THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Adnan Iqbal Chaudhry &
Mr. Justice Zulfiqar Ali Sangi.

C.P. No. D – 3387/2023	:	Mst. Sumera Amir wife of Muhammad Amir versus Province of Sindh and others.
C.P. No. D – 3388/2023	:	Mumtaz Rizwan wife of Rizwan Ur Rehman versus Province of Sindh and others.
C.P. No. D – 3389/2023	:	Muhammad Mushtaq son of Muhammad Rukhsar versus Province of Sindh and others.
C.P. No. D – 3390/2023	:	Mst. Ummer Kulsoom wife of Muhammad Afaq Khan versus Province of Sindh and others.
C.P. No. D – 3397/2023	:	Mst. Rukhsana wife of Muhammad Shahid versus Province of Sindh and others.
C.P. No. D – 3399/2023	:	Mst. Samreen Faheem wife of Muhammad Faheem versus Province of Sindh and others.
C.P. No. D – 3417/2023	:	Wajahat Ali son of Wajid Ali versus Government of Sindh and others.
C.P. No. D – 3430/2023	:	Muhammad Nasir Qureshi son of Muhammad Aslam versus Province of Sindh and others.
C.P. No. D – 3431/2023	:	Muhammad Azhar Qureshi son of Muhammad Aslam versus Province of Sindh and others.
C.P. No. D – 3432/2023	:	Faisal son of Muhammad Aslam versus Province of Sindh and others.
C.P. No. D – 3433/2023	:	Muhammad Zeeshan son of Muhammad Ishaq versus Province of Sindh and others.
C.P. No. D – 3434/2023	:	Mrs. Roshan Qayyum wife of Muhammad Arif versus Province of Sindh and others.

C.P. No. D – 3435/2023	:	Mrs. Ayesha wife of Muhammad Akram versus Province of Sindh and others.
C.P. No. D – 3459/2023	:	Imran Aftab Baqai son of Muhammad Aftabuddin Baqai versus Province of Sindh and others.
C.P. No. D – 3477/2023	:	Mst. Samina Naz wife of Zafar Akhtar versus Province of Sindh and others.
For the Petitioners	:	M/s. Jowhar Abid, Muhammad Ishaq and Muhammad Idrees Alvi, Advocates.
For the Respondents	:	Mr. Mehran Khan, Assistant Advocate General Sindh alongwith M/s. Shazia Qazi, Additional Secretary, Home Department, Ali Asghar Mahar, Focal Person, Home Department, AIG Legal, Qamar Raza Jiskani, AIG Legal, Mushtaq Ahmed Abbasi, DSP Legal Raza Mian, DSP Surjani Town, Amin Rehman, PDSP, Amin (Investigation) East, P.I. Asif Ali, P.I. Babar Ali, P.I./S.H.O. Zulfiqar Ali, P.I./S.H.O. Rao Rafiq, S.I. Deedar and S.I.P. Ali Muhammad, all are present in Court. Ms. Amna Ansari, Additional Prosecution General Sindh.
Date of hearing	:	26-07-2023
Date of short order	:	26-07-2023
Date of reasons	:	01-08-2023

JUDGMENT

Adnan Iqbal Chaudhry J. - By a short order dated 26-07-2023 we had allowed these petitions and had ordered the release of the detenues after declaring their preventive detention unlawful. These are the reasons for that order.

2. The Petitioners are family members of the detenues. The detention orders were issued by the Home Secretary, Government of

Sindh to the Inspector General Police, Sindh [IGP] under section 3(1) of the Maintenance of Public Order Ordinance, 1960 [**MPO Ordinance**]. Since detention was for 30 days, the role of the Review Board constituted under Article 10 of the Constitution of Pakistan was not triggered. The detention orders were dated 11-07-2023, 12-07-2023 and 13-07-2023 respectively. The ground for detention in all was identical *viz.* that the IGP has informed that each detenu "*is instigating and provoking public to block roads, highways and organize sit-ins which may disturb peace and tranquillity, and can create serious Law & Order situations and such an act on his part will be highly prejudicial to the Public Safety and Maintenance of Public Order, therefore; Inspector General of Police Sindh, has recommended that he may be detained under MPO-1960*". It is not the case of the Respondents that the grounds of detention were set-out separately in any other document.

3. Apparently, prior to the aforesaid detention orders, FIR No. 795/2023 was lodged by the State on 09-07-2023 at P.S. Zaman Town, Korangi, Karachi for offences punishable under sections 147, 149, 153A, 341 and 109 PPC, alleging that 80/90 persons on vehicles had blocked the main Korangi Road while raising slogans in favour of Altaf Hussain of MQM (London); and that when the police tried to disperse them, they resisted, but later moved on in the form of a rally. Four persons were arrested from the scene. The ASI who lodged the FIR named 39 others proclaiming that all the persons accused were workers of MQM (London). Learned counsel for the Petitioners submitted that most of the detenues were arrested pursuant to said FIR, and though they were granted bail by the Magistrate, but right thereafter they were detained under the MPO Ordinance.

