

(2001) 07 GUJ CK 0048
In the Gujarat High Court

Case No : Special Civil Application No. 3718 of 2001

Khimjibhai Nagjibhai Parmar

APPELLANT

Vs

District Magistrate

RESPONDENT

Date of Decision : 19-07-2001

Acts Referred:

Citation : (2002) CriLJ 686

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Pravin Gondaliya, for the Appellant; H.L. Jani, AGP for Respondent Nos. 1, 2-4 and P.J. Davawala, for the Respondent

Final Decision : Allowed

Judgement

H.K. Rathod, J.—Heard Mr. P.S. Gondalia learned advocate for the petitioner, Mr. H.L. Jani learned AGP for the respondents nos 1, 2 and 3 and Ms. P.J. Davawala learned advocate for the respondent no. 3.

2. In this petition the petitioner has challenged the order of detention dated 21.2.2001 u/s 226 of the Constitution of India. The order of detention has been passed by the District Magistrate, Jamnagar under the provisions of section 3(2) of Prevention of Black Marketing and Supply of Essential Commodities Act (hereinafter referred to as the said Act.) Present petitioner has been detained in Central Jail, Baroda as a class-II detenu. The grounds of detention has been communicated and supplied to the petitioner by the detaining authority. The respondent State Government as detaining authority has not filed any reply though on behalf of respondent no. 3 the Union of India has filed affidavit in reply which has been taken on record.

3. Mr. Gondalia learned advocate appearing for the petitioner has submitted that the petitioner was having licence of fair price shop issued by the State Government. He submitted that various grounds have been raised in the petition challenging the order of detention but according to him 2 grounds are enough to

vitiating the order of detention.

4. The first contention raised by Mr. Gondalia learned advocate for the petitioner in ground (E) is that the detaining authority has not considered the less drastic remedy at the time of passing the order of detention. The detaining authority was not at all aware about the remedy of cancellation of licence of the fair price shop and suspension of the licence and this remedy has not at all been considered by the authority which shows the non application of mind on the part of the detaining authority. Therefore, the order of detention suffers from non application of mind. However, he submitted that the order of detention is passed on 21.2.2001 and on the very next day i.e. 22.2.2001 the licence of the petitioner in respect of the fair price shop was cancelled for a period of 90 days and therefore, according to him the order of detention is required to be quashed and set aside. The second contention of Mr. Gondalia learned advocate for the petitioner which has been raised in ground (H) of the petition is that a representation has been made by the petitioner on 12.5.2000 to the concerned authorities through the jail. It is submitted that the petitioner has received a communication from the State Government and the Central Government in connection with his representation. Looking to this reply of the authorities there is unexplained delay in deciding the representation of the petitioner and it is further submitted that the petitioner has sent a copy of the said representation to the District Magistrate, Jamnagar and demanded Gujarati translation of the document at page 53 which is in English language. But no reply has been received from the District Magistrate, Jamnagar- the detaining authority as regards the representation of the petitioner. The detaining authority has not supplied the translation of the document at page 53 of the petition which is in English language though demanded by the petitioner in his representation. According to Mr. Gondalia learned advocate for the petitioner as no reply was given by the detaining authority to the representation of the petitioner, it amounts to denial of legal and fundamental right of the petitioner to have effective representation under Article 22(5) of the Constitution of India. Mr. Gondalia learned advocate for the petitioner has relied two decisions of this Court in support of his contentions viz. 1999(1) GLH 145 : 2000(2) GLR 1767.

5. Mr. H.L. Jani learned AGP for the respondent State Government submitted that no attempt has been made by the detaining authority about less drastic remedy such as cancellation or suspension of the licence of the petitioner. However, he submitted that if the licence is suspended or cancelled then it will definitely affect the card holders of the village where the fair price shop is situated. He also submitted that if the licence of the petitioner is cancelled or suspended it would create administrative difficulties and inconvenience to the card holders of the village since they have to go for purchasing the very materials which are available from the fair price shop from other sources. Therefore, in order to see that no inconvenience is caused to the villagers, the licence of the petitioner was not suspended or cancelled by the authority. Mr. Jani learned AGP has also submitted that looking to the entire grounds of detention, it has been recorded

