

(2013) 12 GUJ CK 0039

In the Gujarat High Court

Case No : Special Civil Application No. 1914 of 2013

Bhawanlal @ Bhagwan Marwadi

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 10-12-2013

Acts Referred:

Citation : (2013) 12 GUJ CK 0039

Hon'ble Judges : S.H. Vora, J

Bench : Single Bench

Advocate : P.P. Majmudar, for the Petitioner No. 1, for the Appellant;

Judgement

S.H. Vora, J.—By way of present petition, under Article 226 of Constitution of India, the petitioner challenges the enforcement, implementation and execution of order of detention prepared and sought to be served on the petitioner by the respondent No. 2 under the provisions of Gujarat Prevention of Anti-Social Activities Act, 1985 (hereinafter referred to as "PASA Act") at the pre-execution stage. It appears that F.I.R. being C.R. No. III-66 is registered with Amroli Police Station, Surat City for the offences punishable under Sections 66(1)(b), 65(e) (a), 11(1)(b) and Section 81 of the Gujarat Prohibition Act against the petitioner and other two accused persons. On reading of the F.I.R., it is the case of the prosecution that one co-accused Panesh @ Pano Patel and Shri Ankur @ Lallo Patel got boxes of bear as well as English liquor for the purpose of selling the same and it is further alleged that the said co-accused revealed to the Police that the said stock of liquor was supplied by the petitioner. Accordingly instant F.I.R. is registered against the petitioner. It appears that the petitioner is released on bail in connection with the aforesaid F.I.R. by the learned Judicial Magistrate First Class, Surat. Because of the registration of the said offences against the petitioner, the petitioner apprehends that respondent No. 2 has prepared and sought to serve detention order against the petitioner, hence this petition at pre-execution stage on the ground that the authorities could not have prepared and sought the service of the detention order under the PASA Act as the petitioner is

falsely implicated with the alleged offences and therefore he cannot be termed as "Bootlegger" as defined u/s. 2(b) of the PASA Act. Such proposed order is also challenged on the ground that except the alleged prohibition offences, there is no other material to show that the alleged activities of the petitioner is affecting or likely to affect adversely maintenance of public order and hence the order of detention is illegal and bad in law. It is also challenged on the ground that the subjective satisfaction arrived by the detention authority is vitiated on account of non-application of mind as there is no nexus and link for the alleged activities with the disturbance of public order. Therefore, due to the impugned action on the part of the respondents, the fundamental right of the petitioner under Articles 14 and 21 of the Constitution of India are violated. In support of his said grounds, the petitioner has referred to and relied upon decision rendered by Single Judge of this Court in case of Salam Abdul Hanifsha v. State of Gujarat in Special Civil Application No. 16113 of 2011 and another decision in Special Civil Application No. 2272 of 2012 in case of Mavjibhai Virabhai Sagathia v. State of Gujarat delivered vide order dated 22.3.2012 and 28.3.2012 respectively. These two decisions are not helpful to the petitioner because in the said cases, learned Single Judge had an occasion to examine the grounds of detention which is not so in the instant case.

2. The petitioner has filed this petition under Articles 21, 22 and 226 of the Constitution of India and made following prayers in Paragraph 15 of the petition;

In the premises aforesaid, the petitioner most humbly and respectfully prays that:

(a) YOUR LORDSHIPS may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or directions quashing and setting aside the order of detention prepared and sought to be served on the petitioner by respondent No. 2 under the provisions of Section 3(2) of the Gujarat Prevention of Anti-Social Activities Act, 1985;

(b) During pendency and final disposal of this petition YOUR LORDSHIPS may be pleased to stay further operation, implementation and execution of the order of detention prepared and sought to be served on the petitioner by respondent No. 2 under the provisions of Section 3(2) of the Gujarat Prevention of Anti-Social Activities Act, 1985;

(c) Pass any such other and/or further orders that may be though just and proper, in the facts and circumstances of the present case;

