knife from the scooter. However, there was no allegation that knife was used for assault by anybody in the incident. Allegation of beating with fist blows and kicks were made. Allegations were made against Ram, not against the present petitioner that Ram had snatched and taken away gold chain of husband of Ushabai. Allegations were made against the other brother of petitioner that he had taken away cash of Rs.10,000/-from a person of the side of Ushabai. Due to the nature of these allegations, the crime came to be registered for offences punishable under sections 392, 323 and 34 etc. of I.P.C.

(37) The record available in the file produced by the respondents show that the learned Additional Sessions Judge, Aurangabad granted ad-interim anticipatory bail in Application No. 1270/2018 on 13.8.2018 in favour of present petitioner and other accused. No record is produced to show that the application came to be rejected subsequently. Considering the date of proposal made by Police Inspector of the police station viz. 8.9.2018, it can be said that only after granting of relief in favour of the petitioner by the Court, the Investigating Officer started collecting the material against the petitioner.

(38) The petitioner belongs to Mahar caste, scheduled caste. On 12.7.2018 itself Ram, brother of petitioner had given complaint in respect of the incident dated 11.7.2018 to police and he had made allegations that offences punishable under the provisions of I.P.C. and provisions of Scheduled Castes and Scheduled Tribe (Prevention of Atrocities) Act were committed against him. In F.I.R., he had not contended that the applicant was present in the office of Village Panchayat at the time of incident. On the basis of this complaint given on 12.7.2018 no crime was registered, but the crime was registered at C.R. No. 276/2018 on 26.7.2018 for offence punishable under section 3 (1)(x) of Scheduled Castes and Scheduled Tribe (Prevention of Atrocities) Act and section 323 r/w. 149 of I.P.C. Thus, the crime was registered against the persons of the side of Ushabai on 26.7.2018 and then she gave report on 27.7.2018 against Ram and the present petitioner. This record is sufficient to infer that there was political rivalry between two groups and the two complaint were given out of such political rivalry. On the basis of this record, the detaining authority could not have formed opinion that the activity of the petitioner was covered under section 3 of the Act. The detaining authority ought to have considered not only the political rivalry, but also the circumstance that the petitioner and the persons of his side belong to scheduled caste when other side which was in power belongs to Maratha community. Considering the set up in the society, this circumstance was relevant, but that circumstance was also not considered by the detaining authority.

(39) A copy of F.I.R. of C.R. No. 131/2018 is on record and it shows that the first informant of this crime is also resident of village Wadgaon. The first informant Ravindra had given this report to police on 3.5.2018 in respect of the incident which had allegedly taken place on 3.5.2018. He had reported that petitioner had assaulted him with fist blows and due to that he had lost portion of his front tooth. The reason for the incident was given as the dispute over the play station of Ravindra which was there in his mobile shop. He had contended that without making the payment of the charges, the petitioner was asking the first informant to allow his sons to play in play station. As one tooth was partly broken, the crime was registered under section 325 of I.P.C. Considering the circumstance that the shop is situated in village Wadgaon, there are two political rival groups and there was possibility of involvement due to political rivalry, the detaining authority could not have held that this act of the petitioner was covered by section 3 of the Act. The record shows that the petitioner was arrested on 4.5.2018 in that crime and on the same day, the J.M.F.C. granted bail to him.

(40) The third crime mentioned in the ground of detention is C.R.No. 56/2016 and it was registered for offence punishable under section 307 r/w. 34 of I.P.C. It was registered against the petitioner and his two brothers. The F.I.R. Was given by one Rajesh Sale. Rajesh is brother in law of Smt. Ushabai, Village Sarpanch. He gave report on 31.1.2016 in respect of the incident which had allegedly taken place on the same day in the village. The copy of F.I.R. shows that on that morning due to collecting Murum by the brother of first informant from the site of lake of Wadgaon, the dispute started. Allegations are made that the petitioner and his brother had prevented the brother of first informant from collecting Murum and they had said that they had contract with a company in that regard. Allegations were made that at about 12.45 p.m. the petitioner and his brothers and also one employee of the petitioner intercepted the first informant and his brother in the village and then assault was made on them with weapons like sword and knife. Allegations were made that the petitioner had used knife against the first informant, but the knife had hit right hand of the first informant. As allegations were made of threat of life and two persons had sustained injuries, the crime was registered for offences punishable under section 307 r/w. 34 of I.P.C. The petitioner was arrested on 31.1.2016. He was kept in police custody for six days. The injury certificates in respect of the first informant and other injured are on record. Eknath Salve sustained C.L.W. over left forearm, one incised wound over left ring finger and one C.L.W. over left side of frontal scalp. Rajesh, the first informant sustained one C.L.W. over left palm and one abrasion over right knee. Thus, no injuries which could have been caused by knife were sustained by first informant, Rajesh. Regular bail was granted by the learned Additional Sessions Judge in favour of the applicant and other accused in Application No. 55/2016 on 29.2.2016.

