

(2014) 07 GUJ CK 0029

In the Gujarat High Court

Case No : Special Civil Application No. 4002 of 2014

Bharatbhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 15-07-2014

Acts Referred:

Arms Act, 1959 — Section 25[1][b], 29
Constitution of India, 1950 — Article 14, 22[5]
Criminal Procedure Code, 1973 (CrPC) — Section 437[5]
Gujarat Prevention of Anti-social Activities Act, 1985 — Section 2(c), 2[c], 3

Citation : (2014) 07 GUJ CK 0029

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

Bench : Single Bench

Advocate : Pratik Y. Jasani, Advocate for the Appellant; Parth Bhatt, AGP, Advocate for the Respondent

Judgement

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S.G. Shah, J.—The petitioner has challenged his order of detention dated 31/12/2013 being PCB/DTN/PASA/370/2013, which is produced at

Annexure-A.

2. The sum and substance of the petition is to the effect that the detaining authority has failed to substantiate that the alleged antisocial activity of the petitioner has adversely affected or are likely to affect the maintenance of "public order". It is further submitted that the petitioner does not at all fall within the definition of "dangerous person" and, therefore, he cannot be preventively detained under the provisions of the Gujarat Prevention of Anti Social Activities Act [hereinafter referred to as "the Act"], unless his activities are likely to affect the maintenance of "public order". For such submission, the petitioner is relying upon the provision of section 3 of the Act.

2.1 It is further submitted that since there was no contemporary material with

the detaining authority to indicate that the public order is disturbed in any manner and, therefore, detaining authority has erred in passing the order of detention.

2.2 It is further submitted that there is no material to indicate as to where the incident alleged in the order of detention had actually occurred or not.

2.3 It is further submitted that based upon the material available with the detaining authority, it cannot be said that there is subjective satisfaction of the detaining authority so as to pass impugned order of detention.

2.4 It is further submitted that till offence is registered against the petitioner is under investigation, no such order can be passed by surpassing the provisions of the Gujarat Police Act.

2.5 It is further submitted that when the petitioner is released on bail by the competent Court for the alleged offence, if at all detaining authority is of the opinion that the petitioner should not be released, they should have preferred an application for cancellation of bail under section 437[5] of the Criminal Procedure Code. But order of detention is unwarranted since it results into drastic order of detaining the petitioner without trial and without provision of bail once detained.

2.6 It is further submitted that the order of detention is passed without application of mind and that the petitioner has been falsely implicated in all criminal cases, which are registered against him and considered for detention.

2.7 It is further submitted that there is no material to indicate the involvement of the petitioner and that he is falsely implicated on the basis of suspicion. It is further submitted that the statement of anonymous witnesses cannot be relied upon and it creates suspicion that how the detaining authority has subjectively satisfied that the petitioner is dangerous person and harmful to the society at large when there is no such material and evidence available before the detaining authority.

2.8 It is further submitted that there is delay of 36 days in issuance of impugned order after last FIR and there is no explanation for such delay since there is no material on record and, therefore, when the petitioner can be dealt with under ordinary law, there is no question to detain the petitioner.

2.9 It is also submitted that all relevant material was not placed before the detaining authority and if the same is not supplied to the petitioner, the petitioner cannot submit his representation and that order of detention is stereotyped and without considering the facts and circumstances.

2.10 It is also submitted that the papers supplied with the detention order are not sufficient, proper and in violation of Article 22[5] of the Constitution of India and that the grounds of detention are vague, ambiguous and non-existence as well as misconceived and, therefore, it is prayed that the order of detention is illegal, null and void and requires to be quashed and set aside.

3. On perusal of the impugned order of detention, it becomes evident that the detaining authority has relied upon at-least two complaints registered against the petitioner for terming him as a "dangerous person". Both such FIRs are under the provisions of sections 25[1][b] and 29 of the Arms Act. First such FIR is registered with Gandhigram Police Station of Rajkot city being II C.R. No. 10/2013 on 31/1/2013 when two country made pistols, four live cartridges and two blank magazines were found from the co-accused with the petitioner, which were sold to him by the petitioner. During investigation, police has found that the petitioner was involved in some other offence also and he has sold such ammunition, as described hereinabove. During investigation, the petitioner has remained absconded for 9 months and, therefore, so far as delay in investigation is concerned, the petitioner cannot take advantage of his abscondment claiming that there is delay on the part of the detaining authority to take immediate steps. This was not the only incident to term the petitioner as a dangerous person.

