IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUSHRUT ARVIND DHARMADHIKARI

&

HON'BLE SHRI JUSTICE PRAKASH CHANDRA GUPTA

ON THE 8th OF MAY, 2023

WRIT PETITION No. 5132 of 2023

BETWEEN:-

SATYANARAYAN LUNIYA S/O SHRI RAM CHANDRA LUNIYA, AGED 45 YEARS, OCCUPATION: BUSINESSMAN 7 BAJRANG NAGAR, DISTRICT INDORE (MADHYA PRADESH)

.....PETITIONER

(SHRI PRASANNA R. BHATNAGAR, LEARNED COUNSEL FOR THE PETITIONER)

AND

1. **THE STATE OF MADHYA PRADESH PRINCIPAL SECRETARY HOME DEPARTMENT THROUGH VALLABH BHAWAN, MANTRALAYA, DISTRICT BHOPAL (MADHYA PRADESH)**

2. **UNION OF INDIA THROUGH SECRETARY MINISTRY OF HOME AFFAIRS GOVT. OF INDIA, ROOM NO. 11 (NSA SECTION) IIND FLOOR, MAJOR DHYAN CHAND STADIUM, NEW DELHI (DELHI)**

3. **DISTRICT MAGISTRATE AND COLLECTOR INDORE, DIST. INDORE (MADHYA PRADESH)**

4. **SUPERINTENDENT OF POLICE, INDORE DIST. INDORE (MADHYA PRADESH)**

.....RESPONDENTS

(SHRI BHUWAN GAUTAM, LEARNED COUNSEL FOR THE RESPONDENT(S) NO. 1, 3 & 4)
(SHRI HIMANSHU JOSHI, LEARNED ASSTT. SOLICITOR GENERAL FOR THE RESPONDENT [R-2].

This petition coming on for order this day, ***JUSTICE SUSHRUT ARVIND DHARMADHIKARI*** *passed the following:*

ORDER

Heard finally with the consent of both the parties.

I n this petition under Article 226 of the Constitution of India, the petitioner has assailed the illegality, validity and propriety of the order dated 22.09.2022(Annexure P-1) passed under the National Security Act, 1980(hereinafter referred to as the 'Act of 1980') by the respondent no. 3 whereby the petitioner has been ordered to be detained in the Central Jail, Indore.

2. The brief facts of the case are that the petitioner is a businessman and income tax payee and carrying on the business of transport and scrap through the registered firm namely S.P. Brothers. The firm is registered under the M.P. Shops and Establishment Act, 1958. The petitioner is also filing the GST returns. Moreso, he is an active member of a political party and due to political pressure from the ruling party, the respondent no.3 has passed the detention order under the Act of 1980. Earlier also, the order dated 17.07.2017 passed by the respondent no.3 was assailed in W.P. no. 6103/2017. This Court vide order dated 13.10.2017 had set aside the order and allowed the writ petition. Again on 28.01.2019, the respondent no.3 passed an order of detention under the Act of 1980 with the purpose of harassing him. The said order was also assailed by filing W.P. No. 3154/2019. Vide order dated 28.03.2019, this Court has quashed the order passed by respondent no.3 holding it to be illegal and against the rule of law and as also on the ground that the order of detention under the Act of 1980 cannot be passed for an indefinite period. The present impugned

order is also issued by the respondent no.3 without following the provisions of the Act of 1980 and without there being any basis, therefore, there is no reason to believe that the petitioner is a threat for maintaining the public peace, law and order. Admittedly, the petitioner has not yet been arrested. Thus, the question which arises for consideration is that challenge to the order of preventive detention at pre-detention stage would not be maintainable.

