

(2009) 10 GUJ CK 0051

In the Gujarat High Court

Case No : Special Civil Application No. 10637 of 2009

In Re: Uttam @ Sonikaka Savaji Soni (Marwadi) thro" his Brother, Shank

Date of Decision : 08-10-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Gujarat Prevention of Anti-social Activities Act, 1985 — Section 2, 3, 3(1), 3(2), 3(4)

Citation : (2009) 10 GUJ CK 0051

Hon'ble Judges : H.N. Devani, J

Bench : Single Bench

Advocate : H.R. Prajapati, for the Appellant; L.B. Dabhi, Ld. Asst. Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

H.N. Devani, J.—This petition under Article 226 of the Constitution of India is directed against the order of preventive detention dated 10th August 2009 made by the Commissioner of Police, Ahmedabad City, in exercise of powers under Sub-section (2) of Section 3 of the Gujarat Prevention of Antisocial Activities Act, 1985 (hereinafter referred to as "the Act"), whereby the petitioner has been detained as a bootlegger. The order was executed on 10th August 2009. The petitioner is thus detained under the Act since then.

2. Mr.H.R. Prajapati, learned advocate for the petitioner, has drawn the attention of the Court to the contents of the impugned order of detention to submit that the only material on which the said order is based is the solitary offence registered against the petitioner under the provisions of the Bombay Prohibition Act, 1949. It is submitted that except for the solitary offence registered against the petitioner and the record of the said case, there was no other material before the detaining authority. It is submitted that merely because an offence have been registered against the petitioner under the Prohibition Act, without anything more, it cannot be said that the activities of the petitioner are prejudicial to the maintenance of public health and/or public. Referring to the impugned order it is pointed out that the subjective satisfaction of the detaining authority is based

upon the fact that the petitioner is a "bootlegger" as defined u/s 2(b) of the Act to submit that the same is contrary to the law laid down by the Supreme Court in the case of Piyush Kantilal Mehta Vs. Commissioner of Police, Ahmedabad City and Another, It is submitted that for the offence under the Prohibition Act, the petitioner may be punished as provided under the said Act, but such acts constituting the offence under the Prohibition Act cannot be said to have affected the even tempo of life of the community. It is urged that the mere mention of allegations unless they are supported by any material cannot be said to be material germane for the purpose of arriving at the satisfaction with regard to breach of public order or public health. It is accordingly, submitted that the subjective satisfaction recorded by the detaining authority being based on no material stands vitiated and as such the impugned order of detention deserves to be set aside.

3. On the other hand Mr.L.B. Dabhi, learned Assistant Government Pleader, has supported the impugned order of detention. It is submitted that the detaining authority had closely examined the proposal made by the sponsoring authority and upon being subjectively satisfied that the activities of the petitioner are prejudicial to the maintenance of public health and/or public order has passed the impugned order, which is just, legal and proper and does not warrant any intervention by this Court.

4. In Piyush Kantilal Mehta Vs. Commissioner of Police, Ahmedabad City and Another, the Supreme Court was considering the legality and validity of an order of detention passed by the Commissioner of Police, Ahmedabad City under Sub-section (2) of Section 3 of the Gujarat Prevention of Antisocial Activities Act, 1985. The order of detention was based on two offences registered against the detainee under the Bombay Prohibition Act, 1949 as well as statements of five anonymous witnesses residing in the areas where the detainee was alleged to be carrying on his illegal activities. The Supreme Court referred to the provisions of Section 2(b) which defines "bootlegger" and Section 3 which provides for making orders detaining certain persons and held thus:

12. Under Sub-section (1) of Section 3, an order of detention of a person can be passed with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. Sub-section (4) of Section 3 contains a deeming provision. Under Sub-section (4), a bootlegger or a dangerous person or a drug offender shall be deemed to be acting in a manner prejudicial to the maintenance of public order when the activities of such a person affect adversely or are likely to affect adversely the maintenance of public order. In other words, although Sub-section (4) contains a deeming provision, such deeming provision will not be attracted unless the activities of the person concerned affect adversely or are likely to affect adversely the maintenance of public order.

5. The Supreme Court referred to the offences registered against the said detainee and observed thus: "There can be no doubt that the offences alleged to have been committed by the petitioner have no bearing on the question of

maintenance of public order." In the facts of the said case the detaining authority had sought to substantiate the allegations that the activities of the detainee were causing hindrance to the maintenance of public order and connect the activities of the petitioner with the question of maintenance of public order by the statements of five witnesses. The Supreme Court held thus:

16. It is submitted by Dr Chitale that the allegations which have been made by the said five witnesses against the petitioner are also very general in character and do not involve the question of public order. Counsel submits that there is a distinction between "law and order" and "public order". The allegations made against the petitioner may give rise to a question of law and order but, surely, they have nothing to do with the question of public order. A person may be very fierce by nature, but so long as the public generally are not affected by his activities or conduct, the question of maintenance of public order will not arise. In order that an activity may be said to affect adversely the maintenance of public order, there must be materials 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."

17. In this connection, we may refer to a decision of this Court in *Pushkar Mukherjee v. State of West Bengal* where the distinction between "law and order" and "public order" has been clearly laid down. Ramaswami, J. speaking for 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.

