

(1999) 12 GUJ CK 0082

In the Gujarat High Court

Case No : Special Civil Application No. 2986 of 1999

Jayanti Nenumel Ramnani

APPELLANT

Vs

Commissioner of Police

RESPONDENT

Date of Decision : 13-12-1999

Acts Referred:

Citation : (2000) CriLJ 3192

Hon'ble Judges : A.L. Dave, J

Bench : Single Bench

Advocate : Yogesh S. Lakhani, for the Appellant; D.P. Joshi, AGP for Respondent Nos. 1, 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

A.L. Dave, J.—The petitioner came to be detained under the provisions of the Gujarat Prevention of Anti Social Activities Act, 1985 (‘PASA Act’ for short) by virtue of an order passed by the Commissioner of Police, Rajkot City, Rajkot on 18th February, 1999, in exercise of power u/s 3(1) of the PASA Act.

2. In the grounds of detention, the detaining authority took into consideration an offence registered against the petitioner under secs.66(B), 65(A), 65(E), 116(B) and 81(3) of the Bombay Prohibition Act. The authority also took into consideration the two statements recorded by the sponsoring authority on 15th February, 1999, and came to a conclusion that the facts stated by the witnesses were correct and that they genuinely apprehended danger to their person and property from the petitioner. The authority, therefore, came to a conclusion that there was need for exercise of power u/s 9(2) of the PASA Act, and claimed privilege by not disclosing the identity of those witnesses. The authority also recorded subjective satisfaction about the petitioner being a bootlegger as defined under the PASA Act. The authority also recorded that he is satisfied that the petitioner will be chargesheeted for the offence registered against him. After considering the alternative less drastic remedy, in the nature of externment proceedings u/s 57(C) of the Bombay Police Act, 1951, the authority concluded

that it is not possible to resort to that remedy and because it is necessary to immediately prevent the petitioner from pursuing his illegal activities which has disturbed public order and public security. Detention under PASA is therefore necessary.

3. The petitioner challenges the detention on various grounds:

3.1 The first is that the statements of the anonymous witnesses cannot be genuine. It is contended further, that considering the less drastic alternative remedy u/s 57(C) of the Bombay Police Act, is only an attempt for an eye-wash. When the number of offence against the petitioner only one, there is no question of proceeding u/s 57(C) of the Bombay Police Act, which requires atleast two convictions. The authority could have considered section 56 of the Bombay Police Act and non-consideration of this less drastic remedy indicates non-application of mind. It is contended further that the detaining authority has not taken into consideration the fact that the offence registered against the petitioner is in respect of foreign liquor and it cannot be said to be detrimental to the public health. It is contended further that there is no subjective satisfaction recorded by the detaining authority about the activities of the petitioner being a detrimental to the public health. It is contended lastly, that the order suffers from non-application of mind as the authority has taken into consideration certain activities which relates to a dangerous person although the authority has not branded the petitioner as a dangerous person. This being an extraneous factor cannot be considered by the authority. The order suffers on that count also. The petition may therefore be allowed.

4. The detaining authority has filed an affidavit-in-reply. In para 9 of the affidavit the detaining authority states "the offences registered and unregistered mentioned in the grounds disclose the disturbance to public health and public order due to his activities." The other contentions are that there was subjective satisfaction about the petitioner being a bootlegger and that he was required to be detained under PASA immediately. It is contended in para 11 that the procedure under sec.59(1) of the Bombay Police Act is lengthy and is common for action under both sections 56 and 57 of the Act. The grounds discussed by the authority would not serve the purpose of public interest and therefore immediately remedy under PASA was resorted to.

5. Mr. Lakhani, learned advocate appearing for the petitioner submitted that, the entire procedure that is followed for detaining the petitioner reflects non-application of mind on part of the detaining authority. He submitted that the petitioner was arrested for the offence registered against him vide C.R. No.23/99 on 15.2.99 at 21.00 hrs as can be seen from the copy of the 'Chehra Nisan Patrak' furnished to the detenu at the time of detention. The two statements which are relied upon by the detaining authority and in respect of whom privilege is claimed are recorded on the same day i.e. between 21.00 hrs. of 15.2.99 and 24.00 hrs of the same day. This reflects that this statements are concocted or got up and the procedure followed is not genuine or correct. Mr. Lakhani

submitted that the detaining authority has not recorded in the grounds of detention anything regarding risk to the public health. There is only one offence registered regarding prohibition. There is nothing against the petitioner so far as other activities endangering public order is concerned. Mr. Lakhani submitted that in the affidavit-in-reply the authority is coming with a case that the offences registered and unregistered, mentioned in the grounds disclose disturbed to public health and public order due to the activities of the petitioner, but there is not an iota, either in the statement or in the offence registered, regarding detriment to the public health. This reflect that the detaining authority is not acting impartially. Mr. Lakhani submitted further that the activities narrated in para 3 of the grounds of detention relates to activities, which are of a dangerous person, which is detrimental to the public order, but the authority has not labelled the petitioner as a dangerous person and only one offence registered against the petitioner under the Bombay Prohibition Act. The petitioner has been detained under the PASA when there is nothing to indicate that the activities were detrimental to the public health. Mr. Lakhani therefore submitted that the petition may be allowed.

6. Mr. Joshi, learned AGP for the State has placed reliance on the affidavit-in-reply. He also pressed into service the decision of this High Court in the case of PARSHOTTAMBHAI NAVALRAM KHEMANI Vs. STATE OF GUJARAT AND ANOTHER 1985(2) GLR 620 and the case of HARIVADAN MATHURDAS MODI Vs. DISTRICT MAGISTRATE, BHARUCH AND OTHERS 1989(1) GLH 505. He submitted that the detaining authority has taken into consideration the public health and public order and passed the order of detention. He confirmed the factual aspect that the petitioner was arrested on 15.2.99 at 21.00 hrs and the statements are recorded on 15.2.99 only, the same have been verified on next date i.e. 16.2.99 and the order came to be passed on 18.2.99.

