

(2011) 09 BOM CK 0126

In the Bombay High Court

Case No : Criminal Writ Petition No. 412 of 2011

Rushikesh Tanaji Bhoite

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 16-09-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 32
Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders and Dangerous Persons Act, 1981 — Section 3(2)

Citation : (2011) 6 BomCR 288 : (2012) BomCR(Cri) 344 : (2012) 114 BOMLR 498

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

Bench : Division Bench

Advocate : V.D. Hon and U.N. Tripathi, for the Appellant; V.D. Godbharle, Assistant Public Prosecutor for Respondent Nos. 1 to 3 and Hemant Surve, for the Respondent

Judgement

A.H. Joshi, J.—Heard Shri V. D. Hon, learned Advocate holding for Shri U. N. Tripathi, Advocate for the Petitioner, Shri V. D. Godbharle, learned A.P.P. for Respondent Nos. 1 to 3, and Shri Hemant Surve, learned Advocate, for Respondent Nos. 4 and 5-intervenOrs.

2. Case proceeds in following admitted background:

(1) The Petitioner is the son of Tanaji Bhoite the detenu. Shri Tanaji Keshavrao Bhoite was detained in furtherance to the order for detention passed by the Collector, Jalgaon, on 10.1.2011, passed u/s 3 (2) of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981 ("The MPDA Act" for brevity).

(2) Soon after the order was passed, Tanaji was arrested and sent for detention in the prison. The detention order, accompanied by grounds and documents relied upon, was served on the Petitioner.

- (3) The English translation of the order of detention was served on the Petitioner.
- (4) The Petitioner submitted a representation to the detaining authority, which has been rejected.
- (5) The Petitioner had represented to the State Government and the State Govt. also rejected the representation.
- (6) Present Petitioner challenged the order of detention, by filing a petition for a writ of habeas corpus, being Criminal Writ Petition No. 123 of 2011.
- (7) Criminal Writ Petition No. 123 of 2011 has been dismissed by this Court after hearing the parties, by judgment and order dated 13.5.2011.
- (8) Present Criminal Writ Petition (2nd) has been filed on 18.5.2011, for a writ of habeas corpus and challenging the order dated 10.1.2011 which was earlier challenged in Criminal Writ Petition No. 123 of 2011 which was dismissed on 13.5.2011.
- (9) During pendency of present writ petition, the Petitioner approached the Hon'ble Supreme Court by way of S.L.P., challenging the judgment and order of this Court dated 13.5.2011 dismissing Writ Petition No. 123 of 2011, and notices have been issued therein.
- (10) This petition is opposed by the State and the incumbent holding the office of detaining authority i.e. The Collector, Jalgaon, at that time, who is arraigned as a Respondent even in own name and has filed an affidavit-in-reply.
- (11) The petition has also been opposed by the Respondent-State, as well as by the interveners, on the ground of maintainability, as well as on merits.
3. The detaining authority was directed to produce the record which has, accordingly, been produced.
4. As we see from the record, the order of detention, the original Marathi text, accompanied by entire set of documents which were available before the detaining authority at the time of passing the order, has been served upon the detenu and his acknowledgment is obtained in presence of the jail authorities on each paper.
5. Perused the petition, reply, annexure and record.
6. We have heard respective Advocates at considerable length and we have analyzed the submissions threadbare.
7. Upon consideration of various contentions and aspects addressed, as we notice, the points which arise for our consideration are as follows;
- (1) Whether the present petition, which is a second petition, is maintainable, in view of the exception taken to the maintainability of the second petition, as recorded in paragraph 7 of the judgment in Shri. Lallubhai Jogibhai Patel Vs.

Union of India (UOI) and Others, ?

(2). In the event it is held that the second petition (present petition) is maintainable, whether, on facts, the Petitioner has made out a case for issue of writ of habeas corpus ?

8. Full Bench of this Court had occasion to hear the point of maintainability of second petition for Habeas Corpus. In the judgment, Their Lordships have followed, by quoting the dictum contained in para 7 of the judgment in Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others, .

9. We quote, for ready reference, the text of para 7 of the judgment in Lallubhai's case, which reads:

7. In a Full bench decision of the Punjab High Court, which purports to follow these English decisions and two decisions of this Court in Daryao v. State of U.P. And Calcutta Gas Company (Proprietary) Ltd. v. State of W.B. it was held as follows:

No second petition for writ of habeas corpus lies to the High Court on a ground on which a similar petition had already been dismissed by the court. However, a second such petition will lie when a fresh and a new ground of attack against the legality of detention or custody has arisen after the decision on the first petition, and (also) where for some exceptional reason a ground has been omitted in an earlier petition, in appropriate circumstances, the High Court will hear the second petition on such a ground for ends of justice. In the last case, it is only a ground which existed at the time of the earlier petition, and was omitted from it, that will be considered. Second petition will not be competent on the same ground merely because an additional argument is available to urge with regard to the same.

