

(2020) 06 GUJ CK 0137

In the Gujarat High Court

Case No : R/Special Civil Application No. 7537 Of 2020

Gaus Mohammad S/O Pir Mohammad Momeen

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 25-06-2020

Acts Referred:

Constitution Of India, 1950 — Article 226

Gujarat Prevention Of Anti Social Activities Act, 1985 — Section 2(c), 3, 3(1), 3(2), 3(4)

Indian Penal Code, 1860 — Section 114, 379

Arms Act, 1959 — Section 25

Citation : (2020) 06 GUJ CK 0137

Hon'ble Judges : Ilesh J. Vora, J

Bench : Single Bench

Advocate : Nanavati, Vrunda Shah

Final Decision : Allowed

Judgement

Ilesh J. Vora, J

1. Heard Mr. Maulik Nanavati, assisted by Mr. Niyant Bhimani, learned counsel for the petitioner and Ms. Vrunda Shah, learned AGP for the

respondent State through video conferencing.

2. By way of this petition under Article 226 of the Constitution of India, the petitioner - Gaus Mohammad Son of Pir Mohammad Momeen has

challenged the legality of the order of detention dated 28.01.2020 passed by respondent no.2 "Commissioner of Police, Surat, under sub-section 2 of

Section 3 of the Gujarat Prevention of Anti- Social Activities Act, 1985 (P.A.S.A Act for short) by detaining the detainee as a dangerous person

as defined under Section 2 (c) of the PASA Act with a view to prevent the detainee from acting in any manner prejudicial to the maintenance of public

order in the area of Surat. In pursuance of the said order dated 28.01.2020, the detainee has been detained in Palara jail at Bhuj.

3. The detainee came to be detained as a dangerous person on his involvement in two offences i.e. FIR being C.R.No.I- 154/2019 registered at

Mahidharpura Police Station, Surat, under Sections 379 and 114 of IPC and the second FIR being C.R. No. I-324/2019 is also registered at Puna

Police Station under Sections 379 and 114 of IPC. In both the offences, the detainee was released by the competent Court.

4. Learned counsel for the petitioner has assailed the following contentions:

(I) That the detention order is passed after a period of about 5 months from the date of registration of alleged complaint.

(II) The registration of the FIRs were pertaining to the alleged theft committed by the detainee. The reporting of the theft case cannot be said to be

adversely affecting the maintenance of public order and public health at large.

(III) That there was no contemporary material available with the detaining authority to indicate that the public order is disturbed in any manner.

(IV) The detainee has been falsely involved in the cases mentioned in the grounds of detention and there is no material to indicate that, the alleged

activities created strong fear in public, prejudicial to the maintenance of the public order and the society as a whole is ever disturbed;

5. On the other hand, learned AGP has supported the impugned order of detention passed by respondent no.2 and submitted that the detainee is a

"dangerous person" and sufficient material and evidence was found during the course of investigation, indicating that the detainee is in habit of

indulging himself into activities as defined under Section 2 (c) of the PASA Act and therefore, considering the facts of the case, the detaining authority

has rightly passed the order of detention, which deserves to be upheld by this Court.

6. Learned AGP further contended that there are two offences registered against the detainee and he has been arrested in connection with the same.

The detainee is strong person and has indulged into anti-social activities, which are prejudicial to the maintenance of public order. In view of this, there

is sufficient material to arrive to the satisfaction that the detainee is a dangerous person and is involved into anti- social activities, which are prejudicial

to the maintenance of public order. He also contended that the order of detention

is passed based on material subjective satisfaction and therefore, he prays this Court to dismiss this petition.

7. Having heard learned counsel for the parties and having gone through the material on record, the only question arises for consideration in this petition is, whether the order of detention deserves to be quashed ?

8. After careful perusal of the material on record, the fact discloses that, two theft cases were registered with Mahidharpura Police Station and Pune

Police Station, on the same day. The record further indicates that, the accused had stolen cell phone from the passenger of the rickshaw. The

detaining authority had considered the case papers of theft cases. No other material found by the authority to satisfy themselves with regard to

activities affecting the public at large. It also required to be appreciated that, the detainee was arrested in both the cases, which seems to be issue of

law and order.

