

(2013) 10 GUJ CK 0186

In the Gujarat High Court

Case No : Special Civil Application No. 14064 of 2013

Akhter Husen @ Akhterbhaji

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 25-10-2013

Acts Referred:

Citation : (2013) 10 GUJ CK 0186

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

Bench : Single Bench

Advocate : S.S. Saiyed, for the Petitioners No. 1, for the Appellant; Moksha Thakkar, Asst. Government Pleader for the Respondent(s) No. 1, for the Respondent

Final Decision : Dismissed

Judgement

S.G. Shah, J.—Rule. Learned AGP Ms. Moksha Thakkar, who waives service of notice of rule for the respondent - State on merits. The petitioner has filed this petition praying to quash the proposed order of detention taking all the grounds on merits of such order of detention even in absence of grounds of detention. The sum and substance of the petition is to the effect that petitioner apprehends his detention because of some pending criminal cases against him for which FIR is filed against him or he apprehends detention because of similar order against co-accused with him in FIR which is pending investigation. Therefore, petitioner has taken several grounds in petition challenging the subjective satisfaction of the detaining authority and arguing that for such reason i.e. only because of pendency of some FIR, the detaining authority cannot pass order of detention. Thereby, practically, this petition is filed under apprehension and even without knowing the real reason, cause and grounds for detention. In support of his case, petitioner has relied upon several decisions of this Court as well as Apex Court where order of detention were quashed and set-aside. However, all such decisions are after considering the actual order of detention and in some cases it was quashed mainly because of technicality and in some cases in absence of

proper evidence, Court has come to the conclusion that there was no subjective satisfaction or that there was no application of mind by the competent authority to arrive at such subjective satisfaction. However, in the present case, in absence of actual order of detention, there cannot be scrutiny and determination about the validity, legality and thereby consideration of subjective satisfaction by the competent authority.

2. Such issue i.e. right of the persons to challenge the proposed order of detention and jurisdiction of the Court to grant appropriate relief in such type of petitions, which are more particularly described as pre-detention petitions, has been considered by this Court as well as Hon"ble the Apex Court in several reported cases. Since there was some difference of opinion and thereby different decisions by the Apex Court in different cases, all such matters are being dragged since long, considering the pending decision in the case of Subhash Popatlal Dave vs. State of Maharashtra in Writ Petition (Criminal) No. 137 of 2011 by the Apex Court. For consideration of such latest judgment and the issue, the following cases were scrutinized:-

- 1) Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another,
- 2) Sunil Fulchand Shah Vs. Union of India and Others,
- 3) Sayed Taher Bawamiya Vs. Joint Secretary to the Govt. of India and Others,
- 4) Hare Ram Pandey Vs. State of Bihar and Others,
- 5) Union of India (UOI) Vs. Amrit Lal Manchanda and Another,
- 6) Union of India (UOI) and Others Vs. Vidya Bagaria,
- 7) Union of India (UOI) and Others Vs. Atam Parkash and Another,
- 8) Union of India and Others Vs. Parasmal Rampuria,
- 9) Khudiram Das Vs. The State of West Bengal and Others,
- 10) State of Tamil Nadu Vs. P.K. Shamsudeen,
- 11) Navalshankar Ishwarlal Dave and another Vs. State of Gujarat and others,
- 12) Union of India (UOI) and Others Vs. Muneesh Suneja,
- 13) Union of India (UOI) Vs. Amrit Lal Manchanda and Another, Hare Ram Pandey Vs. State of Bihar and Others,
- 14) Union of India (UOI) and Another Vs. Shrimati Chaya Ghoshal and Another,
- 15) Naresh Kumar Goyal Vs. Union of India (UOI) and Others,
- 16) Rajinder Arora Vs. Union of India (UOI) and Others,
- 17) Alpesh Navinchandra Shah Vs. State of Maharashtra and Others,

18) State of Maharashtra and Others Vs. Bhaurao Punjabrao Gawande,
19) Deepak Bajaj Vs. State of Maharashtra and Another,
20) Dropti Devi and Another Vs. Union of India (UOI) and Others,
1993 (2) GLH (UJ) 27 in Dahyabhai Ratnabhai Sojitra Vs. District Magistrate,
Rajkot & Ors. and 2006 (1) GLH 28;

3. The common impression and argument at bar that in the judgment under reference, Hon"ble Mr. Justice Altamas Kabir, CJI (as he then was) has held that litigants have absolute right to challenge the proposed order of detention at pre-detention stage and the Court has to allow such application irrespective of restrictions laid down by the another three Judges Bench of the Apex Court in the case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, is not correct.

