

(2003) 05 GUJ CK 0016
In the Gujarat High Court

Case No : Special Civil Application No 264 of 2003 with Special Civil Applications Nos.484, 190, 398, 1584, 1660, 2169 ,466, 150, 3, 97, 4866, 5093, 5217, 1655, 3102, 188, 467, 836, 1585, 2004, 23, 831, 211, 89, 102, 323, 541, 589, 1175, 1658, 1705, 7, 3687, 6, 47,

Maganbhai Khodabhai Koli

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 27-05-2003

Acts Referred:

Gujarat Prevention of Anti-social Activities Act, 1985 — Section 9(1)
Constitution of India, 1950 — Article 22, 22(5)

Citation : (2003) 05 GUJ CK 0016

Hon'ble Judges : J.N. Bhatt, Acting C.J.

Bench : Single Bench

Advocate : Shakeel A. Qureshi, for the Appellant; Harsha Devani Learned, A.G.P. and P.D. Bhatae Learned, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

J.N. Bhatt, Acting C.J.

1. Since in this group of writ petitions, a common legal ground is involved, and consensual submissions to determine and adjudicate upon the entire group simultaneously by one judgment, all the writ petitions challenging the orders of detention, under the Gujarat Prevention of Anti Social Activities Act, 1985 are being disposed of by one common judgment, after having heard the learned advocates appearing for the petitioners detenus and the learned A.G.Ps on behalf of the respondents.

2. The Gujarat Prevention of Anti Social Activities Act, 1985 [the PASA Act, for short] is aimed and designed to provide for preventive detention of bootleggers, dangerous persons, drug offenders, immoral traffic offenders and property grabbers for preventing their anti social and dangerous activities prejudicial to the maintenance of public order. The petitioners have been detained by the

competent authority under the PASA Act by passing the detention orders. They have assailed the detention orders on various grounds by filing writ petitions, in this group of matters, by invocation of the provisions of Article 22(5) of the Constitution of India. The common ground, which is challenged before this Court, in this group of petitions, is pertaining to the non-fulfillment and non-observance of the constitutional right to make effective representation under Article 22(5) of the Constitution. It is provided therein that when any person is subjected to detention order in pursuance of any provisions of detention law, the authority making such detention orders, is obliged to afford an opportunity of making a representation against such orders of detention at the earliest by communicating to such persons, the grounds on which the detention order has been founded upon, which is constitutional safeguard enshrined under Article 22(5) of the Constitution of India has long legal legendry philosophy and purpose so that the liberty of an individual is not invaded upon without there being statutory provisions and without due compliance and observance of the safeguards provided in the Constitution as well as in different detention laws.

3. The Article 22 consists of two parts. Clauses [1] and [2] apply to persons arrested or detained under a law otherwise than a preventive law. Whereas Clauses [4] to [7] are applicable in case of arrested or detained under the preventive detention law. The underlying design and desideratum of the provisions of clause 5 of Article 22 of Constitution of India succinctly expounded, explored and accepted and very much widened by the host of the judicial pronouncements. It is, therefore, imperative for any authority under the detention law to see that the material safeguards constitutional as well as statutory are observed in its due spirit and letter, since invasion of the liberty is by virtue of the order under the detention laws.

4. Age old contest between liberty and detention has once again emerged in this group of petitions at the instance of the petitioners, who are detained under the detention orders, recorded by the authorities under the PASA Act. Needless to reiterate that the liberty is a basic and dynamic jurisprudential concept and philosophy, and, therefore, it has signature tune of the constitution of India. Apart from the, fundamental basic necessities of a human being, air, water and food, every living being has three other instinctive humans aspirations [i] liberty [ii] the freedom to enjoy the human life and [iii] quick justice in case of any wrong which could be described as accessibility to the justice process. The constitutional framers and founding father have, therefore, designed and provided specific constitutional safeguards in Article 22 for the preservation, projection and protection of the liberty of an individual. Since it is dynamic and very significant aspects and concept, it requires continued search and research so as to regularly assess the changing dimension and dynamics of such constitutional safeguards and rights. The personal right of liberty is thus, guaranteed under the Constitution, the highest law of the land. It is in this context, though, the preventive detention is a departure from the normal course and concept of liberty, the liberty is withheld by passing the order of detention in

certain cases for certain defined earmarked reasons and courses yet, it is incumbent upon the authority to fulfill and observe the statutory, constitutional safeguards so as to obliterate any arbitrariness or ramification in exercise of powers of detention under the detention laws. It will be, therefore, necessary in this group of petitions to consider as to whether the right and the personal liberty of an individual when encroached upon with the seal of the statutory provisions whether the requisite safeguards are duly observed or not in this group of petitions and only on this ground, which is common in all these petitions, as to whether the safeguards to make effective representation by the detenus after the detention orders are recorded by the competent authorities, as envisaged and enshrined under the constitutional provisions of Article 22(5) has been duly observed or not is the core and the sole important ground, which is taken up for consideration and adjudication.