4. In another FIR before Padadhari Police Station of Rajkot Rural being C.R. No. 3094/2013 dated 25/11/2013 it is disclosed that when investigating agency was searching for the petitioner for last couple of months; because of his involvement in the first FIR, details of which are recorded hereinabove, on 25/11/2013 when investigating agency was able to trace out the petitioner and when he was caught, he was found with 18 live cartridges of 12" bore amongst which 8 are of special company, whereas 10 are of Shaktiman company. It is clear and certain that the petitioner does not hold licence for dealing with such arms and ammunition and therefore, when the petitioner was found with 18 live cartridges of different brands, it becomes obvious that such ammunition is for selling or passing on to the persons who are holding weapons, may be without licence. In such second FIR, 18 live cartridges were found from the pocket of the petitioner i.e. from his personal custody and when such live cartridges were recovered, the police has further investigated the case for possibility of other weapons and during the process, the petitioner has shown the house of another co-accused, namely Firojkhan Alikhan Malik, to whom he has sold other country made pistols. During search at the house of said Firojkhan in presence of the present petitioner, one loaded country made Tamancha was recovered with cartridges of 65 mm.

5. On scrutiny the documents provided to the petitioner with the order of detention pertaining to investigation of both these FIRs makes it clear that the petitioner is dealing with the arms and ammunition and sold in all three country made pistols to two different persons with live cartridges. It is known fact that such country made weapons are being used for illegal activities in the areas like committing murder, dacoity, extortion, etc. If such dacoity and extortion is from third person from whom the petitioner or persons procured arms and ammunition, does not have any relation of any kind and during such activity and if there is a murder of any third person, then such activity cannot be treated or considered as simple law and order problem, but it can certainly be termed as

disturbance of public order.

6. With such details, if we peruse the impugned order of detention, it becomes clear that the detaining authority has explained all such relevant material in the impugned order so as to term the petitioner as dangerous person under section 2[c] of the Act. Considering the provisions of the Act, when the petitioner is involved in two different crimes/offences and when in both offences, the petitioner has dealt with the arms and ammunition, it can certainly be said that there is not only law and order problem but disturbance of public order if such person is not detained and allowed to move freely in the area. It cannot be ignored that the incident of killing by fire arms as well as dacoity with the help of fire arms, etc., has been increased and, therefore, also it cannot be said that dealing in the fire arms without using it cannot be considered to treat the petitioner as a dangerous person.

7. It is not disputed fact that the Act is not held ultra-vires by the competent Court and that the Act allows the competent authority to pass impugned order based upon their "subjective satisfaction". Terminology of "subjective satisfaction" is wide enough and gives ample jurisdiction and power to the competent authority to pass appropriate order in appropriate case. It is settled legal position that in absence of specific clarity that subjective satisfaction is otherwise unjust, illegal, arbitrary or perverse, the Courts should not enter into the scrutiny of the reason for subjective satisfaction and thereby the Court should not try to over-administer the power and jurisdiction of the competent authority, though it is true that the Court can interfere and thereby quash and set aside such an order if it is passed without proper application of mind and in absence of evidence and material which are otherwise necessary for passing such order. However, in the present case, considering the discussion hereinabove, when it is clear that the petitioner is involved in two cases and in both the cases when he has dealt with arms and ammunition and sold them in the State, in my opinion, it cannot be said that the competent authority has passed such an order arbitrarily or that such order is not in accordance with the law or perverse. So far as the justification for subjective satisfaction is concerned, as stated earlier, it is settled legal position that the reasons for justification regarding subjective satisfaction are not subject to scrutiny except it is without evidence on record, whereas in the present case, it cannot be said that there is no material or evidence before the competent authority to pass order of detention against a person, who is dealing in the arms and ammunition and selling it to different persons in the State. Therefore, if such person is not detained and thereby allowed to continue his activities, he would certainly bring other arms and ammunition from some unknown source within the State and district and if he sells such arms and ammunition to different persons, then there would be more issues of public order including law and order and, therefore, such a person is certainly required to be restrained from continuing such activities and for the purpose, order of detention is the only option.

