

(2015) 09 BOM CK 0118

In the Bombay High Court

Case No : Criminal Writ Petition No. 2331 of 2015

Jay

APPELLANT

Vs

The Commissioner of Police Pune and Others

RESPONDENT

Date of Decision : 16-09-2015

Acts Referred:

Arms Act, 1959 — Section 25, 4, 4(25)
Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 5-A
Constitution of India, 1950 — Article 22(5), 226
Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders and Dangerous Persons Act, 1981 — Section 2, 2(a)(iv), 2(b-1), 3, 3(2)
National Security Act, 1980 — Section 5-A
Penal Code, 1860 (IPC) — Section 384, 386, 504

Citation : (2015) ALLMR(Cri) 4437

Hon'ble Judges : V.K. Tahilramani, A.C.J;A.S. Gadkari, J

Bench : Division Bench

Advocate : U.N. Tripathi, for the Appellant

Final Decision : Allowed

Judgement

V.K. Tahilramani, Acting C.J—Through this writ petition preferred under Article 226 of the Constitution of India, the petitioner - detenu Jay @ Nunya Rajesh Bhosale has impugned the detention order dated 19.5.2015 passed by respondent No. 1 Commissioner of Police of Pune detaining him under sub-section (2) of Section 3 of The Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons and Video Pirates Act, 1981 (Mah. Act No. LV of 1981) (Amendment-1996) (Amendment - 2009) (Hereinafter referred to as the "MPDA" Act.)

The detention order along with grounds of detention which are also dated 19.5.2015 was served on the petitioner on 19.5.2015 and their true copies have been annexed as Annexure-A and B to this petition. A perusal of the grounds of detention (Annexure B) shows that the detention order has been based on two

CRs. and three incamera statements. The first CR i.e. CR No. 91 of 2015 of Faraskhana Police Station is under Sections 384, 386 and 504 of IPC. The second CR i.e. CR No. 3088 of 2015 of Faraskhana Police Station is under Sections 37(1) (3) read with 135 of Maharashtra Police Act and under Section 4 read with Section 25 of Arms Act which relates to the detenu being found in possession of a "koyta" by the police when they were on patrolling duty within the limits of Faraskhana police station. Thereafter reliance is placed on three incamera statements.

2. As far as the three incamera statements are concerned, a ground has been raised in relation to the same in the petition. In the said ground, it is stated that the detaining authority has taken into consideration three statements of witnesses "A", "B" and "C" recorded incamera for issuing detention order, however, the three incamera statements were not verified by any Senior Police Officer of the rank of Assistant Commissioner of Police or above and further no copy of verification has been furnished to the detenu along with the statements. Thus, the right of the detenu to make an effective representation against the detention order has been violated. This ground has been replied by the detaining authority in paragraph 7 of the affidavit-in-reply. In the said affidavit, it is stated that the Assistant Commissioner of Police, City Division, Pune has verified the statements of witnesses "A", "B" and "C" however, there is no averment in the affidavit about furnishing of the verification by the Assistant Commissioner of Police of the incamera statements to the detenu. The learned A.P.P. has produced before us original record and we find that the Assistant Commissioner of Police (ACP) has put an endorsement on all the statements that he has verified the three incamera statements. This endorsement is found at the bottom of all three incamera statements. However, it is noticed that in the copies of incamera statements of witnesses "A", "B" and "C" which have been supplied to the detenu, the endorsement of the ACP does not read that "statements are verified" by the ACP. Instead of the word "verified" what is stated in the copy furnished to the detenu is the word "perused". As stated earlier, the original file shows that all the three incamera statements were verified by the ACP but this verification by the ACP has not been furnished to the detenu.

3. Mr. Tripathi, the learned counsel for the petitioner submitted that it was mandatory for the detaining authority to furnish the verification of the incamera statements by the ACP to the detenu and non-supply of the same affects the right of the petitioner to make an effective representation under Article 22(5) of the Constitution of India and thus, the order of detention is liable to be set aside. In this connection, Mr. Tripathi relied firstly on the judgment of the Division Bench of this Court in Shubhangi Sawant v. R.H. Mendonca reported in 2001 ALL MR (Cri.) 68. This was a case where the petitioner was given only the copies of incamera statements, without verification made by the Assistant Commissioner of Police. The detaining authority had taken into consideration the incamera statements of two witnesses which were recorded by Senior Police Inspector and were verified by the Assistant Commissioner of Police. However, the copies of the

