
(2011) 08 BOM CK 0087

In the Bombay High Court

Case No : Criminal Writ Petition No. 338 of 2011

Dinesh Tiwari

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 29-08-2011

Acts Referred:

Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980 — Section 3, 3(1)(2), 3(2)

Citation : (2012) BomCR(Cri) 188 : (2012) CriLJ 1369

Hon'ble Judges : A.R. Joshi, J; A.H. Joshi, J

Bench : Division Bench

Advocate : A.S. Bayas, for the Appellant; V.D. Godbharale, Assistant Public Prosecutor for State, for the Respondent

Judgement

A.H. Joshi, J.—Rule, Rule made returnable forthwith.

2. Heard both the sides and perused the record.

3. This writ petition, filed by the detenu, challenges the order dated 5th April, 2011 passed by the District Magistrate/Collector, Jalgaon, exercising powers u/s 3(1)(2) of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (hereinafter to be referred to as the said Act.)

4. Factual background of the Petitioner and contentions raised by the Petitioner are summarized as follows, (

a) In 1999, the Petitioner was holding a licence of wholesale distributorship for sale of kerosene. He continued to hold the licence up to 2003/2004.

(b) He withdrew from the business of selling of kerosene owing to change in the policy of distributing kerosene through public distribution system (PDS) which is known as "blue kerosene" by the State Government.

(c) He has thereafter started business of sweet mart.

(d) He claims to be a lawabiding and lawloving citizen. His wife is working as a teacher and has two children.

(e) False cases were filed against him under the provisions of Essential Commodities Act during the period 2002 and 2008 and he, in No. way, is concerned with the black marketing or illegal trading of kerosene.

(f) Due to animus, enmity and political motivation, the Sub Inspector - Pratipsingh Kalusingh Patil, and Collector, Jalgaon, are revengefully acting against him and its product, the order of detention has been passed against the Petitioner.

5. Furtherance to the order of preventive detention, he has been detained in the Central Prison at Nasik.

6. This petition is filed after service of order of detention.

7. The petition is taken up for final disposal after receiving reply and calling of Record.

8. The Petitioner has raised the grounds of challenge in paragraph 16 of the petition, which are summarized as follows,-

(1) The impugned order, passed by District Collector is u/s 3(2) of the said Act, and is passed without considering the material, which was available before him.

(2) The Collector has not considered the fact that the requirement of Section 3 of the said Act is that the person should have been engaged in the business of black marketing with intent to disturb the public distribution system for supply of Essential Commodities.

(3) The Respondent Nos. 1 and 2, while passing the impugned order, have not followed the mandate of Section 3 of the Act, which contemplates that the person should have been found in possession of such Essential Commodities, which are illegally and unauthorizedly being used with intention to disturb the public distribution system; and in the present case, No. such attempt is made or like facts are alleged against the Petitioner.

(4) The Respondent Nos. 1 and 2, while passing the impugned order, have only considered the fact that the Petitioner was tried in various complaints/crimes registered against him under the Essential Commodities Act in past;

(5) The Respondent No. 2 has failed to consider the fact that the number of cases, which were registered against the Petitioner, are baseless and, therefore, the Petitioner is acquitted by the competent criminal court and, therefore, the order passed by of the Respondent No. 2 deserves to be quashed and set aside.

(6) The Respondent No. 1 and 2, while passing the impugned order, have not given an opportunity of hearing or any show cause notice to the Petitioner for passing the detention order, in view of the judgment of Apex Court in the case of Bannalal Vahilda Chavla Vs. Union of India and Others, .

(7) Without seizing the kerosene, as alleged, from the custody of the Petitioner by the Respondents authorities and, therefore, in absence of this whether the order passed by Respondent Nos. 1 and 2 is sustainable in the eye of law;

(8) The detention of the Petitioner, based on the order of Respondent No. 1 and 2, from the premises of this Hon"ble Court is not justifiable in the peculiar facts of this case;

9. The Petitioner has averred in the petition that he has been intimated by notice dated 7th April, 2011, the reasons for detention. The Petitioner has further averred that the reasons do not incorporate satisfactory grounds of detention.