by the detaining authority that if the petitioner is indulging in such type of activities of making profit from the fair price shop by charging more price to the articles supplied by the Government than what has been prescribed by the Government, the card holders will have to pay more price which will be causing economic loss to the card holders of the village. He further submitted that looking to the grounds of detentions, the observations made by the detaining authority and considering the statement obtained from the card holders, the petitioner is in the habit of indulging such activities which violates the relevant provisions of Essential Commodities Act. Therefore there were compelling circumstances to pass the order of detention against the present petitioner; otherwise the same activities will be carried on by the petitioner which will adversely affect the right of the card holders. He also submitted that looking to the facts and circumstances and it is clear from the record that subjective satisfaction has been established and therefore, there is no option before the detaining authority but to pass the order of detention against the petitioner and therefore, the order of detention is quite legal and valid which does not require any interference by this court.

6. Ms. P.J. Davawala learned advocate for respondent no. 3 has supported the order of detention and submitted that considering the facts and materials on record the detaining authority has rightly passed the order of detention which is quite legal and valid and the same cannot be interfered by this court while exercising extra ordinary powers under Article 226 of the Constitution of India. Ms. P.J. Davawala learned advocate for the respondent no. 3 supported the submissions of learned AGP Mr. Jani as against Shri Gondalia and stated that non cancellation or suspension of licence has no meaning because the order of detention has been passed on 21.2.2001 and immediately on the next day the licence of the petitioner has been suspended by the concerned authority for a period of 90 days and the original order of suspension of licence has been shown to the court by Mr. Gondalia, learned advocate for the petitioner. He submitted that a specific averment has been made in ground (E) to the petition but no reply has been filed by the State Government. Therefore, he submitted that when the authority itself is not aware of the less drastic remedy and not considered the same before passing the order of detention, then the order of suspension must be vitiated on that ground alone.

7. I have considered the submissions of all the learned advocates for the parties and considering the facts and circumstances of the present case and perusing the grounds of detention in details, according to my opinion the detaining authority has not taken into account the less drastic remedy of suspension or cancellation of the licence. If the petitioner has violated the relevant provisions of Essential Commodities Act, this aspect should have been considered by the detaining authority but the detaining authority has totally ignored the same. If the aspect of less drastic remedy has been considered and found not effective by the detaining, then the matter stands entirely on a different footing. But in the present case, the detaining authority has not at all considered the aspect of less

drastic remedy for restraining the activities of the petitioner and without taking into account the less drastic remedy straightaway the order of detention has been passed. Therefore, it amounts to non application of mind. In this connection the observations made by this court in the in the case of Upendrabhai Jasubhai Joshi vs. District Magistrate, Navsari in the case of 1999(1) GLH 145 are relevant. The observations made by this court in paras 6, 7, and 8 of the above said decision are reproduced as under:

"6. The last ground is that if the petitioners had indulged themselves in large scale black marketing of diesel oil they would be prevented from indulging in such activity by revoking or suspending their licence and this possibility was not considered by the Detaining Authority. The grounds of detention had been read before me. After going through the grounds of detention I could not find any mention in the same from which an inference can be drawn that the Detaining Authority was aware of the situation that in the facts and circumstances of the case suspension or cancellation of licence would not be the effective remedy in preventing the alleged nefarious activities of the petitioners. Learned Public Prosecutor has contended that it seems that by mistake it was not mentioned in the grounds of detention by the Detaining Authority that this possibility was considered. However, this contention cannot be accepted. It is not a case of mistake. Even vaguely it is not stated in the grounds of detention that suspension or cancellation of licence was not efficacious remedy in preventing the black marketing of the essential commodity.

7. The learned Public Prosecutor has relied upon a Division Bench pronouncement of this Court in Purshottambhai Navalram Khemani vs. State of Gujarat and Anr. (2) GLR 610 . Her main contention has been that it is not for this Court to sit in appeal over the discretion of the Detaining Authority in arriving at subjective satisfaction and this Court cannot say that on the material on record the Detaining Authority could not have arrived at such subjective satisfaction. In my opinion this case does not support the learned Public Prosecutor, rather it goes against her. It has been laid down in this case no doubt that alternative remedies are not bar to the preventive detention. Thus availability of alternative remedy according to this case is no bar for ordering preventive detention. In this very case in para 15 it has been observed as under:

"15. It is in these circumstances that we have to address ourselves to the moot question as to whether the Detaining Authority had addressed itself to the material aspect as to whether cancellation of the petitioner's licence would be sufficient on the facts of the case to keep the petitioners out of harm's way and would be an effective alternative remedy rendering his preventive detention which is a more drastic action unnecessary It is obvious that if this material consideration has not entered the process of subjective satisfaction of the Detaining Authority the petitions must succeed"

8. From the above observations it is clear that if the Detaining Authority has not entered in this exercise in the process of arriving at subjective satisfaction the

petitions must succeed. At another place in this very judgment at page 638 it was observed that on the facts of this case there is no escape from conclusion that this consideration has also in fact entered exercise of subjective satisfaction of the Detaining Authority. Once that conclusion is reached the limited scope of inquiry before this court comes to an end. It is thus clear that in this case the Detaining Authority has considered whether cancellation of fair price shop's licence was effective remedy or not. The case is distinguishable because in this case the detaining authority had considered the question pertaining to cancellation of petitioner's licence. It was observed that on the facts of this case it must be held that all the relevant considerations pertaining to cancellation of petitioner's licence were kept in view by the Detaining authority. All the pros and cons of situation had been kept in view by the Detaining Authority and it is thereafter that the orders in question were passed. In the case before me the Detaining Authority viz. the District Magistrate Shri R.C. Gohil in his affidavit has not mentioned that he considered the efficacy of suspension or cancellation of petitioner's licence and that by mistake he could not mention this fact in the detention order or in the grounds of detention. Consequently the theory of mistake argued by the learned Public Prosecutor falls to the ground."

8. The non supply of the translation of the document at page 53 to the petition in Gujarat by the detaining authority, though demanded by the petitioner, it amounts to non communication of grounds of detention which having the adverse effect of making effective representation which ultimately violates Article 22(5) of the Constitution of India. In this context the view taken by this court in the case of Koli Sureshbhai Balabhai Parmar vs. District Magistrate, Bhavnagar reported in 2000(2) GLR 1767 is relevant. Relevant observations made by this court in paras 12 and 13 of the above said judgment are reproduced below:

"12. Thus the correct legal position which emerges from the aforesaid decisions, is as under:

(i) Failure to furnish the copies of the documents to which only a reference or a casual or passing reference was made in the grounds of detention is not an infringement of Art. 22(5), fatal to the order of detention.

(ii) While a distinction has to be maintained between a document which has been relied upon by the detaining authority in the grounds of detention and a document which finds a mere reference in the grounds of detention, non supply of the copy of the documents relied upon in the grounds of detention is fatal to continue the detention and in such cases the detenu need not to show that any prejudice is caused to him. Non supply of such a document would amount to denial of right of being communicated the grounds and of making an effective representation against the order.

(iii) When the detenu was already on bail at the time when the detention order was passed the detaining authority has to necessarily rely upon the bail application and the order granting bail as that would be a vital ground for

ordering the detention and in such cases, the copies should also be supplied to the detenu.

(iv) What applies to a document would equally apply to furnishing translated copy of the document in the language known to and understood by the detenu should be document be in a different language.

13. Such being the position of law on the basis of Supreme Court decision, as aforesaid, this Court finds that in the facts of the present case non supply of the translation of the bail order and the conditions of bail at pages nos 13 to 19 and 22 i.e. non supply of the documents, which were vital to the grounds of detention, has affected the petitioner's right under Art. 22(5) of the Constitution of India. This Special Civil Application therefore, deserves to be allowed on this ground alone and Therefore, it is not necessary for me to consider the other grounds on which the detention order has been sought to be assailed."

9. In light of the above observations of both the cases as referred to above and looking to the facts of the present case, when the detaining authority has not at all considered and applied his mind in respect of less drastic remedy of cancellation and suspension of the licence of the petitioner and non supply of the translated document in Gujarat at page 53 to the petition though demanded, it amounts to non application of mind on the part of the detaining authority having adverse effect to the legal right of the petitioner for making effective representation under Article 22(5) of the Constitution of India. Thus the order of detention is required to be quashed and set aside.

10. In the result the petition is allowed. The order of detention dated 21.2.2001 passed by the District Magistrate, Jamnagar against the petitioner is hereby quashed and set aside. The petitioner-detenu Kihimjibhai Nagjibhai Parmar who is detained in Central Jail at Vadodara is ordered to be set at liberty if he is not required in any other case. Rule is made absolute. No order as to costs.