

(2005) 03 GUJ CK 0081

In the Gujarat High Court

Case No : Special Civil Application No. 112 of 2005

Kaushalbhai Rameshbhai Desai

APPELLANT

Vs

District Magistrate

RESPONDENT

Date of Decision : 11-03-2005

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2005) CriLJ 2428

Hon'ble Judges : J.R. Vora, J

Bench : Single Bench

Advocate : H.R. Prajapati, for the Appellant; I.M. Pandya, AGP for Respondent Nos. 1, 2 and 3 and M.I.A. Shaikh, for the Respondent

Final Decision : Allowed

Judgement

J.R. Vora, J.—This Special Civil Application under Article 226 of the Constitution of India has been filed by the petitioner challenging his detention in pursuance of the order passed against him by the District Magistrate, Surat on 25th January, 2005 in exercise of powers conferred upon him vide Sub-Section (2)(a) of Section 3 of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (PBM Act for short). The petitioner is under detention in pursuance of the said order from 25th January, 2005.

2. The grounds of detention as placed on record reveal the factual background that the petitioner was a dealer of oil companies and was granted a license according to rules for distribution of blue kerosene to the fair price shops of specified area of Surat District. The blue kerosene is an essential commodity under the control orders framed by the State Government by virtue of the Essential Commodities Act, 1955 and the blue kerosene is subsidized by the State Government for distribution for the same amongst lower or middle income commune citizens who hold ration cards, as per the rules framed by the State Government. According to the distribution system, the agent of the oil companies who is licensed by the State Government, receives bulk of such blue kerosene

from oil companies and distributes to the fair price shop-owners who are licence holders to distribute in turn, such blue kerosene to the ration card holders. The difference between white and blue kerosene is made because white kerosene is available in open market with higher rates, while blue kerosene being an essential commodity is for distribution to needy citizens by the fair price shop owners through ration cards by subsidized rates.

3. On 4th January, 2005, the present petitioner through one oil tanker No.GT-G-3119 lifted 12000 liters of blue kerosene for distribution to [1] Mohanlal B. Jain at Mahuva, 4000 liters, [2] Kharvan Co-operative Society, 2000 liters [3] Vinodbhai K. Patel, Bartad, 3000 liters and [4] Shankarlal Nagjibhai Jain, Shaikhpur, 3000 liters. The petitioner being license holder submitted a programme for distribution of 12000 liters of kerosene to above four persons which was approved by the State Government. The tanker in which such quantity was carried belonging to one Smt. Surekhaben which was hired by the petitioner and the driver of such tanker was one Shri Ghanshyambhai Agrawal and his assistant cleaner was one Shri Pappu Franses Koli.

4. The District Supplies Department of Surat received information on 4th January, 2005 that the petitioner instead of distribution programme approved was to transport the said bulk of blue kerosene to one Shri Ambubhai Naranji Goja having a fair price shop and license holder to distribute such kerosene to ration card holders at subsidized rates. A team of Supply Department, Surat District kept surveillance around the shop of said Shri Ambubhai Naranji Goja at Salabatpura, Surat and raided his shop. On shop being raided by the team of the District Supplies Officers of Surat District, they found that the tanker No.GT-G-3119 unloaded 12000 liters of blue kerosene at the shop of said Shri Ambubhai Naranji Goja. The tanker was loaded and sent and was transporting the bulk as per the instructions of the present petitioner. The Supply Officers recorded the statements of tanker driver Ghanshyambhai Agrawal. He stated that the bulk of 12000 liters of blue kerosene was unloaded at the shop of Shri Ambubhai Naranji Goja instead of above mentioned four persons at the instructions of the petitioner, while cleaner Pappu Franses Koli also offered his statement in support of driver Ghanshyambhai Agrawal. A panchnama was drawn and said bulk of 12000 liters of kerosene was seized by the team of Supply Department of Surat District. As per the allegations, this 12000 liters of kerosene which was obtained at subsidized rate was to be sold by the petitioner and Shri Ambubhai Naranji Goja in open market with higher rates in collusion. Such black marketing was to yield huge amount of personal gain to the petitioner and Shri Ambubhai Naranji Goja. The authority also came to the conclusion that driver Shri Ghanshyambhai Agrawal also was an accomplice along with the petitioner and Shri Ambubhai Naranji Goja in this black marketing and he was also to receive financial gain. According to the statements of the driver Shri Ghanshyambhai Agrawal, the four above mentioned persons to whom according to control orders, the petitioner was bound to make delivery of blue kerosene, were also to receive financial gain through this scandal of black marketing of blue