3. In response to the Notice issued by the Court upon the respondents, an affidavit-in-reply was filed by the detaining authority i.e. Commissioner of Police, Surat City stating that the order of detention has been passed under the provisions of Section 3 of the PASA Act as petitioner is a Bootlegger within the meaning of Section 2(b) of the PASA Act. It is also stated in the said affidavit-in-reply that the petitioner is ordered to be detained under the PASA Act. It is stated by respondent No. 2 that after considering all the relevant materials

including documents placed before respondent No. 2 and after subjectively satisfied himself that the activities of the petitioner were prejudicial to the maintenance of public order, it was found necessary to detain the petitioner preventively under the PASA Act. It is also stated in the said affidavit-in-reply that the respondent No. 2 has sent the detention order for execution to the concerned Police Authorities and inspite of various efforts put by the concerned Police, the detention order could not be served as the petitioner is absconding and thus evades services of detention order and execution of the order of detention.

4. On this factual premises, the learned AGP appearing for the State submits that present petition at pre-execution stage is not tenable and moreover, the present petition does not fall on any of the grounds as stated in case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, .

5. The first contention of learned advocate for appearing for the petitioner is that the order of detention under the PASA Act could not have been passed for the solitary offence being registered and that the grounds on which order of detention was passed were extraneous and irrelevant and therefore in light of decision of Single Judge by this Court in cases of Salam Abdul Hanifsha (Supra) and Mavjibhai Virabhai Sagathia (Supra), the present petition may be accepted and allowed.

6. Considering the nature of prayers, which are reproduced hereinabove, it is crystal clear that the petitioner challenges the detention order at the pre-execution stage without placing on record the reasons and/or grounds for issuance of the detention order and therefore petitioner cannot question the validity or sufficiency of the grounds for issuance of detention order at this stage. It becomes clear by way of present petition that the petitioner prays for issuance of writ of mandamus or any other appropriate writ order or direction to quash and set aside the order of detention without its execution and without verification of contents of such detention order at pre-execution stage as if it is illegal, void and arbitrary. In other words, it can also be said that even without referring and testing the contents of the order of detention, it is prayed by way of present petition that such detention order which is yet to be executed suffers from malafide and violative under Articles 14 and 21 of the Constitution of India.

7. On careful reading of decision rendered in case of Subhash Popatlal Dave v. Union of India and Anr. delivered in Writ Petition (Criminal) No. 137 of 2011, the following principles relating to the matters challenging detention order at pre-execution stage can be summarized as under:-

(a) No petition can be entertained to quash the proposed order of detention without it being executed and served upon the detenue at pre-execution stage except in the rarest of rare case on certain specific limited grounds which have been summarized by the Hon''ble Apex Court in the case of Alka Subhash

Gadia's case (Supra), namely; (I) that the impugned order is not passed under the Act under which it is purported to have been passed. (II) That it is sought by executed against a wrong person, (III) That it is passed for a wrong purpose, (IV) That it is passed on vague, extraneous and irrelevant grounds or (V) That the Authority which passed an order had no authority to do so.

(b) The detenus have no right to raise a contention that there is no link or nexus between the order of detention and actual detention at any later date in case the detenu evades/evaded the execution of detention order either remains absconded or protected by Court's order.

(c) The subjective satisfaction of the detaining authority is to be considered on the date of detention order and not on the date of its scrutiny.

8. The Hon'ble Apex Court in Alka Subhash Gadia's case (Supra) while laying down the scope of detention order at pre-execution stage, the Hon'ble Apex Court said that "..... this only emphasis the fact that the Courts have power to interfere with the detention orders even at the pre-execution stage but they are not obliged to do so nor will it be proper for them to do so save in exceptional cases." The Hon'ble Apex Court declared the ambit of the judicial review by saying "the refusal by the Courts to use their extra ordinary powers of judicial review to interfere with the detention orders prior to their execution on any other grounds does not amount to the abandonment of the said power or to their denial of the proposed detenu, but prevents their abuse and the perversion of the law in question." Finally, the Hon'ble Apex Court in para 32, observed as under:-