10. The State has filed the reply. The factual aspects contained in petition are answered, and the grounds raised by the Petitioner in the petition have been replied in paragraph No. 18 of reply.

11. Substance of the reply of the Collector to the grounds raised in the petition is, narrated as below, -

a) The order dated 5.4.2011 is legal and deserves to be confirmed on legal grounds;

(b) It is clear from the documents put up that the Petitioner is consistently involved in back marketing of blue kerosene and creating hurdles in maintenance of supplies of blue kerosene;

(c) Petitioner was involved illegally hoarding and controlling kerosene of "Public Distribution System" and sold the kerosene in black market to the owners/drivers of vehicles.

(d) Petitioner is acting in the manner prejudicial to the maintenance of Public Distribution System and affected day to day life of society;

(e) Petitioner's activities affect the public order, it created hurdle to supply of controlled kerosene to the beneficiaries of Public Distribution system so it is essential to detain him under provisions of said Act and after the satisfaction, the said order is passed.

(f) The say of Petitioner is not true, as clarified above. Petitioner is acquitted only on technical points and this is considered while passing the order;

(g) Principles of natural justice were not required to be followed, yet the representation furnished by Petitioner was considered.

(h) It is not necessary to issue show cause notice before passing and serving a detention order;

(i) Actions taken by Respondent's officers are taken in good faith. They have No. ill will, malice or prejudice against any one, including the Petitioner;

(j) The offences were registered because the Petitioner was found to have been

involved in the offences.

12. The learned Advocate for the Petitioner has placed reliance on following reported judgments of the Apex Court:

- (1) Harilal Bansu Kewat Vs. State of Maharashtra and Another, ;
- (2) Bannalal Vahilda Chavla Vs. Union of India and Others, ;
- (3) The State of Maharashtra v. Bhaurao Panjabrao Gawande - 2008 LawSuit (SC) 183.

13. In order to scrutinize the contentions of the Petitioner and the reply to the petition, we have examined the record and what we find is summarized as under, -

- i) The Petitioner was served with the impugned order dated 5th April, 2011;
- (ii) The Petitioner was arrested and removed to Central Prison, Nashik for detention pursuant to the order dated 5th April, 2011 passed against the Petitioner, thereby directing that he be detained.
- (iii) An intimation of detention was served on family members of the Petitioner, viz. Anup Tiwari.
- (iv) The Petitioner was served with notice dated 7.4.2011, notifying to the Petitioner the reasons of detention.
- (v) The grounds of detention included in the memorandum of grounds dated 7.4.2011 are based on material from which narration of grounds is carved out from paragraphs 9 and 10.

14. It is seen that paragraph 10 of the communication dated 7.4.2011, AnnexureG to the petition, notifies to Petitioner, as follows, -

10. You are also further informed that you shall be heard in person by the Advisory Board in due course if the Board considers it essential to do so or if you so desire. If you desire to be heard in person by the Advisory Board, you may intimate your desire to the Advisory Board or to the Government of Maharashtra through the Superintendent of Jail where you have been detained, so that the Advisory Board may be intimated about it and necessary arrangement may be made to produce you before the Advisory Board on the date fixed by it for the purpose.

15. The record shows that the Petitioner's nephew - Anup Omprakash Tiwari has submitted a representation dated 7.4.2011. It does not disclose as to whether it is submitted in response to the communication dated 7th April, 2011, AnnexureG to the petition. This representation is delivered in the office of Collector on 7.4.2011.

16. The Petitioner's nephew has made a grievance in the representation averring

certain points, which are summarized as follows, (

1) No. serious offence is registered against the detenu - Dinesh Rameshchandra Tiwari;

(2) In the offence, described in the reasons, which are the basis of detention, the detenu has been acquitted and using such facts or cases as basis of detention would amount to contempt of Court;

(3) There are only five offences which are pending, which are of recent origin and have been lodged with malafide;

(4) The order of detention is unjust, illegal and violative of fundamental rights and deserves to be revoked.

(5) The report, which is adverse to the Petitioner and has been used against him, consists of 21 pages supplied to him.