incamera statements supplied to the detenu did not contain the verification made by the Assistant Commissioner of Police. In these circumstances, this Court held that it had resulted in violation of Article 22(5) of the Constitution and, therefore, the detention order was vitiated. The said judgment was relied on and applied by another Division Bench of this Court (Coram: Sahai and S.K. Shah, JJ.) in Criminal Writ Petition No. 1649 of 2001 in the case of Joginder Prakash Piwal v. M.N. Singh and others, decided on 7.2.2002. In the said case also the copies of the incamera statements of witnesses supplied to the detenu did not contain verification done by the ACP. Consequently, it was held that there was violation of Article 22(5) of the Constitution and the detention order was vitiated. Mr. Tripathi pointed out that in this case also the detenu was supplied with the copies of the incamera statements of three witnesses without being supplied the verification done by the ACP. Mr. Tripathi submitted that in these circumstances, the right of the detenu to make an effective representation is violated and hence detention order is vitiated.

4. The learned A.P.P. pointed out that the present order of detention has been made on five grounds i.e. two CRs i.e. CR No. 91 of 2015 under Sections 384, 386 and 504 of IPC and CR No. 3088 of 2015 of Faraskhana Police Station under Sections 37(1)(3) read with 135 of Maharashtra Police Act and under Section 4 read with Section 25 of Arms Act and three incamera statements. He submitted that assuming that the three incamera statements cannot be relied, section 5-A of the MPDA Act would operate and these three incamera statements would be excluded from consideration, however, two CRs i.e. CR No. 91 of 2015 and CR No. 3088 of 2015 would remain. Thus, it can be said that the detention order has been issued on two grounds i.e. CR No. 91 of 2015 and CR No. 3088 of 2015 and on these two grounds the detention order would sustain.

5. In support of the above contention, the learned A.P.P. placed reliance on the decision of the Division Bench of this Court in Smt. Gobibai V. Ghanavat Vs. The State of Maharashtra and Others, (2003) BomCR(Cri) 851 : (2003) 2 MhLj 851 . In the said case also similar situation had arisen and similar arguments were advanced that as the verification by the ACP of the incamera statements was not furnished to the detenu the detenu's right to make an effective representation was violated and thus, the detention order was vitiated. In Smt. Gobibai (supra), this Court has observed as under:

"13. In our view, with the introduction of Section 5A it cannot be disputed that even if some of the grounds fail on account of being vague, non-existent, non-relevant or not connected with such person or is rendered invalid for any other reason, still the order cannot be deemed to be invalid or inoperative if the same can be supported on the remaining ground or grounds. The impugned order was passed under Section 3(2) of the Act, which can be passed if the detaining authority is satisfied that it is necessary to do so in case the detenu is acting in any manner prejudicial to the maintenance of public order which is defined in Section 2 of the Act."

6. Thereafter the learned A.P.P. placed reliance on the decision of the Supreme Court in the case of State of U.P. and Another Vs. Sanjai Pratap Gupta @ Pappu and Others, (2004) CriLJ 4600 : (2004) 8 SCALE 75 : (2004) 8 SCC 591 : (2005) 1 UJ 219 . In the said decision, the Supreme Court observed that section 5-A of the National Security Act was introduced to take care of the situation when one or more of the grounds can be separated from the other grounds for justifying detention. It may be stated that Section 5-A of MPDA Act and NSA Act are *pari materia*.

In Attorney General for India and Others Vs. Amratlal Prajivandas and Others, AIR 1994 SC 2179 : (1995) 83 CompCas 804 : (1995) CriLJ 426 : (1994) 3 JT 583 : (1994) 2 SCALE 925 : (1994) 5 SCC 54 : (1994) 1 SCR 1 Supp : (1994) 74 TAXMAN 469 , it was observed that where the detention order is based on more than one ground, by a legal fiction it would be deemed that there are as many orders of detention as there are grounds which means that each of such orders is an independent one. In that case the Constitution Bench was considering scope of Section 5-A of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short "the COFEPOSA Act") which is *pari materia* with Section 5-A of the MPDA Act. In view of the factual position analysed, the inevitable conclusion is that Section 5-A is applicable to this case and as in the present case, the detention order is based on two CRs and three incamera statements, it can be said that by legal fiction, it would be deemed that there are five orders of detention as there are five separate grounds on which the detenu has been detained. Thus, even if three grounds i.e. grounds relating to incamera statements are excluded from consideration, two grounds still remain i.e. 2 CRs i.e. CR No. 91 of 2015 and CR No. 3088 of 2015 of Faraskhana Police Station. It may also be stated that it is observed that in the case of Shubhangi Sawant and Joginder Prakash Piwal (*supra*), the point of severability under Section 5-A of the MPDA Act was not raised by the learned APP and hence, it did not arise for consideration. However, in the present case the learned APP has specially raised the point of applicability of Sec. 5-A and we are of the opinion that Sec. 5-A would fully apply in the facts of the present case.

