

(1999) 11 GUJ CK 0057
In the Gujarat High Court

Case No : Special Civil Application No. 1574 of 1999

Kishor Naginbhai Parmar

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 22-11-1999

Acts Referred:

Citation : (2000) CriLJ 3195 : (2000) 4 GLR 460

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

Bench : Single Bench

Advocate : H.R. Prajapati, for the Appellant; Joshi, AGP, for Respondent No. 1, 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

A.L. Dave, J.—The Commissioner of Police, Vadodara city, Vadodara passed an order on 12th February 1999 in exercise of powers under sub-section [2] of section 3 of the Gujarat Prevention of Anti Social Activities Act, 1985 [for short, 'the PASA Act'] detaining the petitioner under the PASA Act. The grounds of detention reveal that the detaining authority took into consideration two of the offences registered against the petitioner. The authority also considered that the petitioner acts in a high-handed manner and has formed a gang for pursuing his illegal activities. The authority verified the statements of two witnesses whose identity has not been disclosed in exercise of powers u/s 9[2] of the PASA Act and recorded a subjective satisfaction that the petitioner is engaged in illegal and antisocial activities endangering the life and property of public and people have fear and apprehension from him, as a result of which, people are not prepared to come forward and lodge a complaint against the petitioner. The detaining authority, therefore, considered the detention as the only remedy that can be resorted to in order to deter the petitioner from pursuing his illegal activities.

2. The petitioner made a representation which was considered and turned down.

3. The petitioner has therefore approached this Court with this petition under

Article 226 of the Constitution of India. The petitioner in the petition has taken many grounds to challenge the order of detention.

4. Mr. Prajapati, learned Advocate for the petitioner, has assailed the order of detention, only on the ground that the subjective satisfaction recorded by the detaining authority for the need for exercise powers u/s 9[2] of the PASA Act and claim of privilege is not well founded and has, therefore, resulted in infringement of the petitioner's right of making an effective representation guaranteed by the Constitution. Mr. Prajapati submitted that the detaining authority has simply re-recorded the statements of the witnesses, but has shown nothing to indicate that the detaining authority has in fact independently verified and has arrived at an independent subjective satisfaction that the fear expressed by the witnesses qua the detainee is correct and / or that the incidents, narrated by the witness have in fact occurred.

5. Mr. Prajapati, learned Advocate, pressed into service the decision of Chandrakant N. Patel Vs. State of Gujarat and Others, . He also pressed into service the decision of this Court in Special Civil Application No.9005/98 dated 4th August 1999 in the case of Shobhaben wife of Chandrakant Chhara v/s Commissioner of Police and also the decision in the case of Relia Dhanjibhai Khimjibhai Koli v/s Rajkumar in Special Civil Application No.9053/98 dated 14th June 1999, wherein these aspects have been considered by this Court. He therefore submitted that the petition may be allowed.

6. Mr. Joshi, learned AGP, has opposed this petition. He submitted that the detaining authority has categorically recorded subjective satisfaction. That subjective satisfaction is also explained in the affidavit in reply filed by the detaining authority wherein the detaining authority states that he had carefully scrutinized, examined and considered all the materials and had also personally verified the veracity, genuineness and correctness of the statements of the witnesses and the incidents narrated in the registered offences. Mr. Joshi therefore urged that the petition may be dismissed.

7. Having regard to the rival contentions, it may be noted that the detaining authority, in the grounds of detention, has stated that he has found the apprehension of the witnesses to be genuine and correct and therefore, their identity is not disclosed by virtue of exercise of powers u/s 9[2] of the PASA Act.

8. In the affidavit in reply, the detaining authority has stated as under :-

"I have carefully scrutinized, examined and considered all those materials and also personally verified the veracity, genuineness and correctness of the statements of witnesses and the incidents narrated in it in the registered offences."

9. It was, therefore, urged on behalf of the respondents that there cannot be any more further verification that can be contemplated in such matters.

