

(2013) 12 GUJ CK 0075
In the Gujarat High Court

Case No : Special Civil Application No. 11840 of 2013

Murtuja Abbas Shaikh Thro. Brother Mohsin Abhas Shaikh	APPELLANT
Vs	
State of Gujarat and Others	RESPONDENT

Date of Decision : 02-12-2013

Acts Referred:

Citation : (2013) 12 GUJ CK 0075

Hon'ble Judges : S.H. Vora, J

Bench : Single Bench

Advocate : H.R. Prajapati, for the Petitioner No. 1, for the Appellant; L.R. Poojari, AGP for the Respondent(s) No. 1 and 3, for the Respondent

Final Decision : Allowed

Judgement

S.H. Vora, J.—Perused the petition, materials supplied to the detenu, detention order and affidavit-in-reply filed by the detaining authority and heard learned advocate Mr. Prajapati for the petitioner and learned A.G.P. Mr. Poojari for the respondent-State. This petition under Article 226 of the Constitution of India is directed against the order of detention dated 12.7.2013 passed by the respondent authority in exercise of powers conferred u/s 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (for short the Act) by detaining the detenu as a "bootlegger" as defined u/s 2(b) of the Act.

2. Learned advocate for the detenu submits that order of detention impugned in this petition deserves to be quashed and set aside on the ground that one offence registered against the detenu before the concerned police station vide III - C.R. No. 243 of 2013 for the offences punishable u/s. 66(1)B, 65AE, 81 and 108 of the Prohibition Act is not of such magnitude and intensity as to have the effect of disturbing the public order so as to pass an order u/s 3 of the PASA Act. Learned advocate for the petitioner has further submitted that the detaining authority has not applied its mind to the vital facts and there was non-application of mind before recording the order of detention. In support of the above contention, learned advocate for the petitioner has relied upon the following case-

laws:

i. Judgment and order dated 22.8.2000 of the Division Bench of this Court (Coram: M.R. Calla & R.R. Tripathi, JJ.), in Letters Patent Appeal No. 223 of 2000 in Special Civil Application No. 554 of 2000 (Ashok Balabhai Makwana vs. State of Gujarat);

ii. Piyush Kantilal Mehta Vs. Commissioner of Police, Ahmedabad City and Another,

iii. Omprakash Vs. Commissioner of Police and Others,

iv. Kanuji S. Zala Vs. State of Gujarat and Others,

3. Learned A.G.P. for the respondent-State supported the detention order passed by the authority and submitted that sufficient material and evidence was found during the course of investigation, which was also supplied to the detainee, indicating that the detainee is in the habit of indulging into activities as defined u/s 2(b) of the Act and, considering the facts of the case, the detaining authority has rightly passed the order of detention and the detention order deserves to be upheld by this Court. For such submission, the learned A.G.P. took me through the grounds upon which detaining authority satisfied to detain the petitioner.

4. Section 2(b) of the Act defines the term "bootlegger" as under:-

2(b). "bootlegger" means a person who distills, manufactures, slurcs, transports, imports, exports, sells or distributes any liquor, intoxicating drug or other intoxicant in contravention of any provision of the Bombay Prohibition Act, 1949 (Born. XXV of 1949) and the rules and orders made thereunder, or of any other law for the time being in force or who knowingly expends or applies any money or supplies any animal, vehicle, vessel or other conveyance or any receptacle or any other material whatsoever in furtherance or support of the doing of any of the things described above by or through any other person, or who abets in any other manner the doing of any such thing.

5. The order of detention is passed on the basis of what has come to be known as the subjective satisfaction of the detaining authority such subjective satisfaction has to be arrived at on two points. Firstly, on the veracity of facts imputed to the person to be detained and secondly, on the prognostication of the detaining authority that the person concerned is likely to indulge again in the same kind of notorious activities. Whereas, normal laws are primarily concerned with the act of commission of the offence, the detention laws are concerned with character of the person who has committed or is likely to commit an offence. The detaining authority has, therefore, to be satisfied that the person sought to be detained is of such a type that he will continue to violate the laws of the land if he is not preventively detained. So, the commission of infraction of law, not done in an organized or systematic manner, may not be sufficient for the detaining authority to justifiably come to the conclusion that there is no alternate but to preventively detain the petitioner.