(6) The Petitioner has not submitted any representation to the Government or to the Advisory Board.

(7) The Government, after considering the material and papers, on the basis of which Collector has passed the order, ordered approval to the Collector's order, by order dated 16.4.2011.

(8) The matter, pertaining to preventive action to be taken against the Petitioner, was placed before the Advisory Board constituted by the State and order passed by the Collector's order, approving the detention order passed by the Government dated 16th April, 2011, have been approved by the Advisory Board.

17. In the background of what we have seen from the record, now we deal with the submissions referred to in paragraph No. 8 as hereinafter.

18. AS TO GROUNDS Nos. (1),(4)&(5):

(1) The impugned order, passed by District Collector is u/s 3(2) of the said Act, is passed without considering the material, which was available before him;

(4) The Respondent Nos. 1 and 2, while passing the impugned order, have only considered the fact that the Petitioner was tried in various complaints/crimes registered against him under the Essential Commodities Act in past;

(5) The Respondent No. 2 has failed to consider the fact that the number of cases, which were registered against the Petitioner, are baseless and, therefore, the Petitioner is acquitted by the competent criminal court and, therefore, the order passed by of the Respondent No. 2 deserves to be quashed and set aside.

Perusal of the record disclose that the grounds, which are served on the Petitioner were based on the material on record. The grounds disclose the details of facts, which have led to formulation of the grounds. The grounds raised by the Petitioner that the order is passed "without considering the material available

before him" is in the nature of imputation, without referring to the material, which, to the knowledge of the Petitioner, was available before the Collector, which he had failed to consider. In fact, the imputation is barely an adjective than statements of facts. Moreover, the fact, that there were series of events when the Petitioner had dealt with in hoarding of subsidized kerosene, was duly borne on record. The evidence in the form of documents, found in possession of the Petitioner, which is the record not owned or belonging to him pertaining to allotment, distribution etc. of controlled kerosene, constitute adequate nexus between procurement of the controlled kerosene and its disposal otherwise than prescribed by the public distribution system. We hold that the imputation that the order is passed without the grounds being on record, is more in the nature of fiction than facts.

19) AS TO GROUND Nos. (2)&(3):

(2) The Respondent No. 2 has not considered the fact that the requirement of Section 3 of the said Act is that the person should have been engaged in the business of black marketing with intent to disturb the public distribution system for supply of Essential Commodities.

(3) The Respondent Nos. 1 and 2, while passing the impugned order, have not followed the mandate of Section 3 of the Act, which contemplates that the person should have been found in possession of such Essential Commodities, which are illegally and unauthorizedly being used with intention to disturb the public distribution system; and in the present case, No. such attempt is attributed towards the Petitioner.

The grounds served on the Petitioner had adequately spelt out and described the acts, which had led to passing of the order did adequately constitute acts on the part of the Petitioner, which fulfill the condition precedent that the Petitioner was involved in acting in such manner which was prejudicial to maintenance of supplies of Essential Commodities to the community. Therefore, the essential ingredients as to exercise of powers u/s 3 of the said Act, were duly fulfilled and complied with.

20) AS TO GROUND No. (6):

(6) The Respondent No. 1 and 2, while passing the impugned order, have not given an opportunity of hearing or any show cause notice to the Petitioner for passing the detention order, in view of the judgment of Apex Court in the case of Bannalal Vahilda Chavla Vs. Union of India and Others, .

In so far as the aspect of giving an opportunity to the Petitioner detenu is concerned, probably the Petitioner believes that an opportunity of hearing, as required in common parlance of observation of principles of natural justice is concerned, is required. This ground is based on misconception.

The scheme of preventive detention generally, and in particular under the Prevention of Black marketing and Maintenance of Supplies of Essential

Commodities Act, 1980, is such, that the preventive detention is capable and is provided, based upon subjective satisfaction and necessity of hearing is dispensed with, by the scheme of Statute. Law authorizes the competent authority to tender, serve grounds of detention upon a detenu consider the objections and confirm the order of detention. Further compliance required under the Statute is by way of approval by the State and thereafter consideration of entire material by the Advisory Board.

