

(2024) 06 GUJ CK 0102
In the Gujarat High Court

Case No : Special Criminal Application No. 5918 of 2024

Memon Javedhusain Haji Haji Usmanbhai Through Memon
Salimbhai Hajibhai Versus **APPELLANT**

Vs

State Of Gujarat & Ors **RESPONDENT**

Date of Decision : 28-06-2024

Acts Referred:

Constitution of India, 1950 — Articles 22(5), 226
Prevention of the Black Marketing and Maintenance of Supplies of Essential
Commodities Act, 1980 — Section 3, 3(1), 3(2), 3(3), 3(4)

Citation : (2024) 06 GUJ CK 0102

Hon'ble Judges : Ilesh J. Vora, J; Vimal K. Vyas, J

Bench : Division Bench

Advocate : HR Prajapati, LB Dabhi

Final Decision : Allowed

Judgement

Ilesh J. Vora, J

1. By this petition under Article 226 of the Constitution of India, petitioner – Memon Javedhusain Haji Haji Usmanbhai, has challenged the order dated 04.05.2024 passed by the respondent – District Magistrate, Sabarkantha directing him to be detained under the provisions of the Prevention of the Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (hereinafter referred to as “the PBM Act of 1980” for short).

2. The said order has been passed in purported exercise of powers conferred by sub-section (1) read with sub-clause (b) of sub-section (2) of Section 3 of the said Act.

3. Brief facts giving rise to file the petition are that, the applicant detainee Memon Javedhusain Haji Haji Usmanbhai is in business of food grains, doing his business in the name and style ‘Bharat Agro’ at Idar, Dist.: Himmatnagar. The Civil Supply Department, made an inspection on the business premises on

03.02.2024 and 04.02.2024. There was illegal quantity of fortified rice found during the inspection. The same was seized and later on under the provisions of Essential Commodities Act, the quantity approximately 28915 Kg. came to be confiscated. It is alleged that, the fortified rice found from the shop of the applicant was meant to be distributed to the consumer through Public Distribution System ("PDS" for short). The applicant did not have produced the invoices of purchase of the said rice and the invoice, which he had produced, was forged and bogus. In such circumstances, the FIR under the provisions of Essential Commodities Act came to be filed on 05.02.2024. The District Magistrate, Himmatnagar after considering the material placed before him, arrived at the conclusion that, the applicant was actively involved in black marketing of the controlled rice and there is all possibility that after registration of the offence, he would indulge in the said activities for his personal gains and therefore, with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies to the commodities essential to the community, the detention of the applicant under the aforesaid act is necessary so as to protect the interest of the society at large

4. In the aforesaid set of circumstances, by exercising powers under Section 3(1) of the PBM Act of 1980, the District Magistrate, Sabarkantha passed detention order dated 04.05.2024 and the same was executed upon the applicant.

5. The applicant made a representation to the State as well as Central Government on 09.05.2024.

6. The present petition challenging the detention order has been preferred thereafter on 11.05.2024.

7. We have heard learned counsel Mr. H. R. Prajapati for the applicant and Mr. L.B. Dabhi, learned APP for the respondent – State.

8. Mr. Prajapati, learned counsel appearing for and on behalf of the applicant detainee, made the following submissions:

(A) That there is a delay in passing the order of detention, which is evident from the order of the detention itself as the same was passed on 04.05.2024, whereas the FIR under the provisions of the Essential Commodities Act was registered against the applicant and others on 05.02.2024. That in absence of any complaint in the interregnum, the conclusion of the detaining authority that it was necessary to detain the applicant with a view to preventing him from acting in a manner prejudicial to the maintenance to the supplies of the commodities essential to the community has no rationality and there is no material placed before the authority to show that applicant would indulge in future in such kind of activities and therefore, while passing the order, the authority did not apply its mind and in a mechanical manner, without any material, the order was passed.

(B) That the grounds for detention has no nexus with the expression "acting in any manner prejudicial to the maintenance of supplies of commodities essential

to the community” as explained under Section 3 of Act of PBM 1980 and therefore, where the offence is registered under the Essential Commodities Act and till date the police has not arrested the applicant and considering solitary offence registered against the applicant, the alleged act would not fall the expression ‘acting in any manner prejudicial to the maintenance of supplies to the communities essential to the community’ as explained under Section 3 of the Act, 1980.