32. This still leaves open the question as to whether the detenu is entitled to the order of detention prior to its execution at least to verify whether it can be challenged at its pre execution stage on the limited grounds available. In view of the discussion aforesaid, the answer to this question has to be firmly in the negative for various reasons. In the first instance, as stated earlier, the Constitution and the valid law made thereunder do not make any provision for the same. On the other hand, they permit the arrest and detention of a person without furnishing to the detenu the order and the grounds thereof in advance. Secondly, when the order and the grounds are served and the detenu is in a position to make out prima facie the limited grounds on which they can be successfully challenged, the courts, as pointed out earlier, have power even to grant bail to the detenu pending the final hearing of his petition. Alternatively, as stated earlier, the Court can and does hear such petition expeditiously to give the necessary relief to the detenu. Thirdly, in the rare cases where the detenu, before being served with them, learns of the detention order and the grounds on which it is made, and satisfies the Court of their existence by proper affirmation, the Court does not decline to entertain the writ petition even at the pre execution stage, of course, on the very limited grounds stated above. The Court no doubt even in such cases is not obliged to interfere with the impugned order at that stage and may insist that the detenu should first submit to it. It will, however,

depend on the facts of each case. The decisions and the Orders cited above show that in some genuine cases, the courts have exercised their powers at the pre-execution stage, though such cases have been rare. This only emphasises the fact that the courts have power to interfere with the detention orders even at the pre-execution stage but they are not obliged to do so nor will it be proper for them to do so save in exceptional cases. Much less can a detenu claim such exercise of power as a matter of right. The discretion is of the Court and it has to be exercised judicially on well settled principles.

Meaning thereby, the detenu cannot claim such exercise of powers as of right because the Hon''ble Apex Court in Alka Subhash Gadia's case (Supra) drawn the distinction between the existence of power and its proper exercise and at the end it is left to the discretion of the Court and it has to be exercised judicially on well settled principles. Furthermore, in Alka Subhash Gadia's case (Supra) case, the Hon''ble Apex Court negated the contention raised there to the effect that whether detention order should be served to the detenu in advance to enable him to challenge him in the Court of law before obeying the order. If such recourse is permitted then it would amount to providing an opportunity of judicial review of the detention order even before it is executed.

9. On proper scrutiny of the decision rendered by the Hon''ble Apex Court in Subhash Popatlal Dave's case (Supra), it becomes crystal clear that pre-detention matters can be entertained for any other exceptions or grounds in addition to exceptions carved out in case of Alka Subhash Gadia's case (Supra) but at the same time, it is finally stands concluded that the Court cannot enter into scrutiny of the order of detention which is yet not served upon the detenu. So the recourse leaves with the detenu is to surrender pursuant to the detention order and then to all his grievances examined on merits after he has opportunity to study the grounds of defence and to make his representation against such grounds as required by Article 22(5) of the Constitution of India.

10. Learned advocate appearing for the petitioner submitted that the Court may call for the detention order so as to find out whether legal and valid grounds exists to detain the petitioner under the PASA Act. Such prayer cannot be entertained by the Court because the issue regarding disclosure of order of detention before its execution is taken care of by the Hon''ble Apex Court in case of Subhash Popatlal Dave's case (Supra), wherein, it has been made clear that the order of detention may not be called upon even under the R.T.I. Act. Therefore, the question of allowing the prayer to direct the respondent - authority to produce the order of detention on the ground that it may be scrutinized and examined by the Court at pre-execution stage does not arise. Neither the provisions of Constitution of India nor the statute under which detention order is passed obliges the State to disclose the grounds before arrest, even though the State is in possession of the grounds before the time of execution of detention order. So, there is no substance in such contention and deserves to be rejected.