7. Thereafter, Mr. Tripathi submitted that as far as the second ground is concerned which relates to CR No. 3088 of 2015, the facts are that the police while on patrolling duty in the limits of Faraskhana police station found the detenu in possession of a koyta. As there was prohibitory order, said CR came to be registered against him under Section 37(1)(3) read with 135 of Maharashtra Police Act and under Section 4(25) of the Arms Act. Mr. Tripathi submitted that merely being in possession of a weapon would not lead to the disturbance of public order. Moreover, he submitted that it was a single case in which the detenu was found in possession of a weapon and hence, it cannot be said that the detenu is habitually committing such offence under the Arms Act. He further submitted that merely being in possession of a weapon is not sufficient to cause disturbance of public order. In support of this contention, he has placed reliance on the decision of this Court in the case of Sudarshan Tukaram Mhatre Vs. R.D.

Tyagi, Commissioner of Police, Thane and others, (1990) CriLJ 1964 . In the said decision, it was held that merely carrying concealed firearm in a public place is not a menace to public order unless of course the person flourishes the weapon or by word or gesture indicates that the weapon is with him and he will not stop at using it. Looking to the fact that this CR is the only CR on which the detaining authority is relying upon in relation to possession of a weapon and the fact that the weapon was not brandished by the detenu and the fact that he did not indicate that he had a weapon and that he will not stop at using it, it could not be said that it affected the public order. This leaves us with only one CR i.e. CR No. 91 of 2015 of Faraskhana Police Station.

8. As far as CR No. 91 of 2015 is concerned, the grounds of detention show that on 26.3.2015 at about 5.30 p.m. the complainant was present in his hotel. At that time, the detenu came to the hotel of the complainant and threatened him loudly, stating that if the complainant did not pay "hafta" of Rs. 10,000/- per month then the hands and legs of the workers in the hotel, would be broken and the hotel would be closed down. Because of the loud threatening, the customers in the hotel ran away and on watching this incident in the hotel, the pedestrians on the road got frightened and ran away. From the facts of CR No. 91 of 2015, it is clear that there was disturbance of public order and the act of the detenu was such that it adversely affected the maintenance of public order. Thus, this case i.e. CR No. 91 of 2015 would clearly be covered under section 2(a)(iv) of the MPDA Act.

9. The relevant definition applicable to a "dangerous person" in section 2(a)(iv) is as follows:

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

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

(i).....

(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. The activity of the detenu is clearly covered by Sec. 2(a)(iv)."

Thereafter Mr. Tripathi submitted that if the grounds relating to three incamera witnesses and the ground relating to CR 3088 of 2015 is excluded only CR 91 of 2015 remains. He submitted that only on the basis of this single solitary incident it cannot be said that the detenu is a dangerous person. The detention order in the present case has been passed against the detenu because he is a "dangerous person" as visualized under the MPDA Act, in which case, it would be necessary to see Section 2(b-1) which defines "dangerous person". As per this section 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).

10. Thus, a perusal of the Section 2(b-1) would show that if the person singly or as a member or a leader of a gang "habitually commits" or attempts to commit or abets the commission of any offence punishable under Chapter XVI or Chapter XVII of the IPC or Chapter V of the Arms Act, he would be a dangerous person in terms of Section 2(b-1) of the MPDA Act. Just as a single swallow does not make a summer a solitary act, does not constitute a habit. In the instant case, after the three incamera statements are excluded from consideration as the verification of all the incamera statements by the ACP was not furnished to the detenu and CR No. 3088 of 2015 cannot be taken into consideration, for the reasons stated in paragraph 7 above by us, that leaves us to only with CR No. 91 of 2015. We shall now proceed to examine whether on the basis of this CR, the detenu can be held to be a dangerous person so as to sustain the order of detention.

11. On applying 5-A of MPDA Act, only CR No. 91 of 2015 remains. In such case it can be held that the detention order is issued only on the basis of CR No. 91 of 2015. This solitary act would not constitute a "habit". In our view on the basis of the said solitary CR No. 91 of 2015 it cannot be said that the petitioner - detenu "habitually commits" or attempts to commit or abets the commission of any of the offences mentioned in Section 2(b-1) of the MPDA Act and since the detenu has been detained as he is a "dangerous person", the impugned detention order would not be sustainable in law.

12. For the aforesaid reasons, we allow this writ petition and quash and set aside the impugned detention order dated 19.5.2015 passed by respondent No. 1- Commissioner of Police, Pune City and direct that the petitioner - detenu Jay @ Nunya Rajesh Bhosale be released forthwith unless wanted in some other case. Rule is made absolute in above terms.