kerosene in open market. The District Supplies Officer, Surat launched proper inquiry and recorded statements of the owner of the tanker and she stated that she had given the said tanker on hire to the petitioner and liability of salary to the driver was on the petitioner. The statements of other persons to whom actually delivery of the blue kerosene was to be made by the petitioner, were also recorded but they denied to have participated in any manner in the said scandal as stated by driver Shri Ghanshyambhai Agrawal. Though an attempt was made by the department for recording of statement of the petitioner, but the petitioner did not offer him for such statement.

5. From the above facts, the authority concerned reached to the conclusion that at the instruction and under the management of the petitioner, tanker driver Shri Ghanshyambhai Agrawal in collusion with Shri Ambubhai Naranji Goja with an intention to gain financially illegally, were engaged in activities of selling blue kerosene in open market at higher rates. The detaining authority also reached to the subjective satisfaction that keeping in view huge financial gain, petitioner and Shri Ambubhai Naranji Goja and driver in collusion were engaged in the activities which were prejudicial to the maintenance of supplies of commodities essential to the community. It was also alleged that the petitioner as well as other two acted in breach of the provisions of Essential Commodities Act, 1955 and Control Orders framed in 1993 by virtue of the Essential Commodities Act 1955. The detaining authority also reached to the subjective satisfaction that the illegal activities of the petitioner, which were prejudicial to the maintenance of supplies of commodities essential to the community were required to be prevented forthwith. A criminal complaint before Salabatpura Police Station, Surat was lodged against the petitioner, Shri Ambubhai Naranji Goja and tanker driver Shri Ghanshyambhai. Though Shri Ambubhai Naranji Goja was arrested in the said complaint, but till the date of passing of the order, the petitioner was not arrested. According to the learned advocate for the petitioner, the petitioner was arrested on the date of passing of the order. The detaining authority also suspended, immediately for 90 days, the license granted to the petitioner for transporting blue kerosene. The detaining authority after considering these measures taken against the petitioner came to the conclusion that the action taken against the petitioner for cancelling license or launching prosecution etc., were not sufficient to prevent the petitioner from repeating illegal acts prejudicial to the maintenance and supplies of essential commodities. The detaining authority, therefore, reached to the subjective satisfaction that there was no other alternative, except to detain the petitioner under PBM Act to prevent his illegal activities forthwith and hence, the detaining authority passed an order of detention of the petitioner under the PBM Act, which is under challenged in this petition.

6. Learned advocate Mr.H.R.Prajapati for the petitioner, learned AGP Mr.I.M.Pandya for the respondents No.1, 2 and 3 and learned Additional Standing Counsel for the Central Government Mr.M.I.A. Shaikh for respondent No.4 were heard at length. The affidavit-in-reply filed by the detaining authority Mr.Pankaj

Joshi, who passed an order and, thereafter, further affidavit-in-reply as filed by Ms.Vatsala Vasudeva, District Magistrate, Surat were taken into consideration. It is to be noted that this Special Civil Application came to be filed by the petitioner at pre-execution of the order stage and pending petition, the order of detention was executed upon the petitioner, so the petition was amended and appropriate grounds and reliefs to challenge the order of detention were embodied in the petition with the permission of the Court. The affidavit-in-reply as filed by Mr.A.K.Ganguli under Secretary in the Department of Consumer Affairs, Food and Public Distribution, New Delhi and affidavit-in-reply filed by Shri H.C.Kadia, Deputy Secretary to the Government of Gujarat, Food, Civil Supplies and Consumer Affairs Department, Sachivalaya, Gandhinagar, were also taken into consideration.

7. The various grounds almost all grounds available to the petitioner were pressed into service by learned advocate for the petitioner to challenge the order of detention and learned AGP and learned Standing Counsel for the Central Government vehemently opposed and controverted the contention raised on behalf of the petitioner.