9. It is settled law that, the object of preventive detention is not punitive, but only preventive. In case of *Rekha Vs. State of Tamilnadu*, 2011 (5) SCC

244, it was observed by the Apex Court that, when order is challenged before the Court, the Court must ask in deciding its legality, was the ordinary

law of the land sufficient to deal with the situation? If the answer is in affirmative, the detention order will be illegal. It is further observed that, it

follows that, if a person is liable to be tried or actually being tried for a criminal offence, but the ordinary law will not be able to deal with the situation,

then and only then, the preventive detention law be taken recourse to it.

10. Therefore, an isolated act as reported by way of two FIRs would not justify and would not basis for subjective satisfaction of the authority

branding the detainee as a dangerous person and the alleged activities of the detainee affects adversely or are likely to affect adversely the

maintenance of public order. There is no any harm or feeling of insecurity among the general public or any section thereof, so far two offences are

concerned.

11. It is apt to refer to the case of *Mustakmiya Jabbarmiya Shaikh Vs. M.M. Mehta, Commissioner*, reported in 1995 (3) SCC 23,7 wherein the Apex

Court observed thus:

6. With a view to deal with the aforementioned submissions advanced by the

learned counsel for the petitioner and to examine the legality/validity of the impugned order of detention it would be appropriate to look into the relevant provisions of the Act in question under which the detention order has been passed. It may be pointed out that the Act provides for preventive detention of bootleggers, dangerous persons, drug offenders, immoral traffic offenders and property grabbers for preventing their anti-social and dangerous activities prejudicial to the maintenance of public order. In the present case having regard to the grounds of detection the detaining authority on being satisfied that the detenu - petitioner was a 'dangerous person' within the meaning of clause (C) of Section 2 of the Act and passed the order of detention. Section 2(C) of the Act reads as under:

"Dangerous person" means a person, and 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 or any of the offences punishable under Chapter V of the Arms Act, 1959".

Here it would also be appropriate to reproduce the relevant part of Section 3 of the Act as under:-

3(1)-The State Government may if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the

maintenance of public order, it is necessary so to do, make an order directing that such person be detained.", (2) If having regard to the

circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police,

the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct that the District Magistrate or the Commissioner of

Police, may also, if satisfied as provided in sub-section (1) exercise the powers conferred by the said sub-section".

(3).....

(4) For the purpose of this section, a person shall be deemed to be 'acting in any manner prejudicial to the maintenance of public order when such

person is engaged in or is making preparation for engaging in any activities whether as a bootlegger or dangerous person or drug offender or immoral

traffic offender or property grabber, which affect adversely or are likely to affect adversely the maintenance of public order,

Explanation. - For the purpose of this sub-section, public order shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely inter alia if any of the activities of any person referred to in this sub-section directly or indirectly, is causing or is likely to cause any harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or public health.

7. A reading of the preamble of the Act will make it clear that the object of provisions contained in the Act including those reproduced above is to prevent the crime and to protect the society from anti-social elements and dangerous characters against perpetration of crime by placing them under detention for such a duration as would disable them from resorting to undesirable criminal activities The provisions of the Act are intended to deal with habitual criminal dangerous and desperate outlaws who are so hardened and incorrigible that the ordinary provisions of the penal laws and the moral fear of punishment for crime are not sufficient deterrents for them. Section 3 of the Act is, therefore, intended to deal with such criminals who cannot readily be apprehended to be booked under the ordinary law and who for special reasons, cannot be convicted under the penal laws in respect of the offences alleged to have been perpetrated by them, But this power under the Act to detain a person should be exercised with restraint and great caution. In order to pass an order of detention under the Act against any person the detaining authority must be satisfied that he is a 'dangerous person' within the meaning of Section 2(C) of the Act who habitually commits, or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or XVII of the Penal Code or any of the offences punishable under Chapter V of the Arms Act as according to sub-section (4) of Section 3 of the Act it is such 'dangerous person' who for the purpose of Section 3 shall be deemed to be a person 'acting in any manner prejudicial to the maintenance of public order' against whom an order of detention may lawfully be made.

