

(2016) 04 GUJ CK 0087

In the Gujarat High Court

Case No : Special Civil Application No. 1716 of 2016

Ganesh

APPELLANT

Vs

Commissioner of Police and Others

RESPONDENT

Date of Decision : 13-04-2016

Acts Referred:

Constitution of India, 1950 — Article 22(5), Article 226
Gujarat Prevention of Anti-social Activities Act, 1985 — Section 2(c), Section 3(2),
Section 9(2)

Citation : (2016) 04 GUJ CK 0087

Hon'ble Judges : V.M. Pancholi, J.

Bench : Single Bench

Advocate : Kishan Prajapati for Sanjay Prajapati, Advocate, for the Appellant;

Final Decision : Allowed

Judgement

V.M. Pancholi, J.—1. By way of the present petition which is filed under Article 226 of the Constitution of India, the petitioner has challenged the order of detention dated 22.1.2016 passed by the respondent authority 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. Heard learned advocate Mr. Kishan Prajapati for Mr. Sanjay Prajapati appearing for the petitioner and learned AGP Mr. Dhawan Jayswal for the respondent-State. I have also perused the material produced on record.

3. Learned advocate for the detainee submits that while passing the order of detention, the respondent-detaining authority has placed reliance upon two FIRs registered against the petitioner-detainee, details of which are given at page 11 of compilation. Learned advocate further submitted that the detaining authority has also relied upon two statements of secret witnesses recorded by the concerned authority on 21.01.2016. However, the same came to be verified on 22.01.2016 and on the same day the order of detention came to be passed.

4. Learned advocate for the petitioner thereafter contended that there is no time gap between the verification of the statement and passing of the order of detention. It is contended that the detaining authority has verified the statement on 22.1.2016 and on the very same day, the impugned order of detention came to be passed. Thus, it is contended that the detaining authority has passed the order of detention mechanically and therefore on this ground the order of detention is required to be quashed and set aside. Learned advocate for the petitioner has placed reliance on the decision passed by this Court on the case of Kalidas Chandubhai Kahar v. State of Gujarat & Ors., reported in , 1993(2) GLR 1659. He therefore requested that the impugned order be quashed and set aside.

5. Section 2(c) of the Act defines the term "dangerous person" as under:--

"2(c). "dangerous person" means a person, who either by himself or as a member or leader of a gang, habitually commits, or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Indian Penal Code (GLV of 1860) or any of the offences punishable under Chapter V of the Arms Act, 1959 (54 of 1959)."

6. Learned advocate for the detainee, placing reliance on the decisions reported in the cases of (i) Ranubhai Bhikhabhai Bharwad (Vekaria) v. State of Gujarat reported in , 2000(3) GLR 2696; (ii) Ashokbhai Jivraj @Jivabhai Solanki v. Police Commissioner, Surat reported in , 2000(1) GLH 393; and (iii) Mustakmiya Jabbarmiya Shaikh v. M.M. Mehta, reported in , (1995)3 SCC 237, 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 public order.

7. 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. For such submission, the learned A.G.P. took me through the grounds upon which the detaining authority satisfied to detain the petitioner.

8. The order of detention is passed on the basis of what has come to be known as the subjective satisfaction of the detaining authority such subjective satisfaction has to be arrived at on two points. Firstly, on the veracity of facts imputed to the person to be detained and secondly, on the prognostication of the

detaining authority that the person concerned is likely to indulge again in the same kind of notorious activities. Whereas, normal laws are primarily concerned with the act of commission of the offence, the detention laws are concerned with character of the person who has committed or is likely to commit an offence. The detaining authority has, therefore, to be satisfied that the person sought to be detained is of such a type that he will continue to violate the laws of the land if he is not preventively detained. So, the commission of infraction of law, not done in an organized or systematic manner, may not be sufficient for the detaining authority to justifiably come to the conclusion that there is no alternate but to preventively detain the petitioner.

