

(2008) 01 GUJ CK 0080

In the Gujarat High Court

Case No : Special Civil Application No. 30161 of 2007

Nareshkumar Purshottamdas Patel

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 18-01-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21, 22, 22(5)
Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities
Act, 1980 — Section 3(2), 7(1)

Citation : (2008) 1 GLR 852

Hon'ble Judges : M.D. Shah, J

Bench : Single Bench

Advocate : H.R. Prajapati, for the Appellant; K.T. Dave, AGP for Respondents 1 and 2 and M.A. Shaikh, Central Govt. Standing Counsel for Respondent 3, for the Respondent

Final Decision : Dismissed

Judgement

M.D. Shah, J.—Rule. Mr. M.A. Shaikh , Central Govt. Counsel waives service on behalf of the respondent No. 3-Union of India and Mr. K.T. Dave, waives service on behalf of the respondents Nos. 1 and 2. The reply affidavits/rejoinders filed by the respective parties are taken on record and considered.

2. The present petition is filed under Article 226 of the Constitution of India challenging the legality and validity of the order of detention bearing No. SP/TPS/ATK/CASEH/07 dated 16-9-2007 passed against the petitioner by the respondent No. 2-District Magistrate, Patan, under the purported exercise of powers vested with him u/s 3(2) of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act,1980 (hereinafter referred to as the "the Act") at the pre- execution stage.

3. The case of the petitioner is that he is an authorized distributor of IOC since last more than 10 years and carrying on his business of LPG. According to the petitioner the Govt. of Gujarat exempted LPG dealers from the application of the

provisions of Gujarat Essential Articles(Licensing, Control and Stock Declaration) Order, 1981 and such exemption was extended from time to time which continued from 21st May, 2007 to 20th November, 2007 , and therefore, no search and seizure could have been carried out by the District Supply Officer or any other officer, however, the District Supply Officer, Patan under the instructions of the District Collector, Patan used to harass the petitioner and all LPG Distributors by forcing them to remain present with certain documents and materials on every Monday. It is further the case of the petitioner that the petitioner is a staunch Congress loyalist and his wife is Vice President of District Women Congress Cell of Mehsana District and that the detention order has been passed on account of political vendetta with a view to keep the petitioner away at the time of election as the respondent No. 2 is in favour of the ruling party BJP; that under the instructions of the respondent No. 2 , the District Supply Officer and the Inspecting squad , carried out inspection at the place of distributorship of the petitioner on 7-9-2007 and by alleging certain irregularities like discrepancy in stock of LPG cylinders, customer register not up to date, non display of price list, details of booked customers is not displayed, opening list of empty as well as refilled LPG cylinders not displayed, fire safety measures not kept ready etc. and thereafter, a seizure order was passed on 8-9-2007 even though there was no shortfall/excess stock at the time of inspection. According to the petitioner, taking into consideration such alleged minor/technical irregularities, the detaining authority came to the conclusion that the petitioner had indulged into activities of blackmarketing of LPG cylinders, and hence, the detention order.

4. Learned Counsel for the petitioner had assailed the order of detention on several grounds. According to him, the order of detention was passed for a wrong purpose as there was no basis for passing the detention order; that even though there was no complaint against the petitioner or other LPG distributors, the respondent No. 2 had directed all the LPG distributors to be present before him with large number of documents and kept them waiting for the whole day with oblique motive and for extraneous consideration on account of political rivalry with a view to prevent him from canvassing for the congress in the assembly elections; that the Inspecting Officer had recorded false and frivolous shortcomings and the seizure order was wrongly passed; that the representation made by the petitioner dated 3-10-2007 is unattended and pending decision; that the representation made by the petitioner ought to have been decided even if the petitioner had not surrendered; that this Hon''ble Court has jurisdiction to interfere with the detention order at the pre-execution stage and that the petition is maintainable as the respondent No. 2 is threatening the petitioner to detain him under the PBM Act; that the respondent No. 2 has no authority to pass the detention order as the distributors of LPG have been exempted from the provisions of getting licence/maintaining records etc.; that the detaining authority has considered technical and minor mistakes on the part of the petitioner as grave irregularities while passing the detention order; that the

detention order is based on irrelevant, extraneous and vague grounds; that no opportunity to explain what material is sought to be used against the petitioner was given to the petitioner; that the detaining authority has relied on the statements of certain customers who have in fact not deposed against the petitioner. According to the learned Counsel for the petitioner, the detaining authority has misused the power under the Act, and therefore, the impugned order of detention is not sustainable in the eye of law.

5. The learned AGP for the respondent-State Mr. Dave submitted that the scope of interference at pre-detention stage is extremely limited and the area has been clearly defined in the case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, According to the learned A.G.P. the case of the petitioner does not cover the circumstances contemplated in the said case. The learned AGP further contended that the petitioner is not correct in saying that the respondent No. 2-District Magistrate had no authority to pass the detention order.

