

1THE HIGH COURT OF SINDH, KARACHI

Present:

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

- C.P. No. D - 3601/2023 : Akbar Ali son of Muhammad Ali versus Province of Sindh and others.
- C.P. No. D - 3603/2023 : Mst. Seema Waheed wife of Waheed Ahmed versus Province of Sindh and others.
- C.P. No. D - 3546/2023 : Madheer-ur-Rehman son of Khair Muhammad versus Province of Sindh and another.
- C.P. No. D - 3547/2023 : Muhammad Hashim son of Tayyab versus Province of Sindh and another.
- C.P. No. D - 3548/2023 : Noor Ullah Tareen son of Hameed Ullah versus Province of Sindh and another.
- C.P. No. D - 3549/2023 : Adil Shah son of Haji Mir Wali versus Province of Sindh and another.
- C.P. No. D - 3550/2023 : Yar Muhammad son of Jalat Khan versus Government of Sindh and another.
- C.P. No. D - 3551/2023 : Qismat son of Hukum Zar versus Province of Sindh and another.
- C.P. No. D - 3552/2023 : Muhammad Usman @ Saqib Angar versus Province of Sindh and another.
- C.P. No. D - 3553/2023 : Hikmat Ullah son of Noor Alam versus Province of Sindh and another.
- C.P. No. D - 3554/2023 : Barkatullah son of News Badshah versus Province of Sindh and another.
- C.P. No. D - 3555/2023 : Aziz Ullah son of Saeed Ullah versus Province of Sindh and another.
- For the Petitioners : M/s. Salahuddin Gandapur, Qadir Khan, Israr Ahmed, Muhammad Imran Meo, Syed Faisal Ali, Advocates.

For the Respondents : Mr. Mehran Khan, Assistant Advocate General Sindh alongwith Mr. Ali Asghar Mahar, Focal Person, Home Department, AIG Legal-II, Mushtaq Ahmed Abbasi, SSP Korangi, Mohammad Tariq Nawaz, DSP Legal Raza Mian, Inspector, Rashid Rind, SHO Zaman Town, Rao Rafique, SHO Khawaja Ajmair Nagri, Ameen Qureshi, SHO Sohrab Goth Muhammad Ishaq, all are present in Court.

Date of hearing : 31-07-2023

Date of order : 31-07-2023

JUDGMENT

Adnan Iqbal Chaudhry J. - The Petitioners in C.P. No. D-3601/2023 and C.P. No. D-3603/2023 are family members of detenuess held in preventive detention. The other Petitioners are detenuess themselves held in preventive detention and who have filed petitions through counsel.

2. 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 13-07-2023, 16-07-2023 and 17-07-2023 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. The aforesaid detention orders are in the backdrop where an FIR was lodged by the State against activists of MQM (London) for blocking a main road during a political rally, and an FIR was lodged against activists of Pashtoon Tahaffuz Movement (PTM) for organizing a political rally without a permit and obstructing the police in the performance of its duty. Learned counsel for the Petitioners in C.P. No. D-3601/2023 and C.P. No. D-3603/2023 submits that the detenues have been detained under the MPO Ordinance as activists of MQM (London) even though they were granted bail in the FIR. Whereas, learned counsel for the other Petitioners submits that they have been detained under the MPO Ordinance simply because they are activists of PTM even though they were not present at the alleged political rally.

4. 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: --

(i) When the alternate remedy is not equally efficacious in terms of speed and expense or cannot provide effective relief to the petitioner.

(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."

5. By orders dated 26-07-2023 and 27-07-2023 we had asked the learned AAG Sindh to place on record the material upon which the Home Secretary was 'satisfied' to issue the detention orders inasmuch as that is an essential requirement of section 3(1) of the MPO Ordinance. However, today, apart from the comments of police officers that the detention orders were issued in the backdrop of the aforesaid FIRs, the only material placed before us by the office of the Home Secretary is a letter received from the Additional IGP seeking preventive detention of the detenues for the reason set-out in the detention orders.

6. Nevertheless, 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 asked the learned AAG Sindh 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. The AAG Sindh relied on 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.¹ The AAG Sindh 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.

¹ This decision and notification had been placed on record by the AAG Sindh in another set of similar petitions.

7. 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, these petitions are allowed. The impugned notices issued under the MPO Ordinance are declared without lawful authority and are set-aside. The detainees who are listed below shall be released forthwith if not required in any other case.

Serial	Case No.	Name of Detenue
1.	C.P. No. D - 3601 of 2023	Zeeshan @ Sabir son of Akbar Ali
2.	C.P. No. D - 3603 of 2023	Waheed Ahmed @ Chairman son of Abdul Zamir
3.	C.P. No. D - 3546 of 2023	Madeer-ur-Rehman son of Khair Muhammad
4.	C.P. No. D - 3547 of 2023	Muhammad Hashim son of Tayyab
5.	C.P. No. D - 3548 of 2023	Noor Ullah Tareen son of Hameed Ullah
6.	C.P. No. D - 3549 of 2023	Adil Shah son of Haji Mir Wali
7.	C.P. No. D - 3550 of 2023	Yaar Muhammad son of Jalat Khan
8.	C.P. No. D - 3551 of 2023	Qismat son of Hukum Zar
9.	C.P. No. D - 3552 of 2023	Muhammad Usman alias Saqib Angar son of Dost Muhammad
10.	C.P. No. D - 3553 of 2023	Hikmat Ullah son of Noor Alam
11.	C.P. No. D - 3554 of 2023	Bakht Ullah son of News Badshah
12.	C.P. No. D - 3555 of 2023	Azizullah son of Saeed Ullah

A copy of this order shall also be emailed to the A.G. Sindh, Home Secretary and IGP Sindh for submitting compliance.

Office is directed to place a copy of this order in the all petitions listed above.

JUDGE

JUDGE

Karachi:

Dated: 31-07-2023