

(1998) 11 GUJ CK 0044

In the Gujarat High Court

Case No : Special Civil Application No. 1482 of 1998

Ismailbhai Sumarbhai Shaikh (Miyana)

APPELLANT

Vs

District Magistrate

RESPONDENT

Date of Decision : 26-11-1998

Acts Referred:

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

Citation : (1998) 11 GUJ CK 0044

Hon'ble Judges : D.C. Srivastava, J

Bench : Single Bench

Advocate : Anil S. Dave, for the Appellant; Siddhi Talati Assistant Government Pleader for Respondent Nos. 1, 2, 3, for the Respondent

Final Decision : Allowed

Judgement

D.C. Srivastava, J.—This writ petition under Article 226 of the Constitution of India has been filed praying for writ of certiorari for quashing the detention order dated 26.2.1998 and habeas corpus for immediate release of the petitioner from illegal detention in pursuance of the aforesaid order of detention.

2. The brief facts are that the Detaining Authority u/s 3(2) of the Prevention of Antisocial Activities Act, 1985 (for short "PASA") passed the impugned detention order. The grounds for detention show that the petitioner was identifying himself as "DADA" of the locality. Several offences under Prohibition Act were registered against the petitioner. According to the grounds of detention 8 cases under Prohibition Act were registered against the petitioner on different dates between September,1996 to January,1998. In addition to this the petitioner was detained under PASA Act earlier vide orders dated 18.12.1992 and 19.12.1995. It was also alleged that the petitioner was giving threat to the Police Officers of the concerned police station, whenever they raided the distillery of the petitioner, where he was distilling, storing and selling the country made liquor. An offence was also registered against the petitioner on 23.11.1997 for giving threat to prohibition police station officer. Besides this, six witnesses gave secret

statements against the petitioner which was also disclosed in the grounds of detention. On the aforesaid material the detaining authority reached subjective satisfaction that the petitioner was carrying on antisocial activity of filtering and selling country made liquor. This activity of the petitioner was causing financial and physical injury to the residents of the locality and it was likely to repeat hooch tragedy which seriously affected public at large in the past. These activities of the petitioner were considered to be against the maintenance of public order and hence the order of detention was passed.

3. Learned Counsel for the petitioner has challenged the impugned order on various grounds.

4. The first contention has been that the copy of bail application and bail order was not supplied by the Detaining Authority to the petitioner and this has affected valuable right of the petitioner in making effective representation to the authority. To my mind, this ground has no substance. In counter affidavit Shri V.S.Gadhavi, District Magistrate in para 10 has deposed that copy of bail order, bail application and other documents relied upon by him were supplied to the petitioner along with grounds of detention. No rejoinder affidavit has been filed by the petitioner. Thus, if the averments made in the affidavit were controverted in counter affidavit and no rejoinder has been filed by the petitioner it will be presumed that counter affidavit is correct and as such copies of bail application and bail order were supplied to the petitioner. This ground has therefore no substance.

5. Another contention has been that the activities of the petitioner cannot be said to have disturbed public order nor such activities can be described as prejudicial to maintenance of public order. From the grounds of detention it seems that the petitioner has carried on business of distilling, storing and selling country made liquor. This activity within the meaning of section 3(b) of PASA Act will render him a bootlegger. However, mere involvement in bootlegging activity does not tantamount to disturbance of public order. Unless the activities of the petitioner have direct impact upon maintenance of public order he could not be preventively detained under preventive detention under the PASA Act. The Hon''ble Supreme Court in the case of Piyush Kantilal Mehta Vs. Commissioner of Police, Ahmedabad City and Another, has observed that merely because a person is engaged in bootlegging activity and he is a bootlegger within the definition of section 2(b) of the PASA Act, he cannot be preventively detained unless his activities are prejudicial to the maintenance of public order. In the subsequent pronouncement of the Apex Court in Omprakash Vs. Commissioner of Police 1992(2) GLR 730 the same view was taken as was taken in Piyush Kantilal Mehta's case (Supra). In this case also pith and substance of the alleged antisocial activities of the detenu as mentioned in the grounds of detention were that the detenu as bootlegger was engaged in unlawful activity of storing and selling country made and foreign liquor at Ahmedabad through himself and his associates and was also causing injuries to innocent persons of that locality by

using lethal weapons thereby unleashing a reign of terror in the said area. According to the Apex Court it is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order. On the aforesaid activities of the petitioner it was found by the Apex Court that such activities did not amount to prejudicial to maintenance of public order. The detention order was therefore quashed. The facts of the case before me are also identical. Here also the petitioner is engaged in the activity of distilling, storing and selling country made liquor. Unregistered cases disclosed by the witnesses who preferred to maintain secrecy about their identity stated nothing but about stray incidents in which threat was extended by the petitioner to the witnesses. Such incidents according to the aforesaid verdict of the Apex Court in Omprakesh's case (Supra) cannot be said to be prejudicial to the maintenance of public order.

6. In the grounds of detention it is mentioned in para 5 that the petitioner was detained under PASA Act earlier under orders dated 18.12.1992 and 19.12.1995 and after getting released from the same he committed the aforesaid offences by continuing these antisocial activities. However, it is not clear from this para in the grounds of detention whether detention orders in 1992 and 1995 were confirmed or quashed. If the orders were quashed the petitioner cannot be blamed if he is engaged subsequently in similar activities and if those activities were not prejudicial to the maintenance of public order he could not be again preventively detained under the PASA Act.