6. I have perused the original case file presented by the learned AGP for the perusal of the Court. The present case is one in which the petitioner has tried his best to avoid arrest and the execution of the detention order passed against him. There is no doubt that personal liberty of a person is sacrosanct and has to be protected, but a person who has not come with clean hands and has made efforts to deflect the course of justice cannot be permitted to take advantage of his own wrong and has to be dealt with seriously. The law has to take its own course. It would be relevant to note here that initially even before the passing of the detention order under challenge, the petitioner apprehending that such an order of detention is likely to be passed against him, preferred Special Criminal Application No. 2112 of 2007 before this Court (Coram: Hon'ble Mr. Justice Akhil Kureshi) which came to be rejected vide order dated 30-10-2007 as no case was made out for interference at the pre-detention stage. Thereafter, the petitioner approached the Supreme Court by way of SLP which came to be withdrawn with liberty to challenge the order of detention as, by then, the order of detention was passed. Moreover, the petitioner is already declared absconding in a proceeding taken out under the provisions of the Criminal Procedure Code, 1982 as also u/s 7(1)(a) of the Act as the order of detention could not be executed in spite of efforts by the police. A proceeding for attachment of the property of the petitioner is also pending before the learned J.M.F.C., Unjha.

7. Before I could proceed to deal with the contentions raised by both sides, I deem it proper to deal with the purpose and intent of preventive detention. Preventive detention is an anticipatory measure and does not relate to an offence, while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the authority is convinced that such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects which

are specified by the concerned law. The action of the authority in detaining a person being only precautionary, the matter has necessarily to be left to the discretion of the authority. It is not practicable to lay down objective rules of conduct in an exhaustive manner, failure to conform to which should lead to detention. The satisfaction of the detaining authority, therefore, is a purely subjective affair. The detaining authority may act on any material and on any information that it may have before it. Such material and information may merely afford basis for a sufficiently strong suspicion to take action, but may not satisfy the test of legal proof on which alone a conviction for offence will be tenable.

8. The main question that falls for consideration in this petition is whether the detenu is entitled to challenge the detention order without the detenu submitting or surrendering to it. I would now refer to one of the leading judgments on the point being Smt. Alka Subhash's case (supra) wherein at paragraphs 12, 29 and 30 of the judgment, it has been observed as under:

12. This is not to say that the jurisdiction of the High Court and the Supreme Court under Articles 226 and 32 respectively has no role to play once the detention-punitive or preventive is shown to have been made under the law so made for the purpose. This is to point out the limitations, which the High Court and the Supreme Court have to observe while exercising their respective jurisdiction in such cases. These limitations are normal and well known, and are self imposed as a matter of prudence, propriety, policy and practice and are observed while dealing with cases under all laws. Though the Constitution does not place any restriction on these powers, the judicial decision have evolved them over a period of years taking into consideration the nature of the legislation or of the order of decision complained of, the need to balance the rights and interest of the individual as against those of the society, the circumstances under which and the persons by whom the jurisdiction is invoked, the nature of relief sought etc. To illustrate these limitations, (i) in the exercise of their discretionary jurisdiction, the High Court and the Supreme Court do not as Courts of appeal or revision, correct mere errors of law or of facts, (ii) the resort to the said jurisdiction is not permitted as an alternative remedy for relief which may be obtained by suit or other mode prescribed by statute. Where it is open to the aggrieved person to move another Tribunal or even itself in another jurisdiction for obtaining redress in the manner provided in the statute, the Court does not by exercising the writ jurisdiction permit the machinery created by the statutes to be passed; (iii) it does not generally enter upon the determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed; (iv) it does not interfere on the merits with the determination of the issues made by the authority invested with statutory power, particularly when they relate to matters calling for expertise, unless there are exceptional circumstances calling for judicial intervention, such as, where the determination is malafide or is prompted by extraneous considerations or is made in contravention of the principles of natural justice of

any constitutional provision., (v) the Court may also intervene where (a) the authority acting under the concerned law does not have the requisite authority or the order which is purported to have been passed under the law is not warranted or is in breach of the provisions of the concerned law or the person against whom the action is taken is not the person against whom the order is directed, or (b) when the authority has exceeded its power or jurisdiction or has failed or refused to exercise jurisdiction vested in it; or (c) where the authority has not applied its mind at all or has exercised its power dishonestly or for an improper purpose; (vi) where the Court cannot grant a final relief, the Court does not entertain petition only for giving interim relief. If the Court is of the opinion, that there is no other convenient or efficacious remedy open to the petitioner, it will proceed to investigate the case on its merit and if the Court finds that there is an infringement of the petitioner's legal rights, it will grant final relief but will not dispose of the petition only by granting interim relief; (vii) where the satisfaction of the authority is subjective, the Court intervenes when the authority has acted under the dictates of another body or when the conclusion is arrived at by the application of a wrong test or misconstruction of a statute or it is not based on material which is of a rationally probative value and relevant to the subject matter in respect of which the authority is to satisfy itself. If again the satisfaction is arrived at by taking into consideration material, which the authority properly could not, or by omitting to consider matters, which it sought to have, the Court interferes with the resultant order; (viii) in proper cases the Court also intervenes when some legal or fundamental right of the individual is seriously threatened, though not actually invaded.