4. In my opinion, though decision in Sayed Taher Bawamiya (supra) is not followed in order dated 10.7.2012, it is mainly due to specific factual details in Sayed case where in 16 years had lapsed and when in operative portion of order dated 10.7.2012 in Subhash Popatlal Dave's case (supra) directs to club all such cases for further hearing, in following words, the discussion on Sayed's case in the order dated 10.7.2012 Subhash Popatlal Dave's case (supra) is not material and it does not overruled the decision in Sayed's case.

30. In the light of the above, let the various Special Leave Petitions and the Writ Petitions be listed for final hearing and disposal on 7th August, 2012 at 3.00 p.m. This Bench be reconstituted on the said date, for the aforesaid purpose.

5. It cannot be ignored that case of Subhash Popatlal Dave (supra) is decided by the Bench of three Hon"ble Judges of the Supreme Court. When judgment of Alka Subhash Gadia is also by the Bench of three Judges and when again another Bench of three Judges have confirmed the judgment of Alka Subhash Gadia (which fact can be ascertained from paragraph 11 of judgment Subhash Popatlal Dave's case (supra) wherein the entire paragraph 30 of Alka Subhash Gadia has been reproduced), now such order cannot be reversed or modified or overruled by equal or similar Bench, it can be done only by a higher Bench of the Apex Court. It is also clear that in the Judgment dated 16.7.2013 in Subhash Popatlal Dave's case (supra), majority - two Judges have not approved the view express by the Hon"ble third Judge and hence and though all Judges are agreed to extend the scope of scrutiny restricted by Alka Gadia's case, that case is neither overruled nor reversed.

6. Thus to summarize the total outcome of the Judgment dated 16.7.2013 in the case of Subhash Popatlal Dave (supra), it can be said that:-

(1) No petitions can be entertained to quash the proposed order of detention without it being served upon the detenu and without considering the grounds on which he is detained, since subjective satisfaction can be considered only after

order of detention has been served, thereafter petitioner is permitted to submit his grievance against such order and it is scrutinized by the Court.

(2) Petitioners are not entitled to argue or allege that there is no link or nexus between the order of detention and the actual detention at any later date when they have evaded the execution of detention order on any ground like abscondment or protection by the Court's order.

(3) The subjective satisfaction of the detaining authority is to be considered as on date of the detention order and not on the date of its scrutiny and, therefore, material or fact after the date of order of detention, which may include absence of further illegal and nefarious activities subsequent to the order of detention, cannot be the ground for quashing the order of detention.

7. In some of the petitions, prayer by the petitioner, to call upon the detaining authority to produce and disclose the order of detention or ground of detention before the Court for its scrutiny, may require consideration at this stage before arriving at any specific conclusion.

8. For the purpose the order dated 10.7.2012 in the case of Subhash Popatlal Dave i.e. in Writ Petition (Criminal) No. 137 of 2011, reported in Subhash Popatlal Dave Vs. Union of India (UOI) and Another, is relevant, wherein while clubbing all other matters of similar nature together for consolidated one judgment, which is delivered on 16.7.2013 when Apex Court had while dealing with some of the matters only, held; after referring to Right to Information Act, 2005; that application to provide ground of detention to the detenu does not arise prior to arrest of detenu despite provision of Right to Information Act, 2005. To hold so, the same Bench of the Supreme Court has considered the provisions of Clause (5) of Article 22 which confirms that what is to be communicated to the detenu when he is actually detained i.e. grounds of detention, making it clear that Section 8 of the Right to Information Act makes an exception from disclosure of such information. It is made clear that grounds for detention are to be served on detenu after his detention, and provisions of RTI Act cannot be applied to case of preventive detention at the pre-execution stage. Therefore, though petitioners have not prayed for production of detention order or its grounds under the RTI Act, since in some petitions petitioner's have prayed for direction to the detaining authority to disclose and produce the copy of detention order and grounds for detention even prior to actual detention, in such pre-detention petition, I am of the clear opinion that unless such order is under challenge for specific exception as carved out in the case of Alka Subhash Gadia or any other pronouncement, statutory or judicial, there is no reason to ask the detaining authority to disclose the information which could be prejudice to the interest of the Society at large and the Nation. Even if it is argued that reason and ground of detention of a particular person may not affect the law and order, public order or security of the Nation, it would certainly affect the right of the State irrespective of activities which of petitioner will result into nullifying the provision of PASA Act. The fact remains that such act has never been declared

unconstitutional and that preventive detention is otherwise permissible under the Constitution and under the common law.

