

(2014) 03 GUJ CK 0072

In the Gujarat High Court

Case No : Special Civil Application No. 16697 of 2012

Kanaji Bhuraji Mali

APPELLANT

Vs

State of Gujarat thro Secretary and 2 Ors.

RESPONDENT

Date of Decision : 06-03-2014

Acts Referred:

Bombay Prohibition Act, 1949 — Section 116(2), 65(a)(e), 66(b), 81, 98
Constitution of India, 1950 — Article 226
Gujarat Prevention Of Anti-social Activities Act, 1985 — Section 2(b), 3

Citation : (2014) 03 GUJ CK 0072

Hon'ble Judges : S.H. Vora, J

Bench : Single Bench

Advocate : E.E. Saiyed, Advocate and Mr. Sikander Saiyed, Advocate for the Petitioner(s) No. 1, Advocate for the Appellant; Bipin Bhatt, AGP for the Respondent(s) No. 1, 3, Advocate for the Respondent

Final Decision : Allowed

Judgement

S.H. Vora, J.—By way of this petition under Article 226 of the Constitution of India, the petitioner challenges the legality and validity of the order of detention dated 21.11.2012 passed by the District Magistrate, Banaskantha @ Palanpur in purported exercise of powers under Sub-Section (2) of Section 3 of the Gujarat Prevention of Anti-Social Activities Act, 1985 (for short, the Act") at pre-detention stage.

2. Brief facts as arising from the petition are that an F.I.R. being C.R. No. III-5245 of 2012 for the offences punishable under Sections 66(b), 65(a)(e), 116(2), 81, 98 and 99 of the Bombay Prohibition Act on 22.9.2012 before Dhanera police station. It is alleged in the petition that the petitioner is a driver. That on the basis of information received by Dhanera Police, a watch was kept on 22.9.2012 for the information that some prohibited liquor is going to enter Gujarat State carrying illegal liquor and accordingly, raid was conducted and some liquor was found for which aforementioned FIR is registered.

3. Upon serious apprehension that the order of detention has already been passed against the petitioner, the present petition is preferred.

4. No affidavit-in-reply is filed by the respondents. Therefore, the contentions and averments made in the petition remained unchallenged and uncontroverted. It is contended that the petition filed by the petitioner is not maintainable under the law. It is further stated that an order of detention is passed by the authority under the said Act against the petitioner. It is further stated that the petitioner has preferred this petition at a pre-mature stage apprehending that the respondent authorities would invoke the provisions of the said Act against the petitioner. It is further stated that the present petition has been filed with misconception of facts and law at the stage of pre-execution of detention order. It was contended that the petitioner was required to surrender before challenging the order of detention which is not yet served to him. It was further contended that since the detaining authority on a subjective satisfaction, after perusal of relevant materials placed before it including the documents relating to one offence registered against the petitioner that the activities of the petitioner were prejudicial to the maintenance of public order, the order of detention was passed against the petitioner. It is further stated that the detaining authority, after carefully considering, pursuing, examining and applying its mind to all the relevant materials placed before it as well as legal provisions applicable to the same, was subjectively satisfied that the petitioner is a "bootlegger" person as defined u/s 2(b) of the Act and hence, passed the order of detention against the petitioner to prevent him from acting in any manner prejudicial to the maintenance of public order. The State has placed on record detention order No. D/MAG/1/PASA/63/2012 dated 21.11.2012 passed by the District Magistrate, Banaskantha @ Palanpur for Court's perusal.

5. Learned advocate for the petitioner has submitted that the petition in the present form is maintainable and tenable both on law as well as on facts to substantively challenge the order of detention at pre-execution stage in view of the decision of the Hon"ble Apex Court in the case of Deepak Bajaj V/s. State of Maharashtra and another reported in (2008)16 SCC 14. According to him, the Hon"ble Apex Court, considering its earlier decision in the case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, and the objections taken at the pre-execution stage by the other side therein, on the identical ground, has held that "we are of the opinion that the five grounds mentioned therein on which the Court can set-aside the detention order at pre execution stage are only illustrative not exhaustive". Learned advocate for the petitioner also relied upon the decision of the Division Bench of this Court in the case of Mahendrasinh Mangalsinh Jadeja V/s. State of Gujarat and other delivered in Letters Patent Appeal No. 1495 of 2013 on 24.12.2013. Lastly, he has submitted that it is an established law that the detention in case of solitary prohibition offence registered against detenu under the Act, is against the law. According to him, except solitary prohibition offence, there is no material to indicate that the alleged activity of the petitioner is

affecting or likely to affect adversely to the maintenance of public order and hence, the order of detention is illegal and bad in law.

6. Learned A.G.P. for the State, on the other hand, submitted that this petition is at pre-execution stage without surrendering before challenging the order of detention. Unless and until the petitioner surrenders, he would not be entitled to get the order as well as the grounds thereunder and the petitioner would not be entitled to copies of the same by filing the present petition.