4. Before proceeding further it is pertinent to highlight that the MPO Ordinance pre-dates the Constitution of Islamic Republic of Pakistan, 1973, and after said Constitution, the provisions of the MPO Ordinance are subject to Articles 10(4) to 10(9) of the Constitution.

5. Taking objection to the maintainability of these petitions, the learned A.A.G. Sindh contended that sections 3(6) and 3(6a) of the MPO Ordinance enable the detenues to make a representation against the order of detention to the detaining authority, and thus an alternate remedy being available, petitions under Article 199 of the Constitution were not maintainable. However, at the same time it was conceded that after issuing the detentions orders the Home Secretary took no further step to "communicate" the grounds of detention to the detenues as required by Article 10(5) of the Constitution and section 3(6) of the MPO Ordinance, and it appears that the detenues or the Petitioners were left to acquire copies of the detention orders themselves. Nonetheless, to put to rest the objection of the AAG Sindh to the maintainability of these petitions, we can do no better than to quote Justice Sabihuddin Ahmed from the case of *Dr. Muhammad Shoaib Suddle v. Province of Sindh* (1999 PCrLJ 747):

> "9. In the first place it may be pertinent to decide preliminary objection as to the maintainability of this petition which was strenuously urged by the learned A.A.G. He contended that section 3(6) of the Ordinance enables the detenu to make representation against the order of detention and an alternate remedy being available this petition under Article 199 of the Constitution could not be entertained. He relied upon a number of reported decisions of superior Courts, including the Honourable Supreme Court, where discretionary jurisdiction under Article 199 was not exercised on the ground that the petitioner should have availed of the alternate efficacious remedy provided by law. He is indeed correct to the extent that normally existence of an alternate efficacious remedy precludes the Court from entertaining a Constitutional petition as is evident from the language of Article 199 itself and it is not necessary to refer to the precedents laid down by Courts. Nevertheless it is equally well-settled that the existence of an alternate remedy does not per se bar the jurisdiction of the Court to entertain a Constitutional petition but it is rule by which the Court regulates its own discretionary jurisdiction. (See Murree Brewery v. Capital Development Authority PLD 1972 SC 279). This rule is subject to certain well-recognised exceptions and it is well-settled that the existence of an alternate remedy would not bar the maintainability of a petition, inter alia in the following circumstances: --
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> (i) When the alternate remedy is not equally efficacious in terms of speed and expense or cannot provide effective relief to the petitioner.
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> (ii) When the impugned order is without jurisdiction or ultra vires the power conferred upon the functionary passing the same.

(iii) When the order is mala fide.

(iv) When the order suffers from an error of law apparent on its face.

(v) In matters where detention of a person in custody is questioned, the Court must prima facie be satisfied as to the bona fides or legality of detention, irrespective of the remedies available to the detenu."

6. The points of law and fact that emerged at the hearing of these petitions and prevailed for allowing these petitions were as follows.

7. Since the power to issue an order for preventive detention under section 3(1) of the MPO Ordinance vests in the Provincial Government, and since the impugned orders did not signify the decision of the Provincial Government, we had asked the learned AAG Sindh to verify whether the impugned orders had the backing of the Provincial Cabinet. This was of course in view of the case of *Mustafa Impex v. Federation of Pakistan* (PLD 2016 SC 808) where the Supreme Court held that after the Eighteenth Amendment the word 'Government' means the Cabinet, and also keeping in view the dictum that the law on preventive detention has to be strictly construed. In response, the AAG Sindh placed on record a decision of the Provincial Cabinet dated 27-04-2020, followed by notification dated 11-06-2020 whereby it had delegated to the Home Secretary the power to issue detention orders under section 3(1) of the MPO Ordinance. The AAG Sindh and the Additional Home Secretary submitted that such delegation was permitted, and was so done by the Provincial Cabinet under section 26 of the MPO Ordinance, and hence the impugned detention notices by the Home Secretary exercising delegated power. But neither the Provincial Cabinet nor the AAG Sindh seemed to be aware that section 26 of the MPO Ordinance which had previously enabled delegation of powers, and that too only to the District Magistrate, had been omitted for the Province of Sindh along with sub-section (2) of section 3 *vide* Sindh Laws (Amendment) Ordinance, 2001, published in the gazette dated 28-11-2001, and which Ordinance came to be protected legislation

under Article 270AA of the Constitution until repealed. We were not informed of any subsequent repeal or amendment. Thus, on 27-04-2020, the Provincial Cabinet could not have invoked section 26 of the MPO Ordinance to delegate its powers under section 3(1) to the Home Secretary. In any case, as held by a learned Division Bench of this Court in *Liaqat Ali v. Government of Sind* (PLD 1973 Karachi 78), the erstwhile section 26 had envisaged delegation only of the 'power' to arrest and detain under section 3(1), not of the faculty of 'satisfaction', which had to be that of the Provincial Government itself. Consequently, the impugned detention orders issued by the Home Secretary were without lawful authority.