10. In this regard, decision by a Full Bench of this Court in the case of

Chandrakant N. Patel [supra] may be profitably referred to. In that case, decision in the case of Bai Amina Vs. State of Gujarat and Others, was also considered. The Full Bench observed as under:-

"On careful reading of the said decision, it can be said that the ratio of the decision is that the privilege u/s 8[2] of the National Security Act can be claimed by the detaining authority only when it is properly and genuinely satisfied that it is against public interest to disclose the facts which are withheld while communicating the grounds of detention to the detenu, and that while deciding whether it is necessary to withhold the materials, facts and particulars to the detenu on the ground that it will be against public interest to do so, another public interest which requires disclosure of all the relevant materials and particulars on which the order of detention is based with a view to affording an adequate opportunity of making an effective representation to the detenu against the order of detention must be borne in mind and the delicate balance between the two must be maintained. If the privilege is claimed bona fide and after proper application of mind, then the detenu cannot legitimately complain that he has been deprived of his right to make an effective representation because of the vagueness of the grounds of detention. The observations which have been made by this Court in that case as regards the promise of confidentiality, etc., are by way of elaboration as to what can be regarded as sufficient or not sufficient for the purpose of arriving at the bona fide satisfaction of the detaining authority in that behalf."

The Full Bench while referring to on the case of Balkrishna Kashinath Khopkar v/s District Magistrate, Thana [1956 [58] BLR 614], also observed that the privilege can only be claimed in public interest. While claiming the privilege, the detaining authority must act with a sense of responsibility and it must consider which facts should not be disclosed to the detenu by reason of the fact that it would be against public interest to disclose those facts. The Full Bench then observed,

"If we examine the decisions in the case of Bai Amina and in the case of Balkrishna closely, it becomes clear that what has been briefly stated as the correct legal position as regard the nature and extent of the privilege in the case of Balkrishna, has been more elaborately stated in the case of Bai Amina."

The Full Bench then observed,

"Since the satisfaction in this behalf has to be of the detaining authority, obviously, the promise of confidentiality given by the person recording the statement cannot by itself be regarded as sufficient ground for withholding the disclosure of such particulars and materials. But if, after considering the general background, character, antecedent, criminal tendency or propensity, etc., of the detenu and the reluctance of the witnesses who gave the statements against the detenu, the detaining authority is satisfied about the necessity of withholding some particulars or materials, then it cannot be said that the same was not done in public interest, and that public interest likely to be subserved by nondisclosure

did not outweigh or override the public interest intended to be served by disclosure of the relevant particulars and materials to the detenu."

11. In this view of the matter, the detaining authority while exercising powers u/s 9[2] of the PASA Act for claiming privilege is expected to consider the general background, character, antecedents, criminal tendency of propensity etc. of the detenu. In the instant case, if affidavit or the grounds of detention are considered, all that is recorded by the detaining authority is that the fear expressed by the witnesses is found to be genuine and correct by the detaining authority. The detaining authority has recorded that it has carefully scrutinized, examined and considered all the materials that were produced before him by the sponsoring authority. It is, therefore, clear that the detaining authority, while verifying the statements of the witnesses and while considering the question of exercising the privilege u/s 9[2] of the PASA Act, has not taken any independent steps for considering general background, character, antecedents, criminal tendency etc. while recording subjective satisfaction, but has relied solely on the material produced by the sponsoring authority. There is no contemporaneous record to indicate the steps taken by the detaining authority and the grounds and reasons for arriving at the subjective satisfaction. It is therefore very difficult to conclude that the detaining authority has considered general background, character, antecedents, criminal tendency and propensity etc. of the detenu while arriving at the subjective satisfaction, for the need for exercise of powers u/s 9[2] of the PASA Act and claim privilege by not disclosing identity of the anonymous witnesses.