7. Another ground of detention is that the petitioner gave threats to the prohibition police station officers who raided the place of the petitioner for seizing liquor. A case has been registered against the petitioner on 23.11.1997. Giving threat to police officers cannot be said to have disturbed public order in the locality. If allegation against the petitioner is proved he will be punished by the competent Court. This Court in Amrat Ramabhai Vaghari Vs. Commissioner of Police 1995(2) GLH 874 also took the similar view. In this case also the petitioner was found to be bootlegger. He was indulging in using force and beating people. Barring some stray isolated minor incidents the activities alleged against the detenu could not be said to create insecurity in public in general. The detention order on these facts was quashed.

8. In view of the aforesaid decision and the facts before me it can be said that the activities of the petitioner cannot be said to be prejudicial to the maintenance of public order and as such the order of detention against the petitioner is bad in the eyes of law and is required to be quashed.

9. The last contention has been that there was inordinate delay in passing the order of detention. It was urged that the petitioner was arrested in connection with another case on 24.1.1998. Bail was granted in that case. However, the detention order was passed on 26.2.1998. It was further argued that there was one month and two days delay in passing the impugned order as computed from the date of commission of last offence. This delay according to the learned

Counsel for the petitioner has rendered detention of the petitioner illegal. Few cases were cited in support of this contention. The case of Pradeep Nikanth Paturkar Vs. S. Ramamurthi and others, is distinguishable on facts. In this case, the detention order on the basis of few criminal cases registered against the petitioner and also on the basis of statements of witnesses was passed after five months and eight days from registration of last case against the petitioner. In the case before me there is only about a month's delay which cannot be called as inordinate or undue delay. No time limit has been prescribed either by the statute or by any authority or by any judicial pronouncement during which the order of detention should be passed. In such cases only recourse to reasonable time can be taken and if the detention order is passed within reasonable time of commission of last offence it cannot be struck down. Further, in this case the Apex Court found that the delay remained unexplained. This is another distinguishing feature. In the case before me there is explanation of delay from the Detaining Authority. In para 9 of the Counter affidavit of the Detaining Authority it is mentioned that one month's time was taken in passing the detention order and because of the administrative reasons this delay occurred. Thus administrative reasons amount to sufficient explanation of delay. The Detaining Authority was not obliged to disclose what were the administrative reasons and in what administrative work he remained busy. After all the District Magistrate has to attend so many administrative work and on the facts and circumstances of the case sufficient as well as satisfactory explanation of delay has been given by the Detaining Authority.

10. Likewise the case of Anand Prakash Vs. The State of Uttar Pardesh and others, can be distinguished on facts. In this case the facts were that the theft of electric wires was committed on 14.2.1989. F.I.R. was registered on 15.2.1989. House of the petitioner was raided on 3.3.1989. 20 k.g. of melted electric wire was recovered. However, no action was taken despite this recovery till 2.5.1989. On 2.5.1989 he was arrested. He moved bail application and the detention order was passed on 3.5.1989. There was no satisfactory explanation why after recovery of melted wire on 3.3.1989 no action was taken till 3.5.1989. Due to these unexplained reasons two months delay was considered sufficient for setting aside the detention order. In the case before me there was no such lapse on the part of the Sponsoring Authority or the Detaining Authority. The Sponsoring Authority was likely to take some time to complete the investigation and then submit his report. Thus, on the facts of the case before me I find sufficient explanation of delay. This Court in the case of Jeevan G. Tandel Vs. Union of India (UOI) and Others, considered the effect of one year's delay in passing the detention order. The Court found that the delay was satisfactory explained by the Customs Authorities and the State Government. Consequently it was held that the detention order was not vitiated on account of delay in passing the detention order.

11. In the case of Osman Ali Khataki Vs. Commissioner of Police, Rajkot 1994(1) GLH 512, the Division Bench of this Court has considered this very question. In

this case the verdict of the Apex Court in *Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others*, was considered and referred. In this case the Apex Court issued guidelines for different High Courts to draw distinction between delay in making the order of detention under law relating to preventive detention like COFEPOSA and the delay in complying with the procedural safeguards of Article 22(5) of the Constitution of India. In a series of decisions the Apex Court held the rule as to inflexible quite obviously in cases of mere delay in making of an order of detention under law like COFEPOSA. The Court should not merely on account of delay in making of an order of detention assume that such delay if not satisfactorily explained, must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of the Detaining Authority or that such subjective satisfaction was not genuinely reached. Taking of such a view would not be warranted unless the Court finds that the grounds are "stale" or illusory or that there is no real nexus between the grounds and the impugned order of detention. The Division Bench in *Osman Ali's case* (supra) considered the delay in passing the detention order under PASA Act and it held that the grounds relied upon were so fresh at the time when the detention order was made that it can never be said that they were stale.

12. Consequently since the delay has been satisfactory explained the delay cannot be said to be inordinate or unexplained hence the detention order cannot be said to be illegal or invalid. Activity of the petitioner was fresh and it could not be said to be stale. As such this ground fails.

13. The case of *Dharmsinh @ Sanjay Vs. Commissioner of Police* in SCA 3306/97 decided on 7.7.97 by this Court is also distinguishable on facts. In this case there was one month and 18 days unexplained delay in passing the detention order. Since the emphasis was on unexplained delay the order was quashed. The delay in the instant case before me has already been explained.

14. In view of the aforesaid discussions since the activities of the petitioner were not prejudicial to maintenance of public order he could not be preventively detained. Subjective satisfaction of the prescribed authority was therefore illegal. The detention order as such has been rendered illegal and invalid. Writ Petition therefore, succeeds and is hereby allowed. The impugned order of detention dated 26.2.1998, Annexure "A" to the writ petition is hereby quashed. The petitioner shall be released forthwith unless he is wanted in connection with some other criminal case.