8. Apart from the above, and assuming for the sake of argument that the Provincial Government could have otherwise delegated its powers to issue detention orders (though this was not argued before us), section 3(1) of the MPO Ordinance stipulates that in issuing a detention order the detaining authority should be "satisfied that with a view to preventing any person from acting in any manner prejudicial to public safety or the maintenance of public order it is necessary so to do."

9. It had been laid down by the Supreme Court as far back as the case of *Ghulam Jilani v. Government of West Pakistan* (PLD 1967 SC 373) that the 'satisfaction' of an executive or administrative authority that preventive detention of a person is necessary, is justiciable by the Superior Courts in the exercise of writ jurisdiction. What that 'satisfaction' entails, has time and again been discussed by the superior courts, and along with that, the jurisdiction of the High Court to examine cases of preventive detention were reiterated by the Supreme Court in *Federation of Pakistan v. Amatul Jalil Khawaja* (PLD 2003 SC 442), as follows:

> "6(i) An order of preventive detention has to satisfy the requirements laid down by their Lordships of the Supreme Court that is to say (i) the Court must be satisfied that the material before the detaining authority was such that a reasonable person would be satisfied as to the necessity for making the order of preventive

detention (ii) that satisfaction should be established with regard to each of the grounds of detention and if one of the grounds is shown to be bad, non-existent or irrelevant the whole order of detention would be rendered invalid (iii) that initial burden lies on the detaining authority to show the legality of the preventive detention and (iv) that the detaining authority must place the whole material upon which the order of detention is based before the Court notwithstanding its claim of privilege with respect to any document the validity of which claim shall be within the competence of the Court to decide. In addition to these requirements, the Court has further to be satisfied, in cases of preventive detention, that the order of detention was made by the authority prescribed in the law relating to preventive detention; that each of the requirements of the law relating to preventive detention should be strictly complied with; that 'satisfaction' in fact existed with regard to the necessity of preventive detention of the detenu; that the grounds of detention had been furnished within the period prescribed by law, and if no such period is prescribed, then 'as soon as may be'; that the grounds of detention should not be vague and indefinite and should be comprehensive enough to enable the detenu to make representation against his detention to the authority prescribed by law; that the grounds of detention, that is, they are not irrelevant to the aim and object of this law and that the detention should not be for extraneous considerations or for purposes which may be attacked on the ground of malice. (Liaqat Ali v. Government of Sind through Secretary, Home, PLD 1973 Karachi 78). (Emphasis provided)

(ii) The right of a person to a petition for habeas corpus is a high prerogative right and is a Constitutional remedy for all matters of illegal confinement. This is one of the most fundamental rights known to the Constitution. There being limitation placed on the exercise of this right, it cannot be imported on the actual or assumed restriction which may be imposed by any subordinate Legislature. If the arrest of a person cannot be justified in law, there is no reason why that person should not be able to invoke the jurisdiction of the High Court immediately for the restoration of his liberty which is his basic right. In all cases where a person is detained and he alleges that his detention is unconstitutional and in violation of the safeguards provided in the Constitution, or that it does not fall within the statutory requirements of the law under which the detention is ordered, he can invoke the jurisdiction of the High Court, under Article 199 and ask to be released forthwith. (PLD 1965 Lah. 135). He need not wait for the opinion of the Advisory Board before praying for a habeas corpus. (AIR 1952 Cal. 26). However, jurisdiction of High Court while examining the material before the detaining authority is not unlimited. When an order passed by an executive authority detaining a particular person is challenged by invoking extraordinary jurisdiction of High Court it is always by means of judicial review and cannot be treated as appeal or revision. The Court cannot substitute its discretion for that of administrative agent The only function of the Court in such cases is to see whether or not order of detention is reasonable and objective. (PLD 1979 Lah. 741. (Emphasis provided).

(iii) The Court can see whether the satisfaction about the existence of the requisite condition is a satisfaction really and truly existing in the mind of the detaining authority or one merely professed by the detaining authority. (AIR 1953 SC 451) A duty has been cast upon the High Court whenever a person detained in custody in the Province is brought before that Court to "satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner." This Constitutional duty cannot be discharged merely by saying that there is an order which says that he is being so detained. If the mere production of an order of detaining authority, declaring that he was satisfied, was to be held to be sufficient also to "satisfy" the Court then what would be the function that the Court was expected to perform in the discharge of this duty. Therefore it cannot be said that it would be unreasonable for the Court, in the proper exercise of its Constitutional duty to insist upon a disclosure of the materials upon which the authority had acted so that it should satisfy itself that the authority had not acted in an "unlawful manner". (Abdul Baqi Baloch v. Government of Pakistan PLD 1968 SC 313). (Emphasis provided).