6. Having heard learned counsel for the parties and considering the facts and circumstances of the case, it appears that the subjective satisfaction arrived at by the detaining authority cannot be said to be legal, valid and in accordance with law inasmuch as the offences alleged in the FIR/s and facts stated by the witnesses cannot have any bearing on the public order since the law of the land i.e. Indian Penal Code and other relevant penal laws are sufficient enough to take care of the situation and that the allegations as have been levelled against the detainee cannot be said to be germane for the purpose of bringing the detainee within the meaning of Section 2(b) of the Act and unless and until the material is there to make out a case that the person concerned has become a threat and a menace to the society so as to disturb the whole tempo of the society and that the whole social apparatus is in peril disturbing public order at the instance of such person. In view of the allegations alleged in the F.I.R./s the Court is of the opinion that the activities of the detainee cannot be said to be dangerous to the maintenance of public order and at the most fall under the maintenance of "law and order." In this connection, it will be fruitful to refer to a decision of the Supreme Court in Pushkar Mukherjee and Others Vs. The State of West Bengal, where the distinction between law and order" and "public order" has been clearly laid down. The Court observed as follows:

Does the expression "public order" take in every kind of infraction of order or only some categories thereof? It is manifest that every act of assault or injury to specific persons does not lead to public disorder. When two people quarrel and fight and assault each other inside a house or in a street, it may be said that there is disorder but not public disorder. Such cases are dealt with under the powers vested in the executive authorities under the provisions of ordinary criminal law but the culprits cannot be detained on the ground that they were disturbing public order. The contravention of any law always affects order but before it can be said to affect public order, it must affect the community or the public at large. In this connection we must draw a line of demarcation between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals and only in a secondary sense public interest. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Preventive Detention Act but a disturbance which will affect public order comes within the scope of the Act.

7. No doubt, neither the possibility of launching of a criminal proceedings nor pendency of any criminal proceedings is an absolute bar to an order of preventive detention. But, failure of the detaining authority to consider the possibility of either launching or pendency of criminal proceedings may, in the circumstances of a case, lead to the conclusions that the detaining authority has not applied its mind to the vital question whether it was necessary to make an order of preventive detention. Since there is an allegation that the order of detention is issued in a mechanical manner without keeping in mind whether it

was necessary to make such an order when an ordinary criminal proceedings could well serve the purpose. The detaining authority must satisfy the court that the question too was borne in mind before the order of detention was made. In the case on hand, the detaining authority failed to satisfy the court that the detaining authority so bore the question in mind and, therefore, the court is justified in drawing the inference that there was no application of mind by detaining authority to the vital question whether it was necessary to preventively detain the detenu. It is also fruitful to refer to the decision of the Hon''ble Apex Court rendered in the case of Rekha Vs. State of T. Nadu tr. Sec. to Govt. and Another, wherein, it is observed by the Hon''ble Apex Court that if a person is liable to be tried, or is actually being tried for a criminal offence but the ordinary criminal law will not be able to deal with the situation, then and only then, preventive detention be taken recourse to.

8. As a result of hearing and perusal of the record, it appears that the material that was available with the detaining authority was the offences registered against the detenu and statement of witnesses and on that basis, it cannot be said that the activity of the detenu has become a threat to the maintenance of "public order" and "public health". Mere involvement of the detenu in such activity may not amount to dangerous activity by the detenu and mere mention of them, unless supported by any evidence, cannot be said to be material germane for the purpose of arriving at the subjective satisfaction that the activity of the detenu is prejudicial to the maintenance of "public order" and "public health". For the sake of repetition, the commission of offence does not exhibit or disclose that the petitioner is doing infraction of law in an organized or systematic manner so as to come to the conclusion that there is no alternate but to preventively detain the petitioner. In the result, this Special Civil Application is allowed. The impugned order of detention dated 12.7.2013 passed by respondent authority is hereby quashed and set aside. The detenu is ordered to be set at liberty forthwith if not required in any other case. Rule is made absolute accordingly. Direct service is permitted.