11. At this stage, it is fruitful to refer the observations made by the Hon'ble Apex Court in Paragraph 8 of the decision rendered in case of Union of India (UOI) and Another Vs. Shrimati Chaya Ghoshal and Another, , which are reproduced as under:

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 individuals 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

12. It is also relevant and fruitful to bear in mind the principles reiterated and re-affirmed by the Hon'ble Apex Court in case of Naresh Kumar Goyal Vs. Union of India (UOI) and Others, , while examining the question as to whether the High Court was justified in law, in not exercising its discretion under Article 226 of Constitution of India to quash the order of detention, at pre-execution stage, answered by observing in Paragraph Nos. 8, 11, 12 and 13, as under:-

... Paragraph No. 8

Learned counsel for the appellant submitted that once it is shown that the State has taken no steps to execute an order of detention and the explanation furnished by the State is unsatisfactory, it must be held that the order of detention was not issued for the purpose for which it could be issued under the Act, and necessarily implied that the real purpose was something else, not authorized by law. In such a case it made no difference whether the appellant moved the High Court at the pre-arrest stage or after his arrest pursuant to the

order of detention. He emphasized that expeditious steps must be taken by the State both in the matter of passing the order of detention and in executing the same. Both are lacking in the instant case. The order of detention was passed on September 4, 2002 while the complicity of the appellant is alleged to have been discovered on August 29, 2001 on the basis of the statement of the driver of the vehicle. In the matter of implementation of the order as well, there was considerable apathy and lethargy, since the order was not even executed till the date the writ petition was filed on June 25, 2003.

Paragraph No. 11

Mr. B.B. Singh, learned counsel appearing on behalf of the State of Bihar, submitted before us that the question involved in the instant appeal is not whether the order of detention should be struck down on the ground that the State of Bihar has not taken necessary steps to implement the order of detention, but whether at the pre-arrest stage the High Court should have exercised its jurisdiction under Article 226 of the Constitution of India to quash the order of detention on such grounds. He submitted that the decisions of this Court have taken the view that exercise of discretion under Article 226 of the Constitution of India can be justified only in appropriate cases and the scope for interference is very limited. Normally the Court would not interfere with the order of detention at a pre-arrest stage under Article 226 of the Constitution of India. He submitted that there are only 5 exceptions to this rule which would justify interference by the Court at the pre-execution stage with the order of detention. Those five situations have been enumerated in the case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another,

As regards his last contention, viz., that to deny a right to the proposed detainee to challenge the order of detention and the grounds on which it is made before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution, we find that this argument is also not well merited based as it is on absolute assumptions. Firstly, as pointed out by the authorities discussed above, there is a difference between the existence of power and its exercise. Neither the Constitution including the provisions of Article 22 thereof nor the Act in question places any restriction on the powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. However, the courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the courts insist that the aggrieved person first

allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the courts. To accept Shri Jain's present contention would mean that the courts should disregard all these time-honoured and well-tested judicial self-restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibal for the appellants, as far as detention orders are concerned if in every case a detinue is permitted to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this is more important, it is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detinue, but prevents their abuse and the perversion of the law in question.

Paragraph No. 12

In *Union of India and Others Vs. Parasmal Rampuria*, , when the order of detention passed under the Act was sought to be challenged at the pre-arrest stage, this Court called upon the respondent first to surrender pursuant to the detention order and then to have all his grounds examined on merit.

Paragraph No. 13

In *Sayed Taher Bawamiya Vs. Joint Secretary to the Govt. of India and Others*, , an argument was advanced before this Court that the exceptions enumerated in *Alka Subhash Gadia* (supra) were not exhaustive. The submission was repelled and this Court observed:-

As we see it, the present case does not fall under any of the aforesaid five exceptions for the court to interfere. It was contended that these exceptions are

not exhaustive. We are unable to agree with this submission. Alka Subhash Gadia case shows that it is only in these five types of instances that the court may exercise its discretionary jurisdiction under Article 226 or Article 32 at the pre-execution stage....