7. Taking into consideration rival side contentions, the first aspect that attracts the attention of this Court is the defect in considering the alternative less drastic remedy. In the grounds of detention the authority has stated that resorting into the proceedings under sec.57(C) is considered by it, but, for that purpose atleast two convictions are necessary for resorting to that remedy. Whereas in the instant case there is only one case registered against the petitioner which is pending investigation and, therefore, it is not possible to resort to sec.57(C) of the Bombay Police Act. The detaining authority, in affidavit-in-reply at para.11 states as under:

"With regard to ground (H) of the petition I say that long procedure u/s.59(1) of the Bombay Police Act 1951 is common for action both sections 56 and 57 of the Act. The grounds discuss why the long procedure will not serve the purpose of public interest and hence immediately remedy under PASA is resorted to."

It is crystal clear that the grounds for not taking action against the petitioner under sec.57(C) which are considered while passing the order of detention, are not the grounds which are stated in the affidavit-in-reply. In the grounds of

detention, the ground of sec.57(C) of the Bombay Police Act was considered as not possible to be resorted for the reason that the two convictions are required for taking action against the petitioner under the said provision. In the affidavit-in-reply, the detaining authority comes with a different version, namely that the same was not resorted to because the proceedings under sec.59(1) of the Bombay Police Act are lengthy. Thus, the grounds stated in the affidavit-in-reply for not resorting to less drastic remedy under sec.57(C) did not find place in the grounds of detention.

7.1 Apart from this, another factor that requires consideration is that whether considering proceedings under sec.57(C) of the Bombay Police Act was infact a genuine consideration of less drastic remedy. Considering section 57(C) of the Bombay Police Act less drastic remedy was not legally available in the facts of the case, and there was no question of considering it. In fact, what the authority ought to have considered was the possibility of resorting to less drastic remedy which is legally available and can be resorted to. That is not considered by the detaining authority which reflects non-application of mind. In this regard, decision in the case of MAVA ARJAN PARMAR Vs. COMMISSIONER OF POLICE rendered by Division Bench of this Court on 6.11.99 and reported in 1990(1) GLR 481 may be referred to. In that case the petitioner was detained under sec.3 on the ground that he was a bootlegger. The Division Bench held that detention order deserves to be quashed as the detaining authority did not consider the possibility of resorting to less drastic remedy under sec.56 of the Bombay Police Act. The decision was based on an earlier decision of the Division Bench of this Court in the case of BHUPATBHAI @ UNDARDO Vs. COMMISSIONER OF POLICE, VADODARA, in Special Criminal Application No.1344 of 1989 decided by Division Bench of this Court on 6.3.1990. In this view of the matter, the order of detention deserves to be quashed.

8. In this regard, the decision relied upon by Mr. Joshi, learned AGP, may well be considered. Considering the decision in the case of Parshhotam Navalram Khemani (Supra) it has been held in that decision that availability of alternative remedy is not barred to prevent the detention but the detaining authority is bound to consider the aspect of available alternative remedy. In the instant case, as discussed above, the detaining authority has not taken into consideration the legally available less drastic remedy and, therefore, this decision will not help the respondents.

8.1 Likewise in the case of Harivadan Mathurdas Modi (supra), the Court held that if the detaining authority has stated that he was satisfied that ordinary law of the land is inadequate and was insufficient to take care of the petitioner detenu from acting prejudicial to the maintenance of public order and detention order was passed as a last resort, it would vitiate the order of detention and it is not necessary that such satisfaction must be recorded in the order of detention. In the present case, the authority has recorded satisfaction about not resorting to sec.57(C) of the Bombay Police Act, but that remedy is not legally available to

be resorted to as discussed earlier. The other legally available remedy is not considered and, therefore, there is gross non-consideration of that alternative remedy as discussed above and, therefore, neither of the decisions can help the respondents.

9. The detaining authority in the grounds of detention has stated that the ordinary law of land i.e. Bombay Police Act sec.57(C) cannot be resorted to for the reasons stated thereabove (namely that two convictions are required for resorting to it). This reflects that what the detaining authority has considered as less drastic remedy is proceedings sec.57(C) only. According to the detaining authority, as can be seen from the phraseology employed in the grounds of detention, the general law of the land meant only sec.57(C) of the Bombay Police Act and no other provisions. The decision of Harivadan Modi (supra) therefore cannot be employed in this case.

10. As regards harm to public health, the detaining authority has stated in affidavit-in-reply that the offences registered and unregistered mentioned in the grounds disclose the disturbance to public health and public order due to activities of the petitioner. Now if the grounds of detention are considered, particularly, the narration of statements of the anonymous witnesses, there is nothing to indicate that the activities are detrimental to the public health. In fact the grounds of detention do not mention anything on the question of public health. The reference is only to public order and public security. Thus, what is stated in the affidavit-in-reply is not borne out from the ground of detention and, therefore, the grounds of detention, having made no reference whatsoever to public health, could not have formed basis for detaining the petitioner only on basis of a single prohibition case registered against him.

11. At this juncture, Mr. Lakhani does not press for a verdict of the rest of the contention raised by him on the above ground. In this view of the matter, the petition deserves to be allowed.

12. In the result, the petition is allowed. The order of detention dated 18th February, 1999, in respect of the petitioner is hereby quashed and set aside. The petitioner-detenu Jayanti Nenumel Ramnani is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute with no order as to costs.