(41) There is the record of chapter proceeding No. 11/2018 which was started on the basis of report given by the same police station for taking bonds under section 110 (e) (g) of Criminal Procedure Code. The report dated 9.7.2018 was

submitted by police for starting chapter proceeding. In the report, there was mention that there were two untoward incidents dated 31.1.2016 and 3.5.2018 involving the petitioner. For these incidents, crimes were already registered as mentioned above. One more incident dated 20.6.2012 was also mentioned. The record of chapter proceedings shows that on 9.7.2018 the petitioner was arrested and produced before the Executive Magistrate. There is record of other chapter proceeding showing that in chapter case No. 12/2016 filed on 8.6.2016 final bond of Rs. 25,000/- was obtained from the petitioner on 11.7.2016. No detail orders which ought to have been made for taking the bond are produced and only one endorsement of such final bond order is appearing on photo copy of chapter proceeding.

(42) Copy of externment order made under Bombay Police Act on 28.8.2001 is on the record and it shows that the petitioner was kept out of Aurangabad district for the period of six months under this order.

(43) Copy of order of confirmation of detention made by the Government and dated 17.7.2004 is produced. This order also shows that the petitioner was detained for the period of one year on that occasion. Similar ground like the petitioner is dangerous person and his activities are prejudicial to the public order was given in that order. The order shows that two cases filed for offences punishable under sections 436 r/w. 149 of I.P.C. were mentioned and one case punishable under section 122 of Bombay Police Act was mentioned. Other eight cases were non cognizable cases and six chapter cases starting from the year 2000 were mentioned and also the order of externment made in the year 2001 was mentioned for making the order of detention. Apparently, the orders of externment, chapter proceedings and detention were not challenged.

(44) It is true that the aforesaid previous record used in the year 2004 for making similar order is relevant. However, on the basis of that record inference is not possible that when the present order was made, there were circumstances prevailing or likely to prevail as mentioned and there was likelihood of causing prejudice to the public order due to the activities of the petitioner.

(45) The order of the detaining authority does not show that he considered the aforesaid political rivalry. He did not consider the nature of allegations made against the present petitioner in the three crimes registered against the petitioner. He did not consider the circumstance that petitioner belongs to scheduled caste and other side which was in power was belonging to Maratha community.

The possibility that other side wanted to suppress the opposition in politics ought to have been considered. Even after careful perusal of the record, which was made available to detaining authority, the detaining authority could have asked to produce the other relevant material which was in favour of the petitioner. That did not happen when the order of detention was made by the detaining authority. That did not happen when the matter was considered by Advisory Board. The

State Government did not mention any material whatsoever for making order of confirmation. These circumstances are sufficient to infer that there was non application of mind by detaining authority and also by the State Government. Even malafides can be inferred from these circumstances. At no stretch of imagination, it could have been inferred that the activity of petitioner was prejudicial to the maintenance of public order.

(46) The learned counsel for petitioner placed reliance on following cases :-

- (i) AIR 1993 SC 396 [Lalan Prasad Chunilal Yadav Vs. S. Ramamurthi and Ors.],
- (ii) AIR 1994 SC 656 [Pradeep Nilkanth Paturkar Vs. S. Ramamurthi and Ors.],
- (iii) 2018 ALL MR (Cri) 3543 [Rashid Shaukat Husain Sayyed @ Jagga Vs. State of Maharashtra and Ors.],
- (iv) 2018 ALL MR (Cri) 2004 [Suryakant @ Mukesh Laxman Dhotre Vs. Commissioner of Police, Solapur and Ors.],
- (v) 2017 ALL MR (Cri) 4791 [Rajkumar @ Anda Jaglal Jaiswal Vs. State of Maharashtra and Ors.],
- (vi) 2018 ALL MR (Cri) 724 [Nagesh Laxman Takmoge Vs. Commissioner of Police, Solapur and Ors.],
- (vii) 2016 ALL MR (Cri) 2234 [Rohidas @ Pintya Laxman Gupte Vs. Commissioner of Police and Ors.],
- (viii) 1998 Bom.C.R. (Cri) 233 [Smt. Nilofar Altaf Masalewala Vs. The State of Maharashtra and Ors.],
- (ix) Judgment of this Court delivered at Nagpur Bench in Criminal Writ Petition No. 768/2015 decided on 1.2.2016 [Sanjay s/o. Ramlal Shahu Vs. State of Maharashtra and Anr.].