9. Even if we consider both the order dated 10.7.2012 [reported in Subhash Popatlal Dave Vs. Union of India (UOI) and Another, and judgment dated 16.7.2013, in the case of Subhash Popatlal Dave [Writ Petition (Criminal) No. 137 of 2011], one thing is clear that the Apex Court has specifically disclosed that matter requires further examination for consideration of limited issue that whether challenge of preventive order at pre-execution stage is permissible on grounds other than those mentioned in the Alka Subhash Gadia's case. However, in the order dated 10.7.2012 itself, the same Bench has specifically rejected the right of a detenu to get the grounds of detention prior to his arrest. To that extent, contention of learned advocate Mr. Rohatgi was rejected by all Judges, which can be confirmed in paragraph 29 of such judgment. Whereas paragraph 23 confirms that Court agrees with the learned A.S.G. Mr. P.P. Malhotra that the State is not under any obligation to provide the grounds of detention to detenu prior to his arrest and detention irrespective of judgment in Choith Nanikram Harchandai (Writ Petition (Crl) No. 88 of 2010) and Suresh Hotwani and Ors. (Writ Petition (Crl) No. 35 of 2011). This aspect is material because K.K. Kochunni's case Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others, was finally decided by this judgment, dismissing his petition at pre-execution stage. While confirming such stand, the Apex Court has categorically observed that the provision of the Constitution will prevail over any enactment of the legislature and that Clause 5 of Article 22 of the Constitution specifically provides that grounds for detention are to be served on the detenu after his detention.

10. Therefore, the question of allowing the prayers to direct the respondent to produce the order of detention with grounds of detention for scrutinization and examination by the Court at pre-execution stage does not arise, though there may be some such decisions or practice followed by Division Bench of this Court, when there is clear and direct decision of the Apex Court on same issue.

11. Therefore, even if we entertain the petition at pre-execution stage against the order of detention well before its service and arrest of the petitioner, practically the petitioner has to specifically disclose that on which ground he wants to challenge such order, except the ground of subjective satisfaction by the competent authority, which can be considered only after scrutinizing of the order of detention, but as discussed herein above, since such order cannot be asked to produce in a petition of present nature i.e. at pre-execution stage, since such order may not be finalized till its actual issuance and execution and, therefore, in absence of specific grounds raised by the petitioner, so as to prove that even otherwise there is no reason for passing the order of detention against the petitioner, the application at pre-execution stage cannot be entertained. Therefore, even if petitioner is entitled to file application for the grounds other than the grounds listed in the Alka Subash Gadia's case, in absence of any other

such ground which may be relevant for consideration before actual execution of order of detention, the proposed detention order cannot be quashed without being executed or even before confirming its existence. Needless to say that permitting such petition and allowing such prayer would result in to anticipatory order to prevent detention, which is not permissible in law, in as much as for the reason that if it is allowed then each and every culprit may file a petition well in advance like an application for anticipatory bail so as to confirm that there may not be an order of his detention, even if there is sufficient grounds to detain him. The outcome of the latest judgment in Subhash Popatlal Dave (supra) only confirms that some grounds may not be exhaustive, but in any case, in absence of details of order of detention, its validity cannot be challenged and it cannot be said that it is illegal or perverse and needs to be quashed, even before its existence.

12. In Union of India (UOI) and Another Vs. Shrimati Chaya Ghoshal and Another, the Apex Court has while dealing with the Law relating to Preventive Detention observed and held as under:

8. Before dealing with rival submissions, it would be appropriate to deal with the purpose and intent of preventive detention. Preventive detention is an anticipatory measure and does not relate to an offence, while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the Executive is convinced that such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects which are specified by the concerned law. The action of Executive in detaining a person being only precautionary, normally the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct in an exhaustive manner, the failure to conform to which should lead to detention. The satisfaction of the Detaining Authority, therefore, is considered to be of primary importance, with great latitude in the exercise of its discretion. The Detaining Authority may act on any material and on any information that it may have before it. Such material and information may merely afford basis for a sufficiently strong suspicion to take action, but may not satisfy the tests of legal proof on which alone a conviction for offence will be tenable. The compulsions of the primordial need to maintain order in society without which the enjoyment of all rights, including the right to personal liberty of citizens would loose all their meanings provide the justification for the laws of preventive detention. Laws that provide for preventive detention posit that an individual's conduct prejudicial to the maintenance of public order or to the security of State or corroding financial base provides grounds for satisfaction for a reasonable prognostication of possible future manifestations of similar propensities on the part of the offender.