8. If we peruse several judgments of this Court and Hon'ble Supreme Court, it becomes clear that generally Courts are lenient in quashing and setting aside order of detention and it may be quashed and set aside on any small ground viz. non-supply of material documents, non-supply of translated documents, absence of material to consider the person under particular definition, may be because of personal dispute between the parties or only few number of cases, etc. However, none of the judgments confirm that even if there is material to arrive at subjective satisfaction to detain a person, the order of detention cannot be passed. In other words, if subjective satisfaction is based upon the available material on record, the detention order cannot be quashed.

9. As discussed hereinabove, in the present case, the competent authority has relied upon the factual details regarding possession and sale of arms and ammunition by the petitioner and, therefore, it can never be said that there is any mistake, arbitrariness or perverseness in considering the petitioner as a dangerous person.

10. Learned advocate for the detenu submits that the order of detention impugned in this petition deserves to be quashed and set aside on the ground that the registration of two offences by themselves cannot bring the case of the detenu within the purview of definition of "dangerous person" under Section 2(c) of the Act. Learned counsel for the detenu 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 FIR/s, no other relevant or cogent material is available on record connecting the alleged anti-social activities of the detenu with breach of the public order.

11. Learned counsel for the detenu, 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 detenu further submits that it is not possible to hold in the facts of the present case that the activities of the detenu with reference to the criminal case/s 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 case/s, the detenu 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.

12. The reported cases cannot be equated with the facts of the present case, wherein the petitioner is involved under the Arms Act. It can never be said that carrying on arms and ammunition in public and selling them would not disturb the public order and would not affect the tempo of the society. It cannot be ignored that now a days in this State also use of arms has been increased for commission of crime and several loot had been committed by using such fire

arms. Therefore, though actual punishment may be severe in the cases where incident is resultant by the use of the fire arms, so far as preventive detention is concerned, when the petitioner is found with live cartridges and when there is a material before the competent authority that the petitioner is dealing with the arms and there is evidence that he has sold three pistols to two different persons, it can never be said that there is no material whatsoever against the petitioner so as to detain him to avoid disturbance of the public order in the State.

13. Learned AGP for the respondent-State supported the detention order passed by the authority and submitted that the detenu is a dangerous person and sufficient material and evidence was found during the course of investigation, which was also supplied to the detenu, indicating that the detenu 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.

14. 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 is legal, valid and in accordance with law inasmuch as the offences alleged in the FIR/s have all the bearing on the public order. 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, hence it can be said that the detenu is a dangerous person within the meaning of Section 2(c) of the Act. There is material on record which shows that the detenu is acting in such a manner which is dangerous to the public order. In the cases of [i] Ranubhai Bhikhabhai Bharwad (supra), [ii] Ashokbhai Jivraj @ Jivabhai Solanki (supra) and [iii] Mustakmiya Jabbarmiya Shaikh (supra), the Hon''ble Supreme Court was of the opinion that the activities of the detenu cannot be said to be dangerous to the maintenance of public order and at the most fall under the maintenance of "law and order", whereas in the present case the facts are otherwise.

15. Though most of the cases are in favour of the detenu for quashing the order of detention on one or another ground, some of them are purely technical i.e. there is delay in passing order, there is delay in deciding representation, grounds are not properly disclosed, full material is not provided, translation is not provided, etc., and ultimately on merits, it is always said that there is no disturbance of public order and question of law and order cannot be termed as public order; in my observation, in most of the cases, following few cases have been ignored wherein the Larger Benches of the Hon''ble Supreme Court has confirmed the order of detention. Some of them are referred hereunder.

I In the case of Lawrence Joachim Joseph D'souza Vs. The State of Bombay, , though there is allegation against the petitioner regarding anti-national activities, the fact remains that as back as in the year 1956 so far as concept of detention

is concerned, the Bench of five Judges of the Hon"ble Supreme Court has held that though allegations in the order of detention were not as precise and specific as might have been desired and specific as might have been desired, having regard to the nature of the alleged activities of the detenu, order of detention cannot be quashed. It is further held that there is no obligation under Article 22[5] and [6] of the Constitution to communicate to the detenu the decision and grounds for detention which would arise only if detenu feeling the grounds to be vague, asks for particulars. It is categorically stated that in absence of any request by the detenu, obligation to communicate the decision and not to disclose facts may be considered prejudicial to public interest, but the non-communication of the decision cannot be held to have hampered his constitutional right of representation and an obligation to communicate cannot be implied in those circumstances. It seems that this Full Bench judgment has never been overruled and, therefore, it cannot be ignored.