(C) That there was a delay in disposal of representation made to the Central Government as well as State Government. The written representation was made on 09.05.2024 and till date, the Committee constituted under the Act unable to decide the representation, which is nothing but a clear violation of the fundamental right of the applicant as enshrined under Article 22(5) of the Constitution of India. Thus, it is evident that there is no explanation for the delay in consideration of representation; that a representation of detainee whose liberty is in peril, should be considered and disposed of as expeditiously as possible and if any delay on the part of the Government, then it should be properly explained, otherwise the time gape of undue delay would be considered as a fatal because it is a constitutional obligation of the Government to consider the representation forwarded by the detainee without any delay.

9. In view of the aforementioned submissions, learned counsel Mr. Prajapati would submit that, the detention order is passed to punish the applicant herein and in absence of any material, the subjective satisfaction arrived by the detaining authority would establish that the order impugned has been passed in a mechanical manner and same is required to be quashed and set aside.

10. On the other hand, opposing the application, learned State Counsel Mr. L.B. Dabhi, has contended that, the applicant at the time of inspection was failed to produce cogent evidence in relation to the fortified rice found from his shop and therefore, the offence under the provisions of the Essential Commodities Act has been registered and therefore, the authority has rightly exercised its power under Section 3 so as to prevent the applicant to defeat the provision of the Act and has acted prejudicial to the maintenance of the supplies of the commodities essential to the community and therefore, there was sufficient material before the detaining authority that in future he would indulge in the same activities and to prevent him, the order of detention is required to be passed and based on this subjective satisfaction and on sufficient grounds, the order of detention was passed.

11. Having regard to the facts and circumstances of the present case, the issue falls for our consideration is as to whether the order of detention passed by the District Magistrate, Sabarkantha in exercise of his power under the provisions of the PBM Act, 1980 is sustainable in law?

12. Before advertng to the submissions, we may refer to Section 3 of the Act, which authorized the authority to pass an order of detention. Section 3 reads as

under:

3. Power to make orders detaining certain persons.— (1) The Central Government or a State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person that with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies of the commodities essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation.—For the purposes of this sub-section, the expression “acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community” means-

(a) committing or instigating any person to commit any offence punishable under the Essential Commodities Act, 1955 (10 of 1955) or under any other law for the time being in force relating to the control of the production, supply or distribution of, or trade and commerce in, any commodity essential to the community; or

(b) dealing in any commodity—

(i) which is an essential commodity as defined in the Essential Commodities Act, 1955 (10 of 1955), or

(ii) with respect to which provisions have been made in any such other law as is referred to in clause (a), with a view to making gain in any manner which may directly or indirectly defeat or tend to defeat the provisions of that Act or other law aforesaid.

(2) Any of the following officers, namely:—

(a) district magistrates;

(b) Commissioners of Police, wherever they have been appointed, may also if satisfied as provided in sub-section (1), exercise the powers conferred by the said sub-section.

(3) When any order is made under this section by an officer mentioned in sub-section (2) he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless in the meantime it has been approved by the State Government:

Provided that where under section 8 the grounds of detention are communicated by the authority making the order after five days but not later than ten days from the date of detention, this sub-section shall apply subject to the

modification that for the words "twelve days", the words "fifteen days" shall be substituted.

(4) When any order is made or approved by the State Government under this section or when any order is made under this section by an officer of the State Government not below the rank of Secretary to that Government specially empowered under sub-section

(1) the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order.

for the order.