7. Before the petition is taken on merits, it is necessary to keep in mind the law as reiterated by the Division Bench of this Court in the case of Mahendrasinh Mangalsinh Jadeja (*supra*) in the matter of petitions challenging the detention order at pre-execution stage and, more particularly, para 11 thereof, which reads as under:--

11. The learned Single Judge has dismissed the writ petition filed by the appellant without perusing the order of detention and the grounds of detention solely on the premise that as per the prevailing position of law the writ petition to challenge the order at pre-execution stage is not maintainable and that the authorities cannot be directed to produce the detention order and the grounds on the record of the petition. It is bounden duty of the Court to call for the order of detention for its own perusal to satisfy itself as to the validity of the detention order. Unless the Court directs the authorities to produce the detention order for its perusal, it would not be possible for the Court to test the detention order and come to the conclusion whether the detention order stands scrutiny of the norms and the guiding principles enunciated in the case of Alka Subhash Gadia (*supra*) and Subhash Popatlal Dave (*supra*). In this premise, we are of the opinion that the impugned judgment of the learned Single Judge cannot be sustained. The matter needs to be remanded to the learned Single Judge to decide the petition afresh after calling for the detention order and grounds for detention for its own perusal and to independently decide whether it is a fit case to quash the detention order at a pre-detention stage or not. The appeal, therefore, succeeds to the aforesaid extent. Interim relief granted in the writ petition by the learned Single Judge shall continue till final disposal of the main writ petition by the learned Single Judge. In view of the disposal of main appeal, no order is required to be passed on the Civil Application and the same stands disposed of accordingly. Direct Service is permitted.

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. 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 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 non 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 Vs. State of T. Nadu tr. Sec. to Govt. and Another*, 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.

10. In light of the abovementioned decisions of the Hon''ble Apex Court and as discussed by the Division Bench of this Court in the case of *Mahendrasinh Mangalsinh Jadeja (supra)*, now, it is right time to examine whether in the facts of this case, the Court should interfere with the preventive detention order at the pre-execution stage. It is true that this petition is filed at a pre-execution stage. However, from the grounds of detention, produced for Court's perusal, it appears that the single offence as aforesaid under the Act has been registered against the petitioner. This fact has not-been controverted by the detaining authority. It also appears that on the basis of the said solitary case under the Bombay Prohibition Act, the District Magistrate, Banaskantha @ Palanpur has come to the subjective satisfaction that the activities of the petitioner as "bootlegger" have disturbed the public order. The preventive detention order mentions that the petitioner is a "bootlegger". The "bootlegger" has been defined u/s 2(b) of the Act, which reads as under:--

2(b). "bootlegger" means a person who distills, manufactures, slurs, transports, imports, exports, sells or distributes any liquor, intoxicating drug or other intoxicant in contravention of any provision of the Bombay Prohibition Act, 1949

(Born. XXV of 1949) and the rules and orders made thereunder, or of any other law for the time being in force or who knowingly expends or applies any money or supplies any animal, vehicle, vessel or other conveyance or any receptacle or any other material whatsoever in furtherance or support of the doing of any of the things described above by or through any other person, or who abets in any other manner the doing of any such thing.

11. 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 solitary FIR cannot have any bearing on the public order since the laws of the land are sufficient enough to take care of the situation and that the allegations as have been levelled against the detenu cannot be said to be germane for the purpose of bringing the detenu within the meaning of Section 2(b) 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. In view of the allegations alleged in the aforesaid F.I.R., the Court is of the opinion that the activities of the detenu 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 Pushkar Mukherjee and Others Vs. The State of West Bengal, , 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.

12. In the instant case, except the aforesaid incident which has been registered against the petitioner, there is no other material which weighed to detain the petitioner. Therefore, it cannot be said that for the aforesaid offence registered

against the petitioner, the petitioner could be considered to be a "bootlegger, whose preventive detention is must for maintenance of public order. So, the Court is of the considered opinion that the petitioner is not a "bootlegger" and his act, as alleged in the detention order cannot disturb maintenance of public order and, therefore, the instant case would fall within 3rd and 4th grounds namely it is passed for wrong purpose or it is passed on vague, extraneous and irrelevant grounds mentioned in the case of Alka Gadia (supra) and, therefore, order of preventive detention at pre-execution stage calls for interference of this Court. As the order of detention has been passed by the detaining authority without having adequate grounds for passing the said order, it cannot be sustained and deserves to be quashed and set aside.

13. In the result, the petition is hereby allowed. Impugned order of detention dated 21.11.2012 passed by the District Magistrate, Banaskantha @ Palanpur against the petitioner is hereby quashed and set aside. Rule is made absolute to the aforesaid extent. Direct service is permitted.