II Whereas again in the case of Kanchanlal Maneklal Chokshi Vs. State of Gujarat and Others, , the Bench of three Judges of the Hon"ble Supreme Court has, relied upon the judgment in the case of Haradhan Saha Vs. The State of West Bengal and Others, . Instead of interpreting the observation of the Hon"ble Supreme Court, it would be appropriate to read the relevant paragraphs, which are reproduced hereunder:

2 In Haradhan Saha v. State of West Bengal, the vires of the provisions of the Maintenance of Internal Security Act was in question. One of the contentions was that Section 3 of the Act offended Article 14 of the Constitution as it permitted "the same offence to be a ground for detention in different and discriminatory ways". It was submitted that while A might be prosecuted but not detained preventively. B might not be prosecuted but only detained preventively and C might be both prosecuted and detained preventively. Dealing with the contention, a Bench of five Judges of this Court explained the basis distinction between preventive detention and detention following upon conviction and observed:

The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceedings. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.

The Court then referred to various earlier decisions and deduced the following principles: First merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for

preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act. Second, the fact that the police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under Code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention. Third, where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or the public order. Fourth, the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order. Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behavior of a person based on his past conduct in the light of the surrounding circumstances." Clearly, the Court did not lay down that the possibility of a prosecution being launched was an irrelevant consideration, not to be borne in mind by the detaining authority. All that was laid down was that the mere circumstances that a detenu was liable to be prosecuted was not by itself a bar to the making of an order of preventive detention. It does not follow therefrom that failure to consider the possibility of a prosecution being launched cannot ever lead to the conclusion that the detaining authority never applied its mind and the order of detention was, therefore, bad.

Thereafter, in paras 3 to 7, the Bench of the three Judges of the Hon'ble Supreme Court has dealt with few more judgments wherein even different Bench of the Hon'ble Supreme Court has quashed and set aside the order of detention, but ultimately by distinguishing all those judgments, the three Judges Bench dismissing the appeal of the detenu, held that the possibility of launching a criminal prosecution is not an absolute bar to an order of preventive detention and when very elaborate statement of facts clearly pointing to an application of mind by the detaining authority, it cannot be inferred that the detaining authority did not apply its mind to the relevant consideration so as to interfere with the order of detention.

III In the case of Commissioner of Police v/s C. Anita reported in [2004] 7 S.C.C. 467, the Hon'ble Supreme Court has held that the High Court cannot substitute its own opinions for that of the detaining authority when the grounds of detention are precise, pertinent, proximate and relevant. It is further stated that 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. Thereby they are not parallel proceedings. It is further observed that "public order", "law and order" and the "security of the State" fictionally draw three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the State. Every infraction of law must necessarily affect order, but an act affecting

law and order may not necessarily also affect the public order. Likewise, an act may affect public order, but not necessarily the security of the State. The true test is not the kind, but the potentiality of the act in question. Acts similar in nature, but committed in different contexts and circumstances, might cause different reactions. The act by itself, therefore, is not determinant of its own gravity. In its quality it may not differ from other similar acts, but in its potentiality, that is, in its impact on society, it may be very different. One act may affect only individuals while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for instance, affecting public order may have an impact that it would affect both public order and the security of the State.

IV In the case of Senthamilselvi Vs. State of Tamil Nadu and Another, Hon''ble Supreme Court has held that non-supply of document which was merely referred to in grounds of detention without being relied upon for purpose of detention cannot be the grounds for quashing the order. It is further held that conclusion that there was likelihood of detenu being released on bail and, therefore, order of detention would be proper. Since such conclusion was subjective satisfaction by the detaining authority based on materials before it, merely such satisfaction is not to be interfered with. It is further stated that there cannot be hard-and-fast rule as to the measure of reasonable time for disposal of representation and each case has to be considered on its own facts.

16. In view of the above, I am not inclined to allow this petition. Hence, the petition is dismissed. Rule is discharged.