13. In light of the statutory provision and considering the grounds for detention, we may first examine the issue with regard to delay in disposal of the representation by the Central Government. It has been strenuously contended that the delay in deciding the representation would indirectly breach of the mandate of Article 22(5) of the Constitution of India. On the other hand, learned APP Mr. Dabhi has contended that there is no time limit to consider the representation. It is settled legal position of law that there is no inflexible rule regarding the time available to the Government to consider the representation. However, the authority is bound to consider the representation submitted at the earliest and in case of delay, there must be explanation to justify the delay so as to avoid the interference of the constitutional courts. The Supreme Court time and again in its various pronouncements observed and held that, in considering the representation, the diligence of very high degree is expected from the authorities in cases of preventive detention as it involved curtailment of some of the most constitutional guarantees and therefore, utmost expedition is essential in handling the representation submitted by the detenu invoking their constitutional right under Article 22(5). Lethargy, lapses, negligence, delay, callousness etc. on the part of the concerned authorities in dealing with the representation shall be viewed seriously and definitely result in interference by the constitutional court for breach of the mandate of Article 22(5) of the Constitution of India. Reference can be made of the case of K.M. Abdulla Kunhi Vs. Union of India, 1991 (1) SCC 476, wherein, the observations of the constitutional bench, made following observations :

"It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in clause (5) of of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard it depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the

concerned detention law, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal.”

14. In light of the settled position of law in respect of delay in deciding the representation and considering the peculiar facts of the present case, we are of the considered view that, in the facts of the present case, the representation against the detention order was submitted on 09.05.2024 and till date, same has not been decided by the State as well as Central Government. There is no clarification being made on oath that why till date, representation has not been considered and decided. If proper explanation would have offered, this Court could have certainly consider whether the delay occasioned due to permissible reasons or unavoidable causes. In such circumstances, we are of the firm view that, the delay in deciding the representation, would render the detention invalid as being violative of constitutional obligation enshrined under Article 22(5) of the Constitution of India.

15. The second contention raised is that, there was a delay in passing the detention order and same vitiates the detention itself. In the facts of the present case, the authority noticed the irregularities in the stock of the food grains in the month 03.02.2024. The FIR under the Essential Commodities Act came to be lodged on 05.02.2024. The order impugned came to be passed on 04.05.2024. In the aforesaid admitted facts, it is evident that since 05.02.2024, the authorities were knowing the alleged mal-practise as well as antisocial activities affecting the supply of the commodities,. However, the authority did not have initiated any proceedings under the preventive detention law and waited for about 90 days. In short, we found that, there is a gap of 3 months in passing the detention order. On the issue of delay in passing the detention order, the Supreme Court in case of Saeed Zakirhussain Malik Vs. State of Maharashtra (2012) 8 SCC 223, held that, prompt action in such matter should be taken as soon as the incident as mentioned in the FIR as well as referred in the grounds for detention have taken place. Relevant para-27 reads as under:

“As regards the second contention, as rightly pointed out by learned counsel for the appellant, the delay in passing the detention order, namely, after 15 months vitiates the detention itself. The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. Though there is no hard and fast rule and no exhaustive guidelines can be laid down in that behalf, however, when there is undue and long delay between the prejudicial activities and the passing of detention order, it is incumbent on the part of the court to scrutinize whether the Detaining Authority has satisfactorily examined such a delay and afforded a reasonable and acceptable

explanation as to why such a delay has occasioned”

16. We take the notice of the admitted fact that during the gap of three months time, no any fresh complaint being registered against the applicant. In absence of any complaint or other materials, the conclusion of the detaining authority that it was necessary to detain the applicant with a view to preventing him from acting in a manner prejudicial to the maintenance of supplies of the commodities essential to the community has no rationality and the subjective satisfaction being arrived without any material. In such set of circumstances, we are of the view that considering the undue delay of 03 months between the prejudicial activities and passing of the detention order, the detaining authority failed to examine such delay and did not assign any reasons or explanation as to why such delay has occasioned.

17. In view of the aforesaid discussions, we came to the conclusion that the impugned detention order has been rendered illegal for two reasons i.e. (i) there was a delay in passing detention order and (ii) there was unexplained delay in deciding the representation of the applicant detainee.

18. In light of the above discussions, we have no hesitation in quashing the order of detention on the ground as discussed above, as the detention order has become illegal for violation of Article 22(5) of the Constitution of India and accordingly, the order of detention dated 04.05.2024 is hereby quashed. We direct the detainee to be set at liberty forthwith, if he is not required in any other case. Rule is made absolute accordingly. Direct service permitted.