8. From the rival contentions raised by the learned advocates for the parties, it appears to this Court that this petition is required to be examined firstly on the issue that whether on the facts of the case, this Court can interfere and come to the conclusion that from the material placed before him, there were no grounds before the detaining authority for passing of the detention order. The issue raised, undoubtedly calls for examining the scope of judicial interference in the detention orders on facts.

9. Needless, it is to observe that the scope of inference of this Court on facts in detention matter is very limited and the Court will though zealously guard the liberty of citizens as enshrined by the Constitution of India and examine that whether necessary safeguards are observed scrupulously, but interference on facts in such matters is consistently held not called for except in exceptional and rarest of rare circumstances. The preventive detention measures are harsh, but it becomes necessary in public interest that precautionary measures in the shape of preventive detention may be resorted to for preservation of public safety. Undoubtedly, this power is required to be exercised with circumspection. Ordinarily, to arrive at subjective satisfaction the detaining authority is not required to satisfy itself that the person concerned is guilty of an offence, but it is sufficient, if from the materials available on record, the detaining authority could reasonably feel satisfied about necessity of the prevention of the activities prejudicial to the interest of the public. Therefore, ordinarily, the powers conferred upon detaining authority should not be undoubtedly restricted nor the law has established any catalogue of the materials, which formed the basis of the detention order, that will depend undoubtedly on the facts situation of the case. The judicial interference to that extent, therefore, is uncalled for, but still Courts are not debarred to go into the facts of the case in given exceptional case to

examine the nexus between the subjective satisfaction reached at by the detaining authority and material placed before him. There may be cases of facts in which it may reasonably appear to the Court that no order can be passed against detenu person on the material available with the detaining authority. Though the Court cannot substitute its own opinion for that of detaining authority when the grounds of detention are precisely proximate and relevant but to come to this conclusion, it becomes always necessary for the Court to scrutinize the case on facts and the material which was made available to the detaining authority. If in any exceptional circumstances, it appears to the Court that on facts even from the material available to the detaining authority the order of detention could not have been passed, the scope of judicial interference is certainly extended to observe, and examine such issue and conclude the same.

10. When the facts of the present case are taken into consideration it leads to examine the role played by the present petitioner in the whole episode as attributed by authorities. It is an admitted fact that the petitioner was a dealer of oil companies and was a license holder of the Supply Department of the State Government for transporting of the blue kerosene in certain areas. According to the petitioner, he hired transport for the said purpose, filed programme to distribute the said blue kerosene in the area in which he was licensed by the State Government and transported the said tanker for distribution of blue kerosene in the area in which he filed programme to the concerned authority. This Court at this juncture is not examining the role played by the driver of the tanker and said Shri Ambubhai Naranji Goja as alleged by the detaining authority in the order of detention. While going through the papers and the grounds of detention as placed on record to the permissible limits and within the scope of judicial interference, it becomes crystal clear that the stigmatic role to the present petitioner is attributed to him by driver of the tanker Shri Ghanshyambhai Agrawal. In his statement, he stated before the authority that he was acting as per the instruction and under the management of the petitioner. As against that the petitioner stated repeatedly and consistently that he never instructed the driver of the tanker Shri Ghanshyambhai Agrawal to transport the bulk of blue kerosene at Surat and to Shri Ambubhai Naranji Goja. Scrutinizing the materials carefully, it becomes clear that the only material available with the detaining authority to attribute a role to the petitioner, is the statement of the driver of the tanker. It becomes, therefore, a grey area to reach to any definite conclusion that whether the driver of the tanker was acting under the instruction of the petitioner or on his own. The involvement of the petitioner is based upon this grey area. It becomes necessary to note here that thereafter, the driver Shri Ghanshyambhai Agrawal not only informed the authorities that he was acting on his own and not as per the instruction of the petitioner, but he also filed an affidavit to this effect and submitted before the authorities, which in turn was made available to the petitioner along with the grounds of detention. Now in these circumstances, it is required to be examined within the scope of limited judicial interference that whether there was compelling reasons for the detaining

authority to pass the order of detention against the petitioner. 11. It may also be noted here that the order of detention as against the petitioner is based on the above material and that the license of the petitioner is suspended for 90 days by competent authority suggesting that for 90 days from the date of order, the petitioner would not be able to carry out any alleged activities. It may also be noted that the prosecution under Sections 3 and 7 of the Essential Commodities Act as well, is launched against the petitioner.