5. In this group of petitions, the common contention which has crystallized in common plea may be articulated hereasunder:

"Whether the right to make effective representation as enshrined under Article 22(5) of the Constitution is duly observed by the detaining authority or the State of Gujarat, so as to make continued detention justified legal and valid ?"

6. It is the common contention in all the petitions which has also reinforced by oral submissions that the representation against the detention orders at the instance of the detenus in different petitions is not considered and alternatively if considered, the delayed consideration of the same depriving the detenus from making efficient and effective representation against the order of detention. Although, the literary or phraseological different words may be used, in so far as this common plea is concerned, but the sum and substance of the plea is as stated hereinabove. Since this ground, which is very vital and is going to the root of the detention order in question in this group of petitions, the consideration and adjudication is only on this ground without divulging on and into meticulously other available grounds or legal missiles.

7. One common feature which has emerged in this group of petitions is that on behalf of the respondent- State of Gujarat, no affidavit in reply is filed. The challenge against the detention order is on divers and diverse ground but in so far as the common ground is concerned, the emphasize is led vociferously on non fulfillment and non observance of the constitutional safeguards under Article 22(5) of the Constitution. The right of detenu to make effective representation against the orders of detention is very vital and significant. The continued detention may become unjustified or illegal, if non consideration of the representation or delayed consideration of the representation is successfully spelt out from the record. The representation of the detenu under the detention law is to be made to the Competent Authority and the Government.

8. Section 9(1) of PASA Act provides that when a person is detained under the detention order, the authority making such orders shall as soon as possible, but

not later than 7 days from the date of detention communicate to him the grounds on which the orders have been made and shall afford him an earliest opportunity of making the representation against the orders of detention to the State of Gujarat. The right to make representation against the order of detention is an important right and, therefore, the order of detention is questioned on the ground that deprivation of effective or the right to make effective representation, it has to be seriously viewed and examined. The representation made by the detenus are required to be considered without any delay and in case of delayed consideration, in case of non explanation of such a delay, the Court is left with no alternative but to raise its hands in helplessness and to quash and set aside the detention order upon challenge with the help of judicial review and that too under Article 226 of the Constitution. In absence of any counter and factual requisite material in connection with the aforesaid plea, non consideration of the representation or in the alternative delayed consideration of the representation, the mere offer of reference or production of file cannot constitute the recognizable, cognizable and acceptable substitute for filing counter affidavit. Failing to file counter affidavit when such plea is specifically propounded in the petition, or failing to satisfy or non explaining ex facie delayed consideration, the State of Gujarat cannot be permitted to advance the plea of production of relevant file at the time of hearing as such an indulgence will not substitute obligation to file counter affidavit. It is in this context, the State of Gujarat is under obligation to file counter affidavit or affidavit in reply so as to meet with the challenge against the detention order and production of file is , therefore, not a substitute for a counter to be filed by the Government. The Court at times examined the file not with a view to absolve, the Government of its accountability to file a counter but to satisfy its conscience in case of any ambiguity or irregularity or alleged indifferenceness. It is in this context, necessary to refer to the observations and directions contained in the decision of the Hon"ble Apex Court in Rajindra Vs. Commissioner of Police, Nagpur Division and others 1994 Suppl. [2] SCC 716.

"Immediately after the detention order was passed and the detenu was taken in custody, he made a representation dated February 12, 1993 addressed to the Central Government. This representation was rejected on April 7, 1993. Two contentions were urged in the High Court, namely [1] that the grounds of detention, which referred to two specific instances, did not justify the conclusion that the detenu was engaged in conduct prejudicial to " public order" and [2] there was an inordinate delay in dealing with his representation. The High Court, dealing with the second contention in regard to the delay, point out in paragraph 9 of its judgment that the first activity of the Central Government was to send a wireless message to the State Government on March 4, 1993 seeking some details. There is no indication as to how the representation was dealt with between February 12, 1993 and March 4,1993. If, as conjectured by the learned Additional Solicitor General, the representation though dated February 12,1993 was actually handed over late for despatch to the Central Government, that fact