9. Having heard 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 FIR/s 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 detenue cannot be said to be germane for the purpose of bringing the detenue 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 detenue 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 detenue 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 (Vekaria)(supra); (ii) Ashokbhai Jivraj @Jivabhai Solanki (supra); and (iii) Mustakmiya Jabbarmiya Shaikh (supra), the Court is of the opinion that the activities of the detenue cannot be said to be dangerous to the maintenance of public order and at the most fall under the maintenance of "law and order." In this connection, it will be fruitful to refer to a decision of the Supreme Court in Pushker Mukherjee v. State of West Bengal [, AIR 1970 SC 852], where the distinction between "law and order" and "public order" has been clearly laid down. The Court observed as follows:

"Does the expression "public order" take in every kind of infraction of order or only some categories thereof? It is manifest that every act of assault or injury to specific persons does not lead to public disorder. When two people quarrel and fight and assault each other inside a house or in a street, it may be said that there is disorder but not public disorder. Such cases are dealt with under the powers vested in the executive authorities under the provisions of ordinary criminal law but the culprits cannot be detained on the ground that they were disturbing public order. The contravention of any law always affects order but before it can be said to affect public order, it must affect the community or the

public at large. In this connection we must draw a line of demarcation between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals and only in a secondary sense public interest. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Preventive Detention Act but a disturbance which will affect public order comes within the scope of the Act."

10. 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 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 detenu. It is also fruitful to refer to the decision of the Hon''ble Apex Court rendered in the case of *Rekha v. State of Tamil Nadu through Secretary to Government* and another reported in , (2011)5 SCC 244 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.

11. As a result of hearing and perusal of the record, it appears that the only material that was available with the detaining authority was the offences registered against the detenu and on that basis, it cannot be said that the activity of the detenu has become a threat to the maintenance of "public order". Mere involvement of the detenu in such activity may not amount to dangerous activity by the detenu and mere mention of them, unless supported by any evidence, cannot be said to be material germane for the purpose of arriving at the subjective satisfaction that the activity of the detenu is prejudicial to the maintenance of "public order". For the sake of repetition, the commission of offence does not exhibit or disclose that the petitioner is doing infraction of law in an organized or systematic manner so as to come to the conclusion that there is no alternate but to preventively detain the petitioner.

12. In the case of *Kalidas Chandubhai Kahar* (supra), the Hon''ble Division Bench

of this Court held in paragraph 6 as under:

"6. His second contention is that the detaining authority has wrongly exercised the powers under Sec.9(2) of PASA Act and by such wrong exercise of powers the detenu, right to make a representation under Art.22(5) of the Constitution has been infringed. He further elaborates his submission by pointing out that the statements of the witnesses have been recorded on 16th October, 1992 and that the said statements have been verified by the Superintendent of Police, C-Division, Baroda City on 16th October, 1992. It has been pointed out by the learned A.G.P. Mr. Y.M. Thakkar that the proposal in the case was made on 16th October, 1992 and the order of detention was passed on 17th October, 1992. It is rather curious that the entire bunch of material was supplied by the sponsoring authority at the time of making the proposal and that has been promptly accepted by the detaining authority and passed the order on the next day itself. At the time of exercising the privilege under Sec.9(2) of PASA, a balance is required to be struck between the public interest on the one hand and the right of the detenu to make a representation under Art.22(5) of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are fictitious persons or not and/or whether their statements are bogus statements or not? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this, there is a provision under Sec.9(2) carved out on the basis of Art.22(5) of the Constitution which provides that nothing in Sub-sec.(1) shall require the authority making such order to disclose facts which it considers to be against the public interest to disclose. Therefore, it is the duty of the detaining authority to strike a balance as stated above, that in the public interest, the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it affects the public interest on the one hand and the right of the detenu on the other. When that is so, the detaining authority is expected to do some exercise before actually exercising the privilege under Sec.9(2) of PASA. Looking to the facts and circumstances of the case, it is clear, as stated hereinbefore, that the verified statements were also placed before the detaining authority and there was no sufficient time for the detaining authority to examine the possibility of exercising the power under Sec.9(2), as the proposal was made on 16th October, 1992 and the order of detention was passed on the following day, i.e., 17th October, 1992, nor is there any material to show as to how he examined the necessity of exercising the power under Sec.9(2). Under the circumstances, in our view, it is a wrong exercise of power under Sec.9(2) which has affected the detenu's right of making an effective representation under Art.22(5) of the Constitution of India and therefore, the continued detention of the detenu is bad and illegal and the impugned detention order is required to be

quashed and set aside."

13. In the present case, the detaining authority has verified the statement of the secret witnesses on 22.1.2016 and on the very same day, the order of detention has been passed. Thus, as per the aforesaid decision, the detaining authority has not properly exercised the powers under Section 9(2) of the PASA Act.

14. 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.

15. In the result, this Special Civil Application is allowed. The impugned order of detention dated 22.1.2016 passed by the respondent authority is hereby quashed and set aside. The detainee is ordered to be set at liberty forthwith if not required in any other case. Rule is made absolute accordingly. Direct service is permitted.