8. The Act has defined 'dangerous person' in clause (C) of Section 2 to mean 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 the chapters XVI or XVII of the Penal

Code or any of the offences punishable under Chapter V of the Arms Act. The expression 'habit' or 'habitual' has however, not been defined under

the Act, According to the Law Lexicon by P. Ramanatha Iyyar, Reprint Edition 1987 page 499 'habitually' means constant, cus-tomary & addicted to

specified habit and the term habitual criminal may be applied to any one who has been previously convicted of a crime to the sentences and committed

Jo prison more than twice. The word 'habitually' means 'usually' and 'generally'. Almost similar meaning is assigned to the words 'habit' in Aiyar's

Judicial Dictionary, 10th Edition page 485. It does not refer to the frequency of the occasions but to the invariability of practice and the habit has to be

proved by totality of facts. It, therefore, follows that the complicity of a person in an isolated offence is neither evidence nor a material of any help to

conclude that a particular person is a 'dangerous person' unless there is material suggesting his complicity in. such cases which lead to a reasonable

conclusion that the person is a habitual criminal. In Gopalan Chari v. State of Kerala, AIR (1981) SC 674 this Court had an occasion to deal with

expressions like 'bad habit', 'habitual', 'desperate', 'dangerous', and 'hazardous'. This Court observed that the word habit implies frequent and usual

practice. Again in Vijay Narain Singh v. State of Bihar, [1984] 3 SCC 14, this Court construed the expression 'habitually' to mean repeatedly or

persistently and observed that it implies a thread of continuity stringing together similar repetitive acts but not isolated, individual and dissimilar acts and

that repeated, persistent and similar acts are necessary to justify an inference of habit. It, therefore, necessarily follows that in order to bring a person

within the expression 'dangerous person' as defined in clause (C) of Section 2 of the act, there should be positive material to indicate that such person

is habitually committing or attempting to commit or abetting the commission of offences which are punishable under Chapter XVI or XVII of the I.P.C.

or under Chapter V of the Arms Act and that a single or isolated act falling under Chapters XVI or XVII of I.P.C, or Chapter V of Arms Act cannot

be characterised as a habitual act referred to in Section 2(C) of the Act.

9. Further, sub-section (1) of Section 3 of the Act confers power on the State Government and a District Magistrate or a Commissioner of Police

under the direction of the State Government to detain a person on being satisfied that it is necessary to do so with a view to preventing him from

acting in any manner prejudicial to the maintenance of 'public order'. The explanation attached to sub-section (4) of Section 3 reproduced above in the foregoing para contemplates that 'public order' shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely inter-alia if any of the activities of any person referred to in sub-section (4) directly or indirectly, are causing or is likely to cause any harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or public health. Sub-section (4) of Section 3 also provides that for the purpose of Section 3, a person shall be deemed to be 'acting in any manner prejudicial to the maintenance of public order' when such person is a 'dangerous person' and engaged in activities which affect adversely or more likely to affect adversely the maintenance of public order. It, therefore, becomes necessary to determine whether besides the person being a 'dangerous person' his alleged activities fall within the ambit of the expression 'public order'. A distinction has to be drawn between law and order and maintenance of public order because most often the two expressions are confused and detention orders are passed by the authorities concerned in respect of the activities of a person which exclusively fall within the domain of law and order and which have nothing to do with the maintenance of public order. In this connection it may be stated that in order to bring the activities of a person within the expression of 'acting in any manner prejudicial to the maintenance of public order"', the fall out and the extent and reach of the alleged activities must be of such a nature that they travel beyond the capacity of the ordinary law to deal with him or to prevent his subversive activities affecting the community at large or a large section of society. It is the degree of disturbance and its impact upon the even tempo of life of the society or the people of a locality which determines whether the disturbance caused by such activity amounts only to a 'breach of law and order' or it amounts to 'public order.' If the activity falls within the category of disturbance of 'public order' then it becomes essential to treat such a criminal and deal with him differently than an ordinary criminal under the law as his activities would fall beyond the frontiers of law and order, disturbing the even tempo of life of the community of the specified locality. In the case of *Arun Ghose v.*