In the instant case, the detaining authority, in our opinion, has failed to substantiate that the alleged anti-social activities of the petitioner adversely affect or are likely to affect adversely the maintenance of public order. It is true

some incidents of beating by the petitioner had taken place, as alleged by the witnesses. But, such incidents, in our view, do not have any bearing on the maintenance of public order. The petitioner may be punished for the alleged offences committed by him but, surely, the acts constituting the offences cannot be said to have affected the even tempo of the life of the community. It may be that the petitioner is a bootlegger within the meaning of Section 2(b) of the Act, but merely because he is a bootlegger he cannot be preventively detained under the provisions of the Act unless, as laid down in Sub-section (4) of Section 3 of the Act, his activities as a bootlegger affect adversely or are likely to affect adversely the maintenance of public order. We have carefully considered the offences alleged against the petitioner in the order of detention and also the allegations made by the witnesses and, in our opinion, these offences or the allegations cannot be said to have created any feeling of insecurity or panic or terror among the members of the public of the area in question giving rise to the question of maintenance of public order. The order of detention cannot, therefore, be upheld.

6. Adverting to the facts of the present case, a perusal of the impugned order of detention shows that it is more or less similarly worded to the order which was subject matter of challenge before the Supreme Court in the above referred decision. The only distinction between the two orders is that in the case before the Supreme Court apart from the two offences registered against the detenu under the provisions of the Bombay Prohibition Act, 1949 there were statements of five anonymous witnesses, whereas in the facts of the present case, the only material on the basis of which the impugned order of detention has been passed is the solitary offence registered against the petitioner under the provisions of the Bombay Prohibition Act. The only ground on which the order of detention has been passed is that the petitioner is a "bootlegger" within the meaning of Section 2(b) of the PASA Act. There is no credible material on record to show that the activities of the petitioner had disturbed the tempo of public life. Though the Supreme Court in the Piyush Kantilal (supra) has way back in the year 1988 held that "It may be that the petitioner is a bootlegger within the meaning of Section 2(b) of the Act, but merely because he is a bootlegger he cannot be preventively detained under the provisions of the Act unless, as laid down in Sub-section (4) of Section 3 of the Act, his activities as a bootlegger affect adversely or are likely to affect adversely the maintenance of public order." the detaining authority who is a high ranking police officer and day in day out passes orders of detention, is either ignorant of the law laid down by the Supreme Court, or deliberately chooses to turn a blind eye to the same. In either case, it shows the detaining authority in poor light.

7. A Division Bench of this Court vide judgment and order dated 22nd August, 2000 rendered in the case of Ashokbhai Balabhai Makwana v. State of Gujarat Letters Patent Appeal No. 223 of 2000, after considering the decision of the Supreme Court in the case of Kanuji S. Zala v. State of Gujarat 1999 (2) GLH 415 held that a bald observation that the activities of the petitioner were an

obstacle to public health and public order cannot be taken to be decisive so as to arrive at the satisfaction that the activities of the petitioner were prejudicial to the public order or public health and that tempo of public life was disturbed. The Court further held that the litmus test to find out whether it is a case of breach of public order or breach of public health is that credible material has to be there. In the facts of the said case, apart from the allegation that the petitioner was a bootlegger based on some registered cases, there were some unregistered cases and statements of anonymous witnesses against the petitioner therein. The Court held thus:

Thus, the only material which remains is the registered criminal cases and that by itself cannot be said to be a material for the purpose of holding that the appellant's activities had become a threat to the public order and public health. Necessary material in this regard is totally wanting in the body of the detention order itself. In large number of cases, the Supreme Court has considered that involvement in bootlegging activities even if coupled with violence does not amount to threat to public order or public health. The mere mention of allegations unless they are supported by any material cannot be said to be material germane for the purpose of arriving at the satisfaction with regard to breach of public order or public health.

8. In the facts of the present case except for a mere mention of the allegations there is no material which can be said to be material germane for the purpose of arriving at the satisfaction that the activities of the petitioner are in breach of public order or public health. In the circumstances, the subjective satisfaction recorded by the detaining authority not being based on any credible material stands vitiated and as such the impugned order of detention cannot be sustained.

9. Before concluding, considering the nature of detention orders which have come up for examination before this Court, wherein in case after case the impugned orders of detention are based solely on the ground that the detenu is a "bootlegger" within the meaning of Section 2(b) of the Act which are in flagrant violation of the law laid down by the Apex Court as well as this Court in the decisions cited hereinabove, the Court deems it fit to invite the attention of the detaining authority to the following decision of the Apex Court. In *Shri Baradakanta Mishra Ex-Commissioner of Endowments Vs. Shri Bhimsen Dixit*, the Supreme Court held thus:

Just as the disobedience to a specific order of the Court undermines the authority and dignity of the court in a particular case, similarly the deliberate and mala fide conduct of not following the law laid down in the previous decision undermines the constitutional authority and respect of the High Court. Indeed, while the former conduct has repercussions on an individual case and on a limited number of persons, the latter conduct has a much wider and more disastrous impact. It is calculated not only to undermine the constitutional authority and respect of the High Court, generally, but is also likely to subvert the rule of Law and engender harassing uncertainty and confusion in the administration of law.

16. Our view that a deliberate and a mala fide conduct of not following the binding precedent of the High Court is contumacious does not unduly enlarge the domain of contempt.

10. If despite the aforesaid decisions having been brought to the notice of the detaining authority, the detaining authority still persists on passing cyclostyled orders like the present one in contravention of the law laid down by the Supreme Court, he may do so at his own peril.

11. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned order of detention dated 10th August 2009 passed by the Commissioner of Police, Ahmedabad City, is hereby quashed and set aside and the petitioner-detenu is hereby ordered to be set at liberty forthwith, if not required to be detained in any other case. Rule is made absolute.

12. Direct Service is permitted.