In the first case of Lalan Prasad cited supra, the Apex Court has laid down that the activities must be patently prejudicial to the maintenance of public order. It is made clear by the Apex Court that if the activity was in respect of law and order, the detention order cannot be issued and the detention order can be quashed. Consideration of provisions of the present Act was involved and at para 5, relevant facts were mentioned and they are as under :-

"5. Now the question arises whether these prejudicial acts are of such a quality that it may be termed as disturbing "public order"? Are these of such intensity, magnitude and spread that they rise from the level of prejudicial to "law and order" to become prejudicial to "public order"? And parallelly which ratio of the two aforesaid cases would govern the fate of this case? It is obvious that the two cases under the Bombay Prohibition Act, 1949 registered against the appellant could legitimately provide the subjective satisfaction to the detaining authority that the appellant is a "bootlegger" but the instances aforementioned, spread over a time, in which the appellant is attributed to have threatened individuals by

speaking words or giving them fists and kicks blows could in no event be summed up as activities prejudicial to maintenance of "public order". Rather these are activities patently prejudicial to maintenance of "law and order". The power to make orders of detention stem from the satisfaction of the detaining authority with respect to any person with a view to preventing him from acting in any manner prejudicial to the maintenance of "public order" and not prejudicial to the maintenance of "law and order". Logically the case of the appellant deserves to follow the course as treaded by this Court in Omparkash's case (AIR 1990 SC 496) (supra). And on that premises the order detaining the appellant need be and is hereby quashed."

In other case of Pradeep Nilkanth Paturkar cited supra, the provisions of the present Act were considered and facts were somewhat similar. Relevant para is para No. 13, which is as under :-

"13. Considering 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."

In some of the cases cited by the learned counsel for petitioner, 'delay' in passing order in relation to the past incidents was considered and it was held that there was no necessity as such to issue such serious order in view of the delay caused in passing the orders. The facts of the present matter are already quoted and they also show that only after making of the orders like bail and anticipatory bail in favour of the present petitioner, some steps were taken by Police Inspector to collect the material and there was no urgency or need as such to take such ultimate step against the petitioner.

(47) The learned APP placed reliance on following cases :-

(i) 1951 ALL MR ONLINE 11 (SC) [The State of Bombay Vs. Atma Ram Shridhar Vaidya],

(ii) 1982 (2) BOM.C.R. (S.C.) 218 [Hemlata Kantilal Shah (Smt.) Vs. State of Maharashtra and Anr.],

(iii) 2006 (1) BOM.C.R. (CRI) 88 [Magar s/o. Pansingh Pimple Vs. State of Maharashtra and Ors.],

(iv) 2004(2) BOM.C.R. (CRI) (S.C.) 180 [State of Maharashtra and Ors. Vs. Ramchandra Rammilan Mishra @ Pandey],

(v) 2018 ALL MR (Cri) 608 [Manoj @ Sonya s/o. Ramdas Ghule Vs. The Commissioner of Police, Pune & Ors.],

(vi) 2001 ALL M.R. (Cri) 1819 [Subhangi Tukaram Sawant & Anr. Vs. R.H. Mendonca, Commissioner of Police & Ors.],

(vii) AIR 1982 (SC) 1143 [Ashok Kumar Vs. Delhi Administration].

In the case of *The State of Bombay Vs. Atma Ram Shridhar Vaidya* cited supra, it is laid down by the Apex Court that the object of preventive detention is to prevent the detenu, a person from achieving certain ends. It is laid down that there is no need of proof of conviction suffered by such person in the past. Provisions of different Acts were involved. There cannot be dispute over the propositions made. In the case of *Hemlata Kantilal Shah (Smt.) Vs. State of Maharashtra and Anr.*, cited supra the Apex Court has laid down that in such cases antecedents, history of the person concern need to be properly taken into account for making detention order. In this case, it is laid down that if the delay is caused in making detention order and proper explanation is offered, that explanation can be accepted. This case was also for action taken under different Acts, but there cannot be dispute over the proposition made in this case. In the case of *Magar s/o. Pansingh Pimple Vs. State of Maharashtra and Ors.* cited supra, facts were different. The case was involving present Act, but the point involved was different.