29...In the face, therefore, of the clear provisions of the Constitution and of the valid Act, it is not open to contend that the provisions of Article 14, 19 and 21 of the Constitution prevent a person being deprived of his liberty without first apprising him of the grounds of his arrest. For this very reason, it is also not open to contend that since the State has all the facts in its possession which require the arrest and detention of the person, it must first disclose the said facts before depriving him of his liberty....

30. Thirdly, and this is more important, it is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The Courts have the necessary power, and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the Courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz. where the Courts are prima facie satisfied: (i) that the impugned order is not passed under the Act which it is purported to have been passed; (ii) that it is sought to be executed against a wrong person; (iii) that it is passed for a wrong purpose; (iv) that it is passed on vague, extraneous and irrelevant grounds, or (v) that the authority which passed it had no authority to do so.

9. This Court is not unmindful of the fact that in rare and exceptional cases, this

Court can interfere at the pre-execution stage of the detention order. However, having regard to the facts and circumstances as also the material on record, I am of the considered opinion that the present case does not fall under any of the aforesaid five exceptions or the requirements as stipulated hereinabove for the Court to interfere. I may make it clear that this Court cannot interfere in such type of matters unless there are exceptional circumstances requiring judicial intervention where the determination is malafide or is prompted by extraneous considerations or is made in contravention of the principles of natural justice. Preventive detention is a precautionary measure and the matter of detaining a person should ordinarily be left to the detaining authority. The learned Counsel for the petitioner had contended that the impugned order of detention which was passed against the petitioner was vague, extraneous and on irrelevant grounds. This contention has to be stated merely for being rejected as the order of detention and the grounds on which the said order is passed have not been placed on record inasmuch as the order of detention has not yet been executed and the petitioner does not have a copy of the order of detention or the grounds on which the order is passed, and therefore, it does not lie in the mouth of the petitioner to say that the non-existent order was passed on vague, extraneous or on irrelevant grounds. The learned Counsel has also contended that the representation made by the petitioner has not been decided and is pending. In view of the decision rendered in the case of Union of India (UOI) and Others Vs. Vidya Bagaria, paras 7, 8 and 9 of the judgment, even this contention is hypothetical in nature and is of no importance when the order of detention itself has not been executed at all and challenge is made at pre-execution stage. The contention that the District Magistrate who passed the order of detention has no authority to do so is also not tenable as the District Magistrate has in clear terms stated in his affidavit-in-reply that he was the competent authority for passing the detention order under Sub-section 2(a) of Section 3 of the Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980. The contention that the order is passed for a wrong purpose also does not hold water as the petitioner has failed to produce any material that would lead this Court to believe that there is a wrong purpose behind the passing of the order of detention while on the contrary, the detaining authority has made a statement on oath that the petitioner had a history of irregularities and black marketing of LPG distribution giving the case numbers under which booked, outcome of the cases directing confiscations of amounts and giving warnings which, prima facie indicates that the petitioner is a habitual offender. The contention of the learned Counsel for the petitioner that no opportunity to explain what is being used against the petitioner is granted to the petitioner is also not well founded since the provisions of Article 22 of the Constitution and of the Act made there under permit the State to arrest and detain a person without first disclosing the grounds, even though they are in its possession before or at the time of arrest.

10. I am, therefore, undoubtedly of the view that, since when the writ petition was filed, the petitioner had not surrendered, the proper course for the petitioner

was first to surrender pursuant to the detention order and then to have all his grievances examined on merits so that he could have an opportunity to study the ground of detention as also make effective representation against the said grounds as required by Article 22(5) of the Constitution as otherwise, I am afraid the very purpose of detention law will be defeated because a person may very well abscond, and thereafter, take a plea that the period for which he was directed to be detained is over and therefore, petition has become infructuous. Reference may beneficially be had to the decisions rendered in the case of (1) Sunil Fulchand Shah Vs. Union of India and Others, , (2) S.M.D. Kiran Pasha Vs. Government of Andhra Pradesh and Others, , and (3) Jayantilal Bhagwandas Shah and etc. Vs. State of Maharashtra and others, and (4) Elesh Nandubhai Patel v. C.P. Singh, Commissioner of Police, Ahmedabad City and Ors. 1997 (2) G.L.R. 1063.

11. The learned Counsel for the petitioner has relied on the following decisions: (1) Rajinder Arora Vs. Union of India (UOI) and Others, (2) Sureshbhai Ratilal Tanna v. State of Gujarat and Anr. [2006] 12 G.H.J. (297) (3) Pawan Bhartiya v. Union of India and Anr. : (2003)11SCC479 , (4) N.K. Bapna Vs. Union of India (UOI) and Others, and (4) Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, (on the contrary going against the petitioner). There is no dispute to the proposition laid down in these judgements, however, on the facts and in the circumstances of the present case these decisions are on an entirely different footing and cannot be made applicable.

12. In view of what is discussed hereinabove and considering the factual and legal positions as reflected above, I am of the firm opinion that this is not a fit case where interference is called for at the stage of pre-execution of the order of detention. The petition, therefore, is devoid of any merits, and hence, deserves to be rejected. Hence rejected. Rule is discharged.