12. From the above, under the scope of Article 226 of the Constitution of India, what is required to be seen is as to whether it could reasonably be said that material placed before detaining authority indicated organized act on the part of the petitioner. It is also to be noted that no previous incident was discovered as against the petitioner revealing repetitive tendency, so as to infer that the petitioner would continue to indulge in similar prejudicial activities warranting compulsion of resorting to the detention of the petitioner under PBM Act.

13. The facts of this case, requires to be examined with reference to the observation of the Apex Court in the matter of Chowdarapu Raghunandan Vs. State of Tamil Nadu and Others, that was a case of detention of COFEPOSA Act. It was alleged against the petitioner that on 30th March, 2001, when the petitioner was landed at Chennai Airport from Singapore, after completing immigration formalities, collected his baggages and was proceeding to the exit gate, he was intercepted by the Customs Intelligence Officer and from his baggages dutiable goods viz. cellphones and accessories worth Rs.13,90,000 were recovered. In his voluntary statement, he admitted that he visited twice earlier and his friend helped him in procuring this dutiable goods for marketing in India. But in his representation to the Commissioner of Customs, he stated that he was the Managing Director of a public limited company and that he had gone to Singapore regarding his company's business. This was the consistent stand of the petitioner while filing the bail application as well as while moving his representation before the Commissioner of Customs that the baggage in question did not belong to him and that the earlier statement obtained was under threat, coercion and undue influence and that those baggage did not contain any tag also to connect the same with him. The other stand which the petitioner consistently took in that case was that the baggage containing the goods in question were in the name of another with his ticket number and address and no action could be taken against him before recording a finding properly and deciding on the basis of any concrete material the ownership of the disputed baggage. Now in these circumstances, the Apex Court observed as under in paragraph Nos.13 and 21.

"13. It is true that in appropriate case, an inference could legitimately be drawn even from a single incident of smuggling, that the person may indulge in smuggling activity but for that purpose antecedents and nature of the activities carried out by a person are required to be taken into consideration for reaching justifiable satisfaction that the person was engaged in smuggling and that with a

view to prevent, it was necessary to detain him. It is also settled law that an order of preventive detention is founded on a reasonable prognosis of the future behaviour of a person based on his past conduct judged in the light of the surrounding circumstances. Such past conduct may consist of one single act or a series of acts. It must be of such a nature that an inference can reasonably be drawn from it that the person concerned would be likely to repeat such acts so as to warrant his detention. If there is non-application of mind by the authority on this aspect, then the court is required and is bound to protect the citizen's personal liberty which is guaranteed under the Constitution. Subjective satisfaction of the authority under the law is not absolute and should not be unreasonable. The question, therefore, would be from the past conduct of the petitioner as set out in the grounds of detention or other circumstances, whether reasonable inference could be drawn that he is likely to repeat such acts in the future. In the present case, past conduct of the petitioner is that he is an engineering graduate and at the relevant time he was the Managing Director of a public limited company. There is no other allegation that he was involved in any other anti-social activities. The only allegation is that he visited Singapore twice as a "tourist". Admittedly, the petitioner has filed bail application in a criminal prosecution for the alleged offence narrating the fact that his so-called statement was not belonging to him and there were no tags on the same so as to connect him with the said baggages and the crime. At the time of hearing of this matter also, it is admitted that the baggages were without any tags. It is also an admitted fact that there is nothing on record to hold that the petitioner was involved in any smuggling activity. However, the learned Additional Solicitor-General submitted that in the statement recorded by the Customs Department the petitioner had admitted that previously he had visited Singapore twice as a "tourist", and, therefore, it can be inferred that the petitioner might have indulged and was likely to indulge in such activities. This submission is farfetched and without any foundation. From the fact that a person had visited Singapore twice earlier as a "tourist", inference cannot be drawn that he was involved in smuggling activities or is likely to indulge in such activities in future. Hence, from the facts stated above it is totally unreasonable to arrive at a prognosis that the petitioner is likely to indulge in any such prejudicial activities.