The above judgment has been confirmed by the Bench of three Judges of the Apex Court reported in State of Tamil Nadu and Another Vs. R. Sasikumar, in the

case of State of T.N. & Anr. Vs. R. Sasikumar.

13. Learned advocate for the petitioner has submitted that this petition is not filed as pre-execution petition before detention order is executed but before any order of detention is confirmed and issued by the competent authority. Thereby, it is his submission that this cannot be treated and cannot be dismissed as non-maintainable, considering it as pre-detention petition. He has relied upon the judgment and order dated 04.07.2012 in Special Civil Application No. 2396 of 2012, wherein detention order on similar ground was quashed and set aside by this Court. However, such detention order was already executed. It is submitted by the learned advocate for the petitioner that petitioner is not a cruel person and there is no reason for detention and Article 21 confirms that no person can be detained without following due process of law. He has emphasized on para 46 of the judgment and order dated 19.08.2013 in Special Civil Application No. 8955 of 2013 between Brijesh Chauhan vs. State of Gujarat, wherein even this Court has considered this aspect that no person can be detained without any reason. It is also argued that when all petitions are allowed by quashing the detention order, there is no reason to ask the petitioner to first surrender to detaining authority and then to pray or quashing and setting aside the detention order, which is otherwise improper and going to quash and set aside. Suffice to say that terminology of pre-detention or pre-execution is only for nomenclature of similar type of litigations otherwise there is nothing in law which classify or identify the litigation in such manner. Moreover, when petition is filed solitary based upon the apprehension of order of detention for the reasons assigned herein, such contention cannot be allowed in terms as prayed for which simply states that petitioner shall not be detained with reference to particular FIR. It goes without saying that detention may not go because of FIR but based upon subjective satisfaction of competent authority regarding activities of such person and as disclosed herein above such subjective satisfaction cannot be scrutinized and cannot be decided as illegal well in advance without service of such order of detention.

14. Learned advocate for the petitioner has submitted that petitioner has argued that there is delay in passing order of detention in as much as order of detention with reference to FIR dated 20.06.2013 has been revoked. However, petitioner apprehends that he may be detained out due to another but previous FIR dated 10.02.2012. It is suffice to note that when there is more then one FIR against the petitioner, it cannot be said that he is innocent and therefore prayer in such petition cannot be allowed as prayed for.

15. In view of above legal position, it would not be necessary to deal with all the issues raised in the petition, which are mainly with reference to the pending FIR/s and investigation, since at present we are not certain that order of detention, if any is under consideration, is solely based upon such facts only. Therefore, I do not think it proper to discuss all such points.

16. The residual plea about the desirability to continue the proposed order of

detention of petitioner and whether there is any live link between the alleged act/s which formed the foundation for detention is a matter for the Detaining Authority to decide. Let a decision in this regard be taken by the Detaining Authority considering the settled legal position that emerges from several decisions on the subject which includes observations by the Apex Court in the cases of Golam Hussain alias Gama Vs. The Commissioner of Police Calcutta and Others, Anil Dey Vs. State of West Bengal,

17. Since there is no interim relief in favour of the petitioner, petitioner is pressing either to grant interim relief or to allow this petition and for the purpose, petitioner has argued that he apprehends his detention only because his name is connected with the investigation of pending FIR, wherein, either his name is disclosed in FIR itself or it has been cropped-up during investigation and thereby chargesheet is filed against him. It is also contended that petitioner has been released on bail for such alleged offence and there are no other antecedents for which petitioner can be detained. However, as discussed herein above, in absence of particular facts of detention order, it cannot be presumed or ascertained that pending or proposed order of detention is based only upon such information. At the same time, it would be appropriate to observe that the detaining authority shall be vigilant and careful in passing any such order of detention, which is based upon such trivial facts only. It should be remembered by the detaining authority that any such order may not only deserve to be quashed and set-aside, but may give rise in appropriate case to pass appropriate orders awarding compensation and taking action against erring officers.

18. Thereby, the detaining authority is free to pass appropriate order of detention based upon appropriate subjective satisfaction. Hence, petition is dismissed. Rule is discharged.