(iv) High Court cannot claim in the exercise of writ jurisdiction to usurp the functions of the authority in which power has been vested nor to substitute their own decision for the decision of that authority. Nor can the Court insist on being satisfied that there were materials upon which it itself would have taken the same action. It is in this sense that it has been said that the Court is not concerned with either the adequacy or the sufficiency of the grounds upon which action is taken The Court in order to be satisfied as required by the Constitution must know that there were in fact grounds relatable to the purposes of the statute upon which the action of the authority concerned could at all have been founded after an honest application of the mind of the authority concerned to all the relevant considerations. The question however, that still remains to be considered is as to whether the reasonableness of the action can be examined when the statute itself does not require the authority to act upon reasonable grounds but leaves him to act upon his own subjective satisfaction. In view of the provisions of Article 199 of the Constitution that degree of reasonableness has at least to be established which has been indicated in the case of Abdul Baqi Baluch PLD 1968 SC 313. Otherwise if an authority could protect himself by merely saying that he believed himself to be acting in pursuance of a statute then what would be the material upon which the Court could say that it was satisfied that the detention or impugned action had not been taken in an unlawful manner. The presumption is that every imprisonment without trial and conviction is prima facie unlawful. (Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri PLD 1969 SC 14). (Emphasis provided)."

It was therefore observed in *Amatul Khawaja* that: "It can be concluded safely that satisfaction can only be based on some evidence or record justifying the detention order ….."

10. By order dated 24-07-2023 we had directed the Home Secretary to place before us the material upon which he was satisfied to issue the impugned detention orders. In response, the Additional Home Secretary filed a statement to enclose certain documents. None of those documents disclose anything against the detenues of C.P. No.s D-3433, 3434, 3435 and 3477/2023, namely Muhammad Afsar, Muhammad Arif, Muhammad Akram s/o Muhammad Ishaq and Muhammad Waqas. As regards the other detenues, the documents placed on the record are only letters dated 11-07-2023, 12-07-2023 and 13-07-2023 written by the SSP to the Additional IGP, and then forwarded by the latter to the Additional Home Secretary, stating that FIR No. 795/2023 was lodged against activists of MQM (London) for taking out an unlawful rally; that the detenues were affiliated with said political party; that "*these persons instigated public to block roads, highways and organize unlawful rally, which may disturb peace and tranquillity and can create serious law and order problems and such an act on his part will be highly prejudicial to the public safety and maintenance of public order. ….. It is therefore requested that Home Department, Government of Sindh may kindly be moved to issue orders of their detention under section 3 Maintenance of Public Order – 1960 for a period of 30 days.*"

11. Therefore, the impugned detention orders had been issued essentially to prevent a repetition of the offence alleged in FIR No. 795/2023 *viz.* the blocking of a public road by workers of MQM (London) by way of a political rally. There is not allegation of damage to public property or injury to any person during such rally, nor is that a ground in the detention orders. We do not for the present delve in to examine whether the blocking of a public road *per se* could be termed prejudicial to 'public order' within the meaning of Article 10(4) of the Constitution.[1] Having said that, no material whatsoever was placed before us to show how the Home Secretary satisfied himself that each detenu was in fact a worker of the stated political

[1] See *Arshad Ali Khan v. Government of the Punjab* (1994 SCMR 1532) for the distinction between 'public order' and 'law and order'.

party, that on 09-07-2023 each detenue was part of the alleged unlawful assembly, that they had committed similar offences in the past and might do so again, and that their detention was necessary to preserve 'public order'. The fact that some of the detenues had already been granted bail in the stated FIR, was also not considered. It is thus apparent, as also manifest in the detention orders themselves, that those were issued by the Home Secretary mechanically on the request of the police without independently exercising the faculty of 'satisfaction' required of section 3(1) of the MPO Ordinance.

12. The Additional Secretary Home had then submitted that there was another ground for detention which was sensitive and confidential, and one which was not in the public interest to disclose. But then, the detention orders had not claimed any privilege from disclosure of grounds of detention and that was never the case of the Respondents to begin with.

13. Having seen that the Home Secretary, Government of Sindh had no lawful authority to issue detention orders under section 3(1) of the MPO Ordinance, and also that the impugned detention orders were issued without fulfilling the requirement of 'satisfaction' under section 3(1) of the MPO Ordinance, we had allowed these petitions as mentioned first above.

JUDGE

JUDGE

Karachi:
Dated: 01-08-2023