21. Though, no doubt, the courts exercising powers of judicial review do not consider the challenge to an order of detention, as if on an appeal reappreciating the materials, yet since an order of detention in prison involves the fundamental rights of the citizen, freedom of movement and pursuit of normal life and liberty, no absolute immunity can be claimed by the respondents as to the decision arrived at and it is open to the courts to see whether there has been due and proper application of mind and that all the relevant and vital materials for the purpose have been noticed, adverted to and considered. So far as the facts of the present case are concerned, the plea on behalf of the petitioner is not that someone else also is concerned with the offending act but that he has nothing to do with it and that the baggage containing the contraband really belonged to

such other person. Such plea cannot be also brushed aside in this case as one merely invented in the air but seems to have necessary basis from the fact that Baggage Ticket Nos.00021777 and 0021771 were registered in the name of one Babu and that concedingly action and investigation in this regard is still pending and has not concluded so far. If the baggage really belonged to another person as was stated to have been registered, it necessarily follows that the petitioner cannot be the owner of the very same baggage. The seriously doubtful position about the elementary and basic fact regarding the ownership of the baggage and the admitted inconclusive stage of the investigation in this regard could not legitimately help the authorities to pass any order of detention against the petitioner on the perfunctory and inchoate materials relied upon. Apart from the absence of any positive or concrete materials to connect the baggage in question with the petitioner, the nature of stand disclosed in the counter affidavit filed on behalf of the 1st respondent on this aspect does not really help the authority to prove that the said material and such vitally relevant aspect was either adverted to or really considered before passing the order of detention. Consequently, the impugned order suffers from the vice of total non-application of mind to a relevant and vital material touching question of the culpability as well as the necessity to order the detention of the petitioner. The impugned order of detention, therefore, has been rightly quashed and the writ petitioner ordered to be released from detention in prison."

14. In one more decision of the Apex Court in the matter of Bannalal Vahilda Chavla Vs. Union of India and Others, the facts were that the petitioner was whole sale dealer of white kerosene and was purchasing white kerosene from a dealer who was licensed to distribute blue kerosene. It was found by the authority that by some process the said dealer converted blue kerosene in white kerosene and was selling the same in open market, that was the allegations against the dealer that the dealer was obtaining blue kerosene by subsidized rates and was selling the same in open market after chemical process and was getting huge price. The petitioner of that petition before Supreme Court was bonafide purchaser of white kerosene from such dealer. The authority took the sample of white kerosene from the petitioner of the petition before Supreme Court which was though found converted from blue kerosene but the stand of the said petitioner was consistently that he never knew that he was purchasing white kerosene from the dealer who converted blue kerosene into white one. In these circumstances, while upholding the order of detention against dealer, the petitioner of that petition, was released with observation in paragraph No.5 and order of detention was quashed against the petitioner. There was also no material before the detaining authority to show that the petitioner had in the past committed any illegal act as regards possession, storage and use of blue-coloured kerosene. All these relevant aspects were not considered by the District Magistrate before passing the detention order. Therefore, the satisfaction arrived at by him was not held to be reasonable and genuine.

15. In the present case also, the involvement of the present petitioner is found

by the detaining authority from the statement of the driver of the tanker, who in turn thereafter, retracted the statement and filed affidavit that he was acting on his own and not under the instructions or in the management of the petitioner so far as the unloading kerosene to Shri Ambubhai Naranji Goja was concerned. Except this there was no material before the detaining authority to show that the petitioner had in the past committed any illegal act as regards the possession, storage and use of blue coloured kerosene. The license granted to the petitioner is suspended for 90 days by the concerned authority and from the facts of the case and after inquiry, authority may take appropriate decision. A prosecution also is launched against the petitioner for the breach of Sections 3 and 7 of the Essential Commodities Act, 1955. From the material placed on record, it is clear that the role attributed to the petitioner by the authorities is based upon a grey area as aforesaid. Therefore, the subjective satisfaction arrived at by the detaining authority cannot be said to be reasonable and genuine. The order of detention challenged in this petition is required to be quashed and set aside on this ground alone.

16. In the result, the petition is allowed. The order passed by the District Magistrate, Surat on 25th January, 2005, against the petitioner in exercise of powers under Sub Section (2)(a) of Section 3 of the PBM Act is hereby quashed and set aside. The detenu KAUSHALBHAI RAMESHBHAI DESAI is hereby ordered to be set at liberty forthwith if he is not required to be detained in jail for any other purpose. Rule is made absolute. Direct service is permitted.