State of West Bengal, [1970] 1 SCC 98 this Court had an occasion to deal with the distinction between law and order and public order. Hidayatullah,

C.J. (as he then was), speaking for the Court observed that public order would embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its affect upon the life of the community in a locality which determines whether the disturbance amounts only to breach of law and order. It has been further observed that the implications of public order are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different, Again in the case of Piyush Kantilal Mehta v. Commissioner of Police, [1989] Supple. 1SCC32,2 this Court took the view that an order that an activity may be said to affect adversely the maintenance of public order, there must be material to show that there has been a feeling of insecurity among the general public. If any act of a person creates panic or fear in the minds of the members of the public upsetting the even tempo of life of the community, such act must be said to have a direct bearing on the question of maintenance of public order. The commission of an offence will not necessarily come within the purview of public order which can be dealt with under ordinary general law of the land.

10, Now reverting to the grounds of detention and the summary of incidents alleged against the petitioner as mentioned in the beginning of this judgment, it may be stated that the first incident is said to have taken place on 24.4.1993 at about 6.45 PM in which the detenu - petitioner alongwith some of his associates is alleged to have dragged out the complainant, one Mohd. Hussain from inside the Hair Cutting Saloon of Shahpur and associates of the petitioner fired four rounds from the revolver injuring the complainant and one another customer. The report lodged by the complainant Mohd. Hussain himself on 24.4.1993, a copy of which has been placed on record, goes to show that a day earlier, that is on 23.4.1993 at

about 9.30 PM there was a quarrel between Amjad Khan, the younger brother of the complainant Mohd. Hussain and the petitioner upon sounding the scooter horn in the gali of the house of the petitioner and it was in that connection that next day i.e. on 24.4.1993 the alleged incident of assault by the petitioner and his associates to the complainant Mohd. Hussain took place. From the narration of facts in the said complaint it is abundantly clear that the criminal activity was directed against an individual and from the nature of the incident it is difficult to assume that it gave rise to public order disturbing the tranquillity of the locality. At the most it was a criminal act directed only against an ind which has nothing to do with the question of public order It appears that it was on account of the earlier day incident that the petitioner made a plan alongwith his associates to teach a lesson to the complainant by assaulting him when he was seen in the Hair Cutting Saloon on 24.4.1993, This apart the incident had occurred on 24,4.1993 while the detention order was passed on 19.8.1994 after the lapse of more than 16 months. This long lapse of time between the alleged prejudicial activity and the detention order loses its significance because the said prejudicial conduct was not approximate in point of time and had no rational connection with the conclusion that the detention was necessary for maintenance of public order. Such a stale incident can not be construed as justifiable ground for passing an order of detention. The second incident dated 11.4.1994 was that the detenu - petitioner was harbouring offender which is an offence under Sections 212/214 of the I.P.C, An offence under Section 212/214 of the I.P.C. cannot be made a basis for passing an order of detention against the petitioner as the said offence does not fall either under Chapters XVI or XVII of the I.P.C. In order to bring a person within the definition of Section 2(C) of the Act it is essential to show that such person either by himself or as a member of or a leader of a gang habitually commits or attempts to commit or abets the commission of offences punishable under Chapter XVI or XVII of the Indian Penal Code or any of the offences punishable under Chapter V of the Arms Act. But as pointed out earlier the offence registered against petitioner under F.I.R. of C.R.No. 7/94 of DCB dated 11,4. 1994 is one under Sections 212/214 of the I.P.C. which falls under Chapter XI of the I.P.C. and not under any of the chapters XVI or XVII which is the requirement of Section 2(C) of the Act. This incident, therefore, can not be made a basis for satisfaction of the detaining

authority that petitioner is a habitual offender, so as to sustain the order of detention.