(48) In the case of *State of Maharashtra and Ors. Vs. Ramchandra Rammilan Mishra @ Pandey* cited supra, the present Act was involved. Specific point like right of detenu to call witness before the Advisory Body was involved. There was consideration of principles of natural justice. The Apex Court held that it is not binding on the Advisory Board to call witnesses named by the detenu and it is up to the detenu to keep the witnesses present. There cannot be dispute over this proposition.

(49) In the case of *Manoj @ Sonya s/o. Ramdas Ghule Vs. The Commissioner of Police, Pune & Ors.* cited supra the present Act was involved, but the points raised were different. In the case of *Subhangi Tukaram Sawant & Anr. Vs. R.H. Mendonca, Commissioner of Police & Ors.* cited supra the provisions of present Act were involved. Meaning of dangerous person is given. In this case also, it was held that number of conviction is not necessary for proof that the person is habitual offender for the present Act. There cannot be dispute over the proposition as the circumstances which are required to be established are already quoted by giving the definitions and the relevant portion of section 3 of the Act.

(50) In the case of *Ashok Kumar Vs. Delhi Administration* cited supra provision of different Act was involved. In this case, the difference between 'public order' and 'law and order' is discussed. The facts show that detenu had taken life of crime and had become notorious character. Thus, the facts were different and the points involved in the present matter are different.

(51) The learned APP submitted that action of the executive involves discretion and subjective satisfaction of the detaining authority. He submitted that the

material and the information may afford the basis for taking action and the material may be sufficient to create strong suspicion or reasonable probability, though it may not satisfy the test of legal proof and in such cases, the Court is not expected to interfere in the order of detaining authority and the Government. On the other hand, the learned counsel for petitioner submitted that individual liberty is involved in the present matter and it was necessary to show that there was likelihood or probability of violation of specified laws. He submitted that for matters like present one every infraction of law would not justify preventive detention. He submitted that surrounding circumstances ought to have been considered by the detaining authority and the detaining authority ought to have formed opinion that the detention does not become instrument of operation.

(52) This Court has already observed that it was the duty of the sponsoring authority to collect all the relevant material and place all the material before the detaining authority and also the Government and Advisory Board. As the sponsoring authority failed in that duty, there was no question of subjective satisfaction of the authority and due to that subjective satisfaction is vitiated. The material discussed above would have definitely influenced the mind of detaining authority, one way or other. Further, this Court has also come to the conclusion that the procedure given in Article 22 of the Constitution of India and also in the Act was not followed in letter and spirit and due to that the petitioner was not able to enforce his valuable constitutional right mentioned by this Court. For that reason also, the order of detention needs to be set aside. This Court has also observed that the preventive detention order has no connection with public order and the things are far stretched in the present matter.

(53) In the case reported as AIR 1966 SC 740 [Ram Manohar Lohiya Vs. The State of Bihar], the Apex Court has laid down that the concept of 'public order' must be distinguished from the concept of 'law and order' and concept of 'security of State'. The Apex Court has observed that these three concepts refer to three concentric circles. Law and order represents largest circle, within which is the next representing public order and the smallest circle represents security of State. Thus, the Apex Court has observed that the activity which affects the law and order may not necessarily affect the public order and the activity which may be prejudicial to public order may not necessarily affect security of the State. Similarly the activity which affects the security of others may not constitute a breach of public order. These observations need to be used in the present matter for taking decision on the merits of the matter. In the result, following order.

O R D E R

(I) The petition is allowed.

(II) The order of detention made by the detaining authority, order of the approval made by the State Government and the order of confirmation of the detention order which is under challenge are hereby quashed and set aside.

(III) The petitioner is to be set at liberty forthwith.

(IV) A copy of this decision to be sent to each District Legal Services Authority and also to the High Court Legal Services Authority at places like Aurangabad, Mumbai, Nagpur and Goa for providing legal aid in cases of preventive detention.

(V) A copy of this decision to be sent to Home Department for circulation, sending to detaining authority. After executing detention order a copy of detention order and grounds of arrest need to be supplied by detaining authority to District Legal Services Authority of that district within 48 hours of the detention.

(VI) District Legal Services Authority to give legal aid to detenu on the day when the copy of detaining authority is received. A copy of this decision to be supplied to the counsel appointed through legal aid.

(VII) Rule is made absolute in those terms.

After pronouncement of the decision, the learned APP surprisingly requested for granting stay to the present decision. In view of the provision of Article 22 of Constitution of India and the provisions of the Act, when this Court comes to the conclusion that the detention of the petitioner cannot sustain in law, no such relief can be granted. The request is refused.