3. Learned counsel for the petitioner contended that no affidavit of the District Magistrate, who had passed the detention order has been filed. This question was considered in the case of **Usman Vs. State of M.P. & Others [ILR(2012) MP 1549].** Para 5 of which reads as under:

> '5. *In the instant case, the District Magistrate who passed the order of detention has not filed his affidavit. It is well established by catena of decisions of the Supreme Court that in answer to a Rule issued in a habeas corpus petition, the counter affidavit on behalf of the State should be sworn by the District Magistrate who had passed the detention order. In the present case, there is a direct allegation that the detention order was passed without application of mind and there was no material before the detaining authority to reach the subjective satisfaction. There is no para-wise reply. The affidavit in support of the reply does not say that the City Superintendent of Police personally dealt with the matter. He has merely sworn the affidavit on the information gathered from the record. No explanation has been offered for not filing the affidavit of the District Magistrate. The reply also does not show that all the procedural steps, as required under the Act, were taken within the*

specified time. Except for newspaper cutting (which have no evidentiary value), no other cogent material has been placed before us to judge the legality of the detention order. In this unsatisfactory state of affairs, we have no hesitation to hold that the District Magistrate passed the detention order in a most cavalier manner without any application of mind, and was confirmed by the State Government in equally callous manner as such, it is difficult for us to sustain the detention order. yet there is another ground which makes the detention order unsustainable. In this connection, we may refer to the earlier Division Bench, decision of this Court in W.P. No. 3426/2008 decided on 22.07.2008 wherein it is held that the detenue must be apprised of his right to make representation to Central Government. We find even this was not fulfilled in the case on hand."

4. Learned counsel for the petitioner also argued that on perusal of the impugned order, no subjective satisfaction has been recorded by the District Magistrate while passing the impugned order and the order impugned is not a reasoned and speaking order.

5. On the aforesaid principles, learned counsel for the petitioner submits that order of detention deserves to be set aside.

6. Per contra, learned counsel for the respondent/State opposed the prayer and submitted that the writ petition deserves to be dismissed. Alternative remedy has not been availed by the petitioner, therefore,the petitioner may be relegated to avail the same. Hence, petition may be dismissed.

7. Heard, learned counsel for the parties and perused the record.

8. The law in regard to challenge to an order of preventive detention at pre-detention stage is well settled by the Apex Court in **'ÂœState of Maharashtra and others Vs. Bhaurao Punjabrao Gawande [(2008) 3 SCC 613]**'Â after following its earlier decision in '**Additional Secretary to the Government of India and others Vs. Smt. Alka Subhash Gadia and another [1992 Supp. (1) SCC 496]**'Â, relevant extract of which is reproduced below:-

> "Âœ40. An order of detention can be challenged on certain grounds, such as, the order is not passed by the competent authority; condition precedent for the exercise of power does not exist; subjective satisfaction arrived at by the detaining authority is irrational; the order is mala fide; there is non- application of mind on the part of the detaining authority in passing the order; the grounds are, or one of the grounds is, vague, indefinite, irrelevant, extraneous, non- existent or stale; the order is belated; the person against whom an order is passed is already in jail; the order is punitive in nature; the order is not approved by State/Central Government as required by law; failure to refer the case of the detenu to the Board constituted under the statute; the order was quashed/revoked and again a fresh order of detention was made without new facts, etc.'

9. The present case reveals that the order of preventive detention has not been confirmed by the State till date and therefore the present petition on the ground of 'Âœthe order is not approved by State/Central Government as required by law' as laid down by the Apex Court as aforesaid is maintainable even at pre-detention stage.

10. This Court now has to deal with the objection of the State Government that the safeguards in Section 3 NSA i.e. the confirmation of order of preventive detention by the State within the stipulated period of 12 days is not available to the petitioner at pre-detention stage.

11. Section 3 of NSA is reproduced below for ready reference and convenience:

"3. Power to make orders detaining certain persons.-

(1) The Central Government or the State Government may:

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,

it is necessary so to do, make an order directing that such person be detained.

(2) The Central Government or 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 security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation."For the purposes of this sub-section, "acting in any manner prejudicial to the maintenance of supplies and services essential to the

community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to sub-section (1) of section 3 of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 (7 of 1980), and accordingly, no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act.