13. Now coming to the other contention raised by the learned advocate for the petitioner in view of decisions relied upon Salam Abdul Hanifsha (Supra) and Mavjibhai Virabhai Sagathia (Supra), the petitioner challenges the legality and validity of the order on the ground that is settled principle of law that person cannot be detained on the basis of solitary offence registered against him. The order of detention is passed on the basis of what has come to be known as subjective satisfaction has to be arrived at on two points. Firstly, on the veracity of the facts imputed to the person to be detained and secondly on the prognostication of the detention authority that the person concerned is likely to indulge again in the same kind of notorious activities. At the same time, neither the possibility of launching of a criminal proceedings nor punishment of any criminal proceedings is an absolute bar to an order of preventing detention. In nut-shell, unless and until the material is there to make out a case that the person concerned is such a threat to the society so as to disturb the whole tempo of the society and that the whole social apparatus is in disturbance of public order at the instance of such person no detention order can be passed but in order to contend that the petitioner case is covered by any of the exceptions as carved out in Alka Subhash Gadia's case (Supra) or any other grounds, there is no material for making such an averments because neither the order of detention nor the grounds/documents upon which the said detention order has been passed, has not been placed on record as order has not yet been executed. So it is not open for the petitioner to challenge the legality and validity of non-available order on the ground that it is passed on vague, extraneous and irrelevant grounds. For the sake of repetition, it is made clear that unless and until the order of detention is available and judicially scrutinized, there cannot be a decision that such order passed by the competent authority under the PASA Act is illegal and deserves to be quashed and set aside. Admittedly, the petitioner does not have copy of the detention order and therefore the petitioner cannot pray before this Court to call the relevant files and then undertake the exercise to satisfy itself as to whether order of detention is legal and valid in view of grounds upon which it is passed. Such exercise is held to be impermissible and beyond the jurisdiction of the High Court at pre-execution stage.

14. In light of pleadings on record, the present case does not appear to be falling in the category as enumerated in Alka Subhash Gadia's case (Supra) or Subhash Popatlal Dave's case (Supra), where pre-execution challenge to the detention order deserves consideration. The Hon'ble Apex Court in the case of Naresh Kumar Goyal (Supra), after a comprehensive review of the case law on the subject and after noticing the principle laid down in Alka Subhash Gadia's case (Supra), it is held that jurisdiction under Article 226 and Article 32, which is discretionary in nature, should not be exercised in a case where the proposed

detenue evades the service of order. If in every case, the detenue is permitted to challenge and seek the stay of operation of the order before its execution, the very purpose of the order and the law under which it is made will be frustrated since the order remains in operation for a limited period. No doubt, Hon''ble Apex Court in the cases referred hereinabove found that Courts have powers in appropriate cases to interfere with the detention order at the pre-execution stage but such power is to be exercised in rarest of rare case or in exceptional cases and thus scope of interference is very limited. In an instant case, the State has categorically stated in affidavit-in-reply that the petitioner is avoiding service of detention order inspite best efforts were put by the concerned Police to serve upon the petitioner.

15. The offshoot of the above discussion is such that the petitioner seeks writ of mandamus in the present case as he has not surrendered nor he has been served with the order of detention and therefore he cannot ordinarily invoke the jurisdiction of the High Court under Article 226 of the Constitution of India as petitioner fails to make out an exceptional case as categorized in Alka Subhash Gadia's case (Supra) and Subhash Popatlal Dave's case (Supra).

16. Bearing in mind such legal proposition, it cannot be inferred on bear words of the petitioner that because of the registration of solitary F.I.R. under Prohibition Act, he is likely to be detained creating false grounds. To substantiate the allegations of malafide, the petitioner has also not joined any authority in his personal capacity and further it is not even clear whether there is any further material with the authority or not. In short, I find that the petitioner has not laid down any firm foundation to permit this Court to exercise its discretionary jurisdiction of a very limited scope in its nature to interfere at pre-execution stage within the parameters laid down by the Hon''ble Apex Court in the cases referred hereinabove. In the result, the petition fails and the same is rejected.

17. It is clarified that the Court has not gone into the merits of the order of detention and if petitioner surrenders and allows the order of detention to be executed, then it will be open for the petitioner to challenge the same on all the grounds that may be available in accordance with law. Considering the facts that interim order is in force since 14.3.2013, it would be appropriate to continue the interim order for further period of two weeks so as to enable the petitioner to challenge the order by way of appropriate proceedings or to surrender, on condition that the petitioner shall mark his presence before the nearest Police Station on every third day, without fail and the petitioner shall disclose his correct address to the nearest Police Station within two days from today. If petitioner fails to comply with any of such conditions, the continuation of interim relief as granted today shall stand cancelled. Rule is discharged. Direct Service is permitted.