Discussion on first point.

10. In order to decide whether the case falls under the exception as recorded in Lallubhai's case (supra), this Court will have to find out, in a comparative manner, as to which were the grounds of challenge agitated and/or pursued in earlier petition and whether those are agitated / pursued in the present petition, as well.

11. After the hearing of the petition had reached almost to its fag end, we had called upon the learned A.P.P. to tender for perusal of the court, a comparative chart showing the grounds agitated in present petition and those incorporated in earlier petition.

12. Based on the submissions, our analysis as to the grounds raised in present petition, as also raised and dealt with in earlier petition , are as follows:

GROUND WHICH ARE REPEATED/SIMILAR/CONNECTED.

Sr.

No.

Points/grounds in present Writ Petition

Same Grounds and averments in Criminal Writ Petition No.123/11, and discussion thereof in the judgment therein.

Grounds and averments in WP at: Discussion thereof in judgment at:

Page No. Para No. Page No. Para No

1.

Grounds (a), (f),(h) and (n).Right to make a representation under Article 22(5) of the Constitution of India has been nullified since the purpose of detention mentioned in Marathi version is 'public law and order', while in English version, it is 'law and order.'Thereby, the petitioner was misled.

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2.

Ground (b).Representation of the petitioner dated 27.1.2011 was rejected on 25.2.2011 and was served on the petitioner thereafter. The decision on his representation was inordinately delayed, by the govt. The delay in taking the decision vitiates the detention. Moreover, if the government has rejected the representation after the decision of the Advisory board, it would amount to failure on the part of the government to take the decision on its own merits.

86 XII 108 19

3.

Ground (c).The representation sent to the detaining authority on 17.1.2011, has been rejected and communicated to the petitioner on 28.1.2011, which is delayed by eight days, which is a gross delay resulting in vitiating the order of detenu.

86 XII 108 19

4.

Ground (d) The statements forming part of investigation in Crime No.72 of 2011, bail application, surrender forms, all were not part of the record before the detaining authority.

69 i(b) 106 15

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5.

Grounds (e) and (m) In case of 17FIRs relied on by the authorities against the detenu, various documents, such as bail papers, orders therein, medical papers, panchanamas, identification parades, all ought to have been before the detaining authority, which were not so available. Therefore, in absence of availability and consideration of these documents before the detaining authority, the order of detention is vitiated.

68 i(a) 97 15

68 i(b)

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81 VIII

6.

Grounds (g), (i), (j) and (k). The order of detention is passed malafide, since the arrest forms in Crime No.172 of 2010 are fabricated, as on the alleged date of execution of these forms, the detenu was admitted and taking treatment in Rubi Hospital at Pune.

87 XIII In entire order and

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13. As mentioned earlier, we have scrutinized the averments contained in present writ petition and also in earlier Writ Petition (123/2011) and as we have noticed, grounds (a) to (j) have been further amplified in the amended grounds (k) onwards and we have, therefore, clubbed the amended ground with original grounds mentioned in the table incorporated in para 12 above.

14. As we notice, drafting the ground for fresh petition is articulated craft work, surgical and cosmetic in nature. All these grounds were either taken and/or undoubtedly available at the time of filing of earlier petition. We have noticed that each page, forming part of the material which was available before the detaining authority, was served on the Petitioner, by obtaining/securing his acknowledgment on each page.

The petition does not disclose as to what was the exact document/material which the Petitioner came across and at what appropriate time, which can satisfy the tests "discovery of new material. or "new material which was not available to the Petitioner and it came to his knowledge only after decision of earlier petition.

15. Present petition is nothing but re-drafting and re-filing of earlier petition for securing re-hearing on the same questions which are already decided in earlier

petition, as urged by the learned A.P.P., as well as by learned Advocate for the interveners.

The concept of "constructive res-judicata" has no application to the present case. The said principle of law would have come into picture, had it been a case that fresh petition was sought to be filed under Article 32 of the Constitution of India, in the Hon"ble Supreme Court. In present case, the doctrine of "res-judicata" would come into operation since it is a case-a petition under Article 226-filed by the same person, before the same court, and on the same issue which is already adjudicated.

16. We are, therefore, satisfied the petition fails to answer the tests and exceptions carved out by reiteration in Lallubhai Jogibhai Patel's case (supra) and, therefore, the same is liable to be held as founded on the same grounds already agitated and decided and hence, not maintainable.

17. Since we have answered point No. 1, holding that the petition is not maintainable, being the same as earlier petition, but filed in different form, point No. 2 framed by us, does not call for any consideration.

Normal rule of duty of court to answer all points raised for consideration would, therefore, not apply to the case which would be governed by doctrine of "res-judicata". We, therefore, decline to deliberate and address on point No. 2 framed by us in para 7 above.

18. In the result, we dismiss the petition. Rule discharged. Costs shall be the costs in the cause.