
(2015) 12 GUJ CK 0004
In the Gujarat High Court
Case No : Special Civil Application No. 19562 of 2015

Afsarkhan

APPELLANT

Vs

Commissioner of Police and Others

RESPONDENT

Date of Decision : 10-12-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 110
Gujarat Prevention of Anti-social Activities Act, 1985 — Section 2[c], 3[2]
Penal Code, 1860 (IPC) — Section 114, 379

Citation : (2015) 12 GUJ CK 0004

Hon'ble Judges : S.G. Shah, J.

Bench : Single Bench

Advocate : Hemant B. Raval, Advocate, for the Appellant

Final Decision : Allowed

Judgement

S.G. Shah, J.—This petition is directed against the order of detention dated 07/11/2015 passed by respondent No. 1, in exercise of powers conferred under section 3[2] of the Gujarat Prevention of Anti Social Activities Act, 1985 [for short "the Act"] by detaining the detainee as a "dangerous person" as defined under section 2[c] of the Act.

2. Learned advocate for the detainee submits that the order of detention impugned in this petition deserves to be quashed and set aside and the ground that the registration of three offences by themselves cannot bring the case of the detainee within the purview of definition of "dangerous person" under Section 2[c] of the Act. Learned counsel for the detainee further submits that the illegal activity carried out as alleged, cannot have any nexus or bearing with the maintenance of the public order and at the most it can be said to be breach of law and order. Further, except statements of witnesses and registration of FIRs, no other relevant or cogent material is available on record connecting the alleged anti-social activities of the detainee with breach of the public order.

3. Learned counsel for the detainee, placing reliance on the decisions reported in

the cases of [i] Ranubhai Bhikhabhai Bharwad (Vekaria) Vs. State of Gujarat, [ii] Ashokbhai Jivraj @ Jivabhai Solanki Vs. Police Commissioner, and [iii] Mustakmiya Jabbarmiya Shaikh Vs. M.M. Mehta, Commissioner of Police and Others, , submitted that the case on hand is squarely covered by the ratio laid down in the aforesaid decisions. Learned counsel for the detainee further submits that it is not possible to hold in the facts of the present case that the activities of the detainee with reference to the criminal cases had affected even tempo of the society, posing a threat to the very existence of the normal and routine life of the people at large or that on the basis of the criminal cases, the detainee had put the entire social apparatus in disorder, making it difficult for whole system to exist as a system governed by the rule of law by disturbing the public order.

4. Learned AGP for the respondent - State supported the detention order passed by the authority and submitted that the detainee is a dangerous person and sufficient material and evidence was found during the course of investigation, which was also supplied to the detainee, indicating that the detainee is in habit of indulging into activities as defined under Section 2[c] of the Act and considering the facts of the case, the detaining authority has rightly passed the order of detention and the detention order deserves to be upheld by this Court.

5. Having heard the learned counsel for the parties and considering the facts and circumstances of the case, it appears that the subjective satisfaction arrived at by the detaining authority cannot be said to be legal, valid and in accordance with law inasmuch as the offences alleged in the FIRs cannot have any bearing on the public order since the law of the land i.e. Indian Penal Code and other relevant penal laws are sufficient enough to take care of the situation and that the allegations as have been levelled against the detainee cannot be said to be germane for the purpose of bringing the detainee as a dangerous person within the meaning of section 2[c] of the Act and, unless and until the material is there to make out a case that the person concerned has become a threat and a menace to the society so as to disturb the whole tempo of the society and that the whole social apparatus is in peril disturbing public order at the instance of such person, it cannot be said that the detainee is a dangerous person within the meaning of Section 2[c] of the Act. Except general statement, there is no material on record which shows that the detainee is acting in such a manner which is dangerous to the public order. In view of the ratio laid down by the Hon"ble Supreme Court in the cases of [i] Ranubhai Bhikhabhai Bharwad [supra], [ii] Ashokbhai Jivraj @ Jivabhai Solanki [supra] and [iii] Mustakmiya Jabbarmiya Shaikh [supra], the Court is of the opinion that the activities of the detainee cannot be said to be dangerous to the maintenance of public order and at the most fall under the maintenance of "law and order". Further, there are serious allegations against the petitioner. On perusal of the jail record it seems that police has not taken proper care in investigating offences and petitioner was arrested only on presumption and therefore I to not see any reason to detain the petitioner by confirming the detention order. However, it is made clear that this order will not influence the trial in any manner.