All these mandatory requirements are imposed by the Statute in order to facilitate preventive detention, which may be warranted by the facts of the case, and thereby mitigate the hurdles of nonobservance of principles of natural justice by rigorous superintendence, all as a safeguard against arbitrary exercise of power to create a fetter on personal liberty. All this procedure dispenses with the normal duty of observance of principles of natural justice.

The Petitioner's grievance that principles of natural justice are not followed, thus, is wholly misplaced in the background of the Statute, under which, the order of detention is passed.

21. AS TO GROUND No. (7)

(7) Without seizing the kerosene, as alleged, from the custody of the Petitioner by the Respondents authorities and, therefore, in absence of this whether the order passed by Respondent Nos. 1 and 2 is sustainable in the eye of law.

Actually, seizure of kerosene, from custody of the Petitioner, is neither a requirement of the Statute or any law laid down by the higher courts. The ground urged by the Petitioner is thus without any foundation

22) AS TO GROUND No. (8):

(8) The detention of the Petitioner, based on the order of Respondent No. 1 and 2, from the premises of this Hon'ble Court is not justifiable in the peculiar facts of this case.

The detention of the Petitioner being done from the premises of High Court does not vitiate the order of detention. In fact, oral execution of order has facilitated Petitioner's approaching this Court. So long as the Petitioner does not surrender pursuant to the order of detention, he cannot file a petition, challenging the preventive detention. Therefore, the Petitioner cannot have any grievance as regards he is being detained while, as alleged, he was around or in premises of the High Court. Moreover, the Petitioner's contention that he was taken in custody while he was in the premises of the High Court, is neither proved, nor is an admitted position.

23. In so far as reliance of the Petitioner on the judgments is concerned, the judgment of this Court in the case of Harilal Bansu Kewat Vs. State of Maharashtra and Another, , it is judgment of fact inasmuch as the order of detention therein was based on specific commodity, which the Petitioner was able

to show that it did not fall in the category of essential commodity. In the present case, the imputation is about the controlled kerosene, i.e. Blue colour kerosene, meant for public distribution system. The said judgment, therefore, has No. application.

24. In so far as the judgment in the case of State of Maharashtra v. Bhaurao Punjabrao Gawande (cited supra) is concerned, reading of the judgment reveals the following points, -

i) The said case, referred as Bhaurao Gawande's case, arose in a situation, where, barely the detention order was implemented, when the petition was filed. The Hon''ble Supreme Court, therefore, held in paragraph 58 that N.K. Bapna Vs. Union of India (UOI) and Others, carve out an exception and, therefore, until the order is enforced, challenge to order of detention cannot be entertained.

ii) By way of general guidance, the Hon''ble Supreme Court has discussed the law relating to preventive detention and held that, the recourse to be followed, while passing an order of preventive detention, are in the nature of availability of material before the Competent Authority, and its subjective satisfaction as regards the need of preventive detention. The action is preventive in nature and not punitive in character;

iii) The judicial review in relation to the order of preventive detention is restricted to availability of material before the Competent Authority and recording of subjective satisfaction.

The sufficiency of grounds and adequacy is not a matter to be reconsidered in judicial review arising out of the order of preventive detention.

25. Case of Bananlal Chawla arose out of due purchase of white kerosene converted from blue kerosene by a manufacturer as his fuel, by paying price of white kerosene. The imputations did not constitute black marketing. This case does not lend any help to the Petitioner.

26. In the present case, as we find, we are satisfied that there was material available before the State, subjective satisfaction is recorded. To our mind, the material, as was available, is neither irrelevant or extraneous. Sufficiency thereof is not and cannot be matter of judicial review. The satisfaction recorded by the Competent Authority is duly and adequately spelt out.

27. We further find the Petitioner, who had opportunity of defence, has not submitted a representation, either to the State Government or to the Advisory Board. The record shows that the State Government has approved the order of detention and considerations arrived at by Advisory Board.

28. The Petitioner has failed to demonstrate noncompliance of any of the provisions of the Act.

29. In the result, the petition has No. merit and it is liable to be dismissed. Rule discharged.