11. This brings us to criminal activities of the detenu - petitioner which are said to have taken place on 10.8.1994 at 4.00 PM and on 12.8.1994 at 7.00

PM. In the incident dated 10.8.1994 the petitioner is alleged to have purchased goods worth Rs. 5(K) from a businessman and on the demand of the

price of the goods, the petitioner is alleged to have dragged him out on the public road and not only gave a beating to him but also aimed his revolver

towards the people gathered over there. Similarly it is alleged that on 12.8.1994 at about 7.00 PM the detenu - petitioner stopped the witness on the

road near eastern side of Sardar Garden and beat him as the petitioner doubted that he was informing the police about the anti-social activities of the

petitioner and his associates. The petitioner is also alleged to have rushed towards the people gathered there with the revolver. Taking the aforesaid

two incidents and the allegations on their face value as they are, it is difficult to comprehend that they were the incidents involving public order. They

were incidents directed against single individuals having no adverse effect prejudicial to the maintenance of public order disturbing the even tempo of

life or the peace and tranquillity of the locality. Such casual and isolated incidents can hardly have any implications which may affect the even tempo

of life or jeopardize the public order or incite people to make further breaches of the law and order which may result in subversion of the public order.

As said earlier the Act by itself is not determinant of its own gravity but it is the potentiality of the act which matters.

12. The alleged incident dated 12.8.1994 relating to the beating of some person on suspicion that he was informing the police about criminal activities

of the petitioner, the allegation is sweeping without any material to support it. Neither any timely report appears to have been made about it to the

police nor any offence appears to have been registered against the detenu - petitioner concerning the said incident. There remains the solitary incident

dated 10.8.1994 pertaining to the alleged beating of a businessman which as said earlier directed was against an individual having no adverse impact

on public at large. Besides, the solitary incident dated 10.8.1994 alone would not provide a justification to hold that the petitioner was habitually

committing or attempting to commit or abetting the commission of offences as contemplated in Section 2(C) of the Act because the expression

'habitually' postulates a thread of continuity in the commission of offence repeatedly and persistently. However, in our considered opinion none of the aforementioned two incidents can be said to be incidents affecting public order nor from these stray and casual acts the petitioner can be branded as a dangerous person within the meaning of Section 2(C) of the Act, who was habitually engaged in activities adversely affecting or likely to affect adversely the maintenance of public order. Similar is the position with regard to the recovery of .32 bore country made revolver from the possession of the petitioner without any permit or licence which is an offence under Section 25 of the Arms Act. The said revolver was found to be rusty and had a broken barrel. Mere possession of a firearm without anything more cannot bring a case within the ambit of an act affecting public order as contemplated in Section 3 of the Act unless ingredients of Section 2(C) of the Act are also made out. From the facts discussed above it turns out that there was no material which may lead to a reasonable and definite conclusion that the detenu - petitioner was habitually engaged in criminal activities and, therefore, a dangerous person. The detaining authority thus passed the impugned order of detention against the petitioner without application of mind on the aforesaid aspects of the case and, therefore, the detention order could not be sustained.â??

12. In light of the aforesaid principles as propounded by the Supreme Court in the above cited judgment and considering the facts of the present case, the detaining authority has failed to substantiate that the alleged anti-social activities of the detenue affect adversely or are likely to affect adversely to the maintenance of public order. The alleged activities of the detenue were not of dangerous to the public at large. As a result, the grounds for passing such detention order cannot be sustained and therefore, it deserves to be quashed and set aside.

13. In the result, present petition is allowed. The impugned order of detention dated 28.01.2020 passed by respondent no.2 â?? Commissioner of Police, Surat, is hereby quashed and set aside. The detenue is ordered to be set at liberty forthwith, if not required in connection with any other case. Rule is made absolutely to the aforesaid extent. Registry is directed to communicate this order to the concerned jail authority by fax/e-mail forthwith.