6. In view of the above, I am inclined to allow this petition because simplicitor registration of FIRs by itself cannot have any nexus with the breach of maintenance of public order and the authority can take recourse under the Indian Penal Code and no other relevant or cogent material exists for invoking powers under Section 3[2] of the Act.

7. If we peruse the citations, it becomes clear that even the Hon"ble Supreme Court has considered that detention is not permitted even in the case of robbery and theft. The present is the case of Sections 379 and 114 of the Indian Penal Code. Moreover, the competent authority has assigned such a reason that since they are unable to take action under sections 107 and 110 of the Criminal Procedure Code [Cr. P.C.], they are detaining the detenue. Unfortunately and surprisingly the authority has disclosed in the impugned order that they do not believe in taking action under sections 107 and 110 of the Cr. P.C. and instead of following such rule of law, they selected to pass an order of detention. Therefore, the Court has no option but to allow the petition.

8. It is generally seen that though some of the accused are repeatedly detained on different occasions for different offences, only because of nondisclosure of proper information and in all such detention orders, such orders are generally quashed and set aside by the Court. It is also seen that because of quashing of previous detention order, competent authority could not consider the grounds of detention under such order which is already quashed as a ground for detention for subsequent offences by the same detenue. However, when competent authorities are not abiding all other cited cases while passing the order of detention based upon three offences, it is surprising to note that at no point of time they challenged the observation of any Court that when previous order of detention has been quashed, it cannot be considered in subsequent detention. It goes without saying that if a particular detenue continuous to commit the similar offence repeatedly, and if he is required to be detained repeatedly then at least at some point of time, the competent authority shall compile all the information and shall consider it for fresh detention order as and when necessary and shall produce all such information before the Court so as to avoid the quashing of such detention order. If competent authority fails to take care of such exercise and when in impugned order of detention all such facts were not disclosed or considered for passing such order, the detention order is required to be dealt with as it is without considering the additional disclosure in affidavit-in-reply by the respondents.

8.1 In the present case, it seems that petitioner has been detained several times but at present, the detention order under challenge does not disclose all such facts so as to enable the petitioner to properly represent his case. Hence, there is no option but to consider that present order of detention is solely based upon a three offence. Therefore, considering the settled legal position that no person can be detained for a three offences.

8.2 In view of above facts and circumstances, it would be necessary to observe

that the competent authority is not precluded to disclose all material facts while detaining the petitioner if so require for any offence that he might commit hereinafter. In other words, though impugned order is quashed and set aside at present, it would not come in way of the competent authority for quoting such FIR and order of detention, thereby to treat petitioner as a habitual offender in case of commission of offence repeatedly.

8.3 No doubt, neither the possibility of launching of a criminal proceedings nor pendency of any criminal proceedings is an absolute bar to an order of preventive detention. But, failure of the detaining authority to consider the possibility of either launching or pendency of criminal proceedings may, in the circumstances of a case, lead to the conclusions that the detaining authority has not applied its mind to the vital question whether it was necessary to make an order of preventive detention. Since there is an allegation that the order of detention is issued in a mechanical manner without keeping in mind whether it was necessary to make such an order when an ordinary criminal proceedings could well serve the purpose. The detaining authority must satisfy the court that the question too was borne in mind before the order of detention was made. In the case on hand, the detaining authority failed to satisfy the court that the detaining authority so bore the question in mind and, therefore, the court is justified in drawing the inference that there was no application of mind by detaining authority to the vital question whether it was necessary to preventively detain the detainee. It is also fruitful to refer to the decision of the Hon'ble Apex Court rendered in the case of Rekha Vs. State of T. Nadu tr. Sec. to Govt. and Another, wherein, it is observed by the Hon'ble Apex Court that if a person is liable to be tried, or is actually being tried for a criminal offence but the ordinary criminal law will not be able to deal with the situation, then and only then, preventive detention be taken recourse to.

9. The petitioner has argues on merits of FIRs, referring certain judgments. However, discussion of such facts, prima facie at this stage, is not warranted since it may otherwise prejudice to the trial.

10. However, since all such orders are quashed on technical ground, the same shall not come in the way of the Detaining Authority to pass an appropriate order in future.

11. In the result, the petition is allowed. The order of detention dated 11/02/2014 passed by the respondent No. 2 is quashed and set aside. The detainee is ordered to be set at liberty forthwith if not required in connection with any other case. Rule is made absolute accordingly. Direct service permitted.