should have been specifically pleaded in the counter expected to be filed by the Central Government as well as by the State Government. It may be mentioned that since the central Government did not file any counter affidavit in the Habeas Corpus proceeding before the High Court, this delay remained unexplained. Thereafter it appears that in response to the wireless message dated March 4,1993, the State Government sent its reply on March 6,1993, yet it took the Central Government over a month to dispose of the representation. The learned Additional Solicitor General tried to explain this delay by saying that further information was received by the State Government on March 18,1993. In this connection our attention was drawn by the learned Additional Solicitor General to the counter filed on behalf of the State Government wherein the chronology of events was set out. Nowhere we find in that chronology that the Central Government had sought additional information from the State Government. What appears from the chronology is that the Advisory Board took a decision on March 18,1993 and that information was conveyed to the Central Government. The Central Government has not filed any counter to state that it was not satisfied with the reply sent on March 6, 1993 and had, therefore, sought further information on any specific issue in connection with the detention. The learned Additional Solicitor General tried to satisfy us that between March 18,1993 to April 7,1993, there were only nine working days, and, therefore, there was no delay but the learned Additional Solicitor General overlooks the fact that the Central Government has failed to explain the delay between March 6, 1993 and March 18, 1993. An effort was made by the learned Additional Solicitor General to persuade us to adjourn the matter to enable the Central Government to produce the file for our perusal. It appears that of late the Central Government does not show that sense of responsibility which is expected of it while dealing with detention cases, namely, of filing a counter in time before the Court dealing with the Habeas Corpus petition. Needless to say that the Central Government should be alive to the need to act promptly in such detention cases where the liberty of an individual is concerned. The Court is expected to go by the pleadings and the Central Government is expected to place the factual material in connection with the detention order by filing a counter affidavit so that the petitioner has an opportunity to meet with that factual information. The indulgence shown by the courts in pursuing the file seems to have given an impression that the Central Government is under no obligation to file a counter affidavit to explain the delay. We propose to remove this impression once and for all if it persists and to impress upon the Central Government that it is under obligation to file its counter within the time permitted by the Court failing which the case may go by default. Let it be clearly understood that production of the file is not a substitute for a counter to be filed by the Central Government. The Court peruses that file not to absolve the Central Government of its responsibility to file a counter but to satisfy its conscience if it notices ambiguities in the Government's stand. If the Courts have shown indulgence by perusing the file where affidavit is not filed for good reason, let that indulgence not be misused by construing it to be a licence to dispense with the obligation to file a return. In the

instance case, no counter was filed and the High Court has taken note thereof but, if we may say so with respect, the Court has shown indulgence by observing that the counter is not filed "presumably because there is no specific allegation in this behalf in the petition" Let it be stated that once a representation is made, the detenu is entitled to the representation being dealt with expeditiously. If, there is some ex facie delay, the obligation is on the State to explain that delay. There is no question of a specific allegation to be made in the petition except pointing out by placing facts that there has been a delay which ex facie calls for an explanation and that obligation has to be discharged by filing a proper counter and explaining the delay. The Courts have not been unduly strict in insisting that each day's delay must be explained but it is obligatory on the part of the Government to show by filing a counter affidavit that it had acted promptly in dealing with the representation. What is essential is that the Court must be satisfied that the officers dealing with the representation were not indifferent to the urgency of the situation of the detenu being in jail. We are afraid that in the instant case by failing to file a counter affidavit and by failing to explain the ex facie delay, the Central Government failed in its duty and, therefore, we see no alternative but to uphold the contention and quash the detention order."

9. The aforesaid proposition propounded in the case of Rajindra [Supra], has been followed by this Court in Division Bench decision in the case of Dhaniben M.Tandel Vs. Union of India and ors. reported in 1997 [1] G.L.H.. 545 while quashing the order of detention.

10. Since the questioned detention orders in all these petitions are liable to be quashed and set aside on one common ground, which goes to the root of the matter, the petitions are decided and adjudicated upon only on one ground without entering into other grounds by this common judgment. In view of the aforesaid discussion, observations and the relevant propositions of laws and the aforesaid two decisions, this Court has no hesitation in finding that the right to make effective representation enshrined under Article 22(5) of the Constitution, has not been observed and duly complied with by the competent authority under the PASA Act, while passing the questioned detention orders, and, therefore, this Court has been left with no alternative but to quash and set aside the impugned questioned detention orders and direct the authority to release the detenus forthwith. In the result, the petitions are allowed. The questioned detention orders in this group of petitions are quashed and set aside and the petitioners-detenus shall be set at liberty, provided not required in any other case. Rule is made absolute accordingly with no order as to costs. Direct service is permitted.