12. In this regard, the decision in Special Civil Application No. 9005/98 in the case of Shobhnaben wife of Chandrakant Chhara v/s Commissioner of Police, decided on 4th August 1999 may also be considered. In that case, the detaining authority while recording a subjective satisfaction in respect of the petitioner's activities being prejudicial to the maintenance of public order, relied on the statements given by the witnesses. The said witnesses were summoned before the detaining authority and the detaining authority verified the correctness of the fear of retaliation expressed by the witnesses. But the detaining authority did not record its satisfaction in respect of credibility of the witnesses and genuineness of the statements given by them. While relying on the decision in the case of Mohd. Sharif alias Kaliyo Nurmohammadsarnibapu Shaikh v/s Commissioner of Police, Ahmedabad city [1997[1] GLH 1017], the Court quoted the observations made therein as under :-

"The question which requires consideration in the facts of the present case is as to whether the Detaining Authority had applied its mind to the statements of these witnesses with regard to these incidents while forming an opinion so as to warrant the detention." "Except the contents of these statements, there is no other contemporaneous evidence on the basis of which the detaining authority could form the opinion with reference to any contemporaneous evidence relating to the date of the respective incidents so as to form the opinion

that the petitioner detenu was a dangerous person and that he would be subjected to the detention under the provisions of the Gujarat Prevention of Anti Social Activities Act. When the verified statements are placed for consideration before the detaining authority, the detaining authority has to apply its mind and such application of mind must be made manifest in the body of the order itself and in any case, when it is alleged that the order had been passed without application of mind, it must be shown before the court by way of filing the affidavit or otherwise on the basis of some contemporaneous evidence and the reasons which can be said to be germane so as to warrant the detention."

12.1 In the instant case, it cannot be said that either the grounds of detention or the affidavit in reply filed by the detaining authority disclose the grounds and reasons which weighed and considered by the detaining authority for exercising powers u/s 9[2] of the PASA Act. No contemporaneous record of grounds and reasons which weighed with detaining authority for not disclosing the identity of the anonymous witnesses seems to have been made, nor it is disclosed in the affidavit in reply. The order of detention, has to be quashed, for the reason that except bald allegation about genuineness of fear and consequent need for withholding the identity of witnesses, there is no material to lend support the exercise of powers u/s 9[2] of the PASA Act. Here decision in the case of Bai Amina v/s State of Gujarat & ors. [22 GLR 1186], which is considered by Full Bench of this Court in Chandrakant N. Patel v/s State of Gujarat [supra], may be profitably referred to.

13. In the case of Relia Dhanjibhai Khimjibhai Koli v/s Rajkumar in Special Civil Application No.9053/98, decided on 14/6/1999, this Court observed as under :-

"There is no material whatsoever to support the assertion whether the allegations made by the concerned witnesses were genuine or not. It appears that the police and the detaining authority both have relied upon the statements of the witnesses without verifying the correctness of the same."

The Court ultimately held that the detention order was without application of mind. In the instant case also, there appears no contemporaneous material to lend support to the assertion of the witnesses and the subjective satisfaction of the detaining authority.

14. In this view of the matter, the order of the detaining authority and the grounds of detention do not indicate the basis of arriving at the subjective satisfaction. A mere statement about having verified the veracity, genuineness and correctness of the fear expressed by the witnesses, under such circumstances, can be of no virtue, in absence of contemporaneous material. The detention therefore stands vitiated for want of proper exercise of powers u/s 9[2] of the PASA Act and resultant infringement of a constitutional right of the detenu of making an effective representation due to nondisclosure of names of the witnesses. The order of detention, therefore, deserves to be quashed and set aside by allowing this petition.

15. The petition is therefore allowed. The impugned order of detention passed by the Commissioner of Police, Vadodara city, Vadodara on 12th of February, 1999 in respect of the petitioner Kishor Naginbhai Parmar, is hereby quashed and set aside. The petitioner be set at liberty forthwith, if not required in any other case. Rule is made absolute. No costs.