(3) 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, by 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 (2), exercise the powers conferred by the said sub-section:

Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three 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 three months at any one time.

(4) When any order is made under this section by an officer mentioned in sub-section (3), he shall forthwith report the fact to the State Government to which he is subordinate 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 no 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:

Provided that where under section 8 the grounds of detention are communicated by the officer making the order after five days but not later than ten days from the date of detentions, this sub-section shall apply subject to the modification, that, for the words "twelve days", the words "fifteen days" shall be substituted.

(5) When any order is made or approved by the State Government under this section, the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order.

12. The expression 'Âœdetention order'Â is defined in Section 2(b) as an order made u/S.3. Section 3(2) and Section 3(3) both relate to power of making an order directing any person to be detained in case the activities of such person are found inter alia to be prejudicial to maintenance of public order. The only difference between the two sub-sections is that sub-section (2) of Section 3 vests power with the Central Government or the State Government while sub-section (3) of Section 3 vests power with the District Magistrate or Commissioner of Police to be exercised within his territorial jurisdiction.

13. The first safeguard provided in proviso to Section 3(3) is that an order of preventive detention passed u/S.3(3) shall at the first instance not exceed three months with the rider that the same can be extended from time to time if found necessary by the State Government by any period not exceeding three months at any one time.

14. The second safeguard in Section 3 is that if the order is passed by District Magistrate or the Commissioner of Police then the fact of the order

having been made along with the grounds on which it was made should be forthwith reported to the State Government concerned and in case the State Government does not approve the said order of preventive detention within 12 days of its making then the same would lapse.

15. The third safeguard provided in Section 3 is that whenever any order of preventive detention is approved by the State Government then within seven days of passing of the order of preventive detention intimation is sent to the Central Government.

16. The objection with regard to alternative remedy, law is well settled, in as much as an alternative remedy is no bar under Article 226 of the Constitution of India where the order is without jurisdiction and appears to be passed in blatant exercise of powers and the same is against the principles of natural justice.[See **Alok Kumar Choubey Vs. State of M.P. & Ors** reported in **2021 (1) MPLJ 348**; **Whirlpool Corporation Vs. Registrar of Trademarks, Mumbai & Others** reported in **1998 (8) SCC 1**].

17. In view of the aforesaid, the objection with regard to alternative remedy is over ruled.

18. The Apex Court in the case of **Commissioner of Police and Anr. Vs. Gurubux Anandram Bhiryani, [1988(Supp)SCC 568**] has held that the period of detention has to be mentioned in the order of detention and the order of detention cannot be passed for an indefinite period. The Division Bench of this Court in the case of **Bhaiya alias Bhaiyalal alias Arvind Vs. State of M.P. [2013(2) JLJ 300]** after careful scrutiny of provisions of Section 3 of the Act of 1980 has held that the order of detention has to be passed for a specific period. Similar view has been taken by another Division Bench of this Court in the case of **Pradeep Vs. State of M.P. & Ors. [2016 (1) JLJ 252]**.

Admittedly, in the instant case, the order of detention does not record any subjective satisfaction or mention the period of detention, therefore, the order of detention is vitiated in view of the settled legal position. Moreover, the reply filed by the State is not supported by the affidavit of the District Magistrate, who had passed the detention order which is mandatory in view of the law laid down in the case of **Usman (supra).**

19. In view of the above, impugned order dated 22.09.2022 (Annexure P-1) passed by the respondent no.3 - District Magistrate and Collector is hereby quashed. The respondent authority is directed to release the petitioner forthwith (if in custody), in case he is not required to be detained in any other criminal case.

20. With the aforesaid, the petition stands allowed and disposed of finally. No order as to cost.

THE HIGH COURT OF MADHYA PRADESH
सत्यमेव जयते

(S. A. DHARMADHIKARI)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE

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