

(2013) 12 GUJ CK 0222
In the Gujarat High Court

Case No : Letters Patent Appeal No. 1383 of 2013 in SCA No. 15827 of 2013

Rajesh Samatbhai Bariya and Another	APPELLANT
Vs	
State of Gujarat and Others	RESPONDENT

Date of Decision : 23-12-2013

Acts Referred:

Citation : (2014) CriLJ 1667

Hon'ble Judges : V.M. Sahai, J;Abdullah Gulamahmed Uraizee, J

Bench : Division Bench

Judgement

Abdullah Gulamahmed Uraizee, J

1. A neat question of law that arises for consideration in this LPA is whether the detention order which has yet not been passed by the detaining authority can be challenged by the so-called proposed detenu by filing writ petition under Article 226 of the Constitution of India. The appellants have filed this Letters Patent Appeal under Article 15 of the Letters Patent Appeal to challenge the judgment dated 25.10.2013 passed by the learned single Judge in Special Civil Application No. 15827 of 2013, wherein the learned single Judge has dismissed the petition filed by the appellants to quash the detention order which is yet to be passed by the detaining authority against the appellants.

2. The facts in brief giving rise to this Letters Patent Appeal are that the appellants filed writ petition in this High Court to quash the detention order which is yet to be passed by the detaining authority on the basis of solitary criminal case registered against the appellants and has sought quashment of the detention order on various grounds available to the appellants to challenge the detention order after its execution. Thus the appellants preferred the writ petition apprehending their detention in pursuance of proposed detention order to be passed by the detaining authority. The learned single Judge by the impugned judgment has dismissed the writ petition. Hence this Letters Patent Appeal.

3. We have heard Ms. Subhadra G. Patel, learned advocate appearing for the

appellants and Mr. Utkarsh Sharma, learned Assistant Government Pleader appearing for the respondents.

4. The learned single Judge has summed up the legal position in para 7 of the impugned judgment as emerging from the judgment of the Supreme Court in the case of Subhash Popatlal Dave Vs. Union of India (UOI) and Another, . The para 7 of the impugned judgment is extracted below:

6. Thus to summarize the total outcome of the Judgment dated 16.7.2013 in the case of Subhash Popatlal Dave (supra), it can be said that:

(1) No petitions can be entertained to quash the proposed order of detention without it being served upon the detenu and without considering the grounds on which he is detained, since subjective satisfaction can be considered only after order of detention has been served, thereafter petitioner is permitted to submit his grievance against such order and it is scrutinized by the Court.

(2) Petitioners are not entitled to argue or allege that there is no link or nexus between the order of detention and the actual detention at any later date when they have evaded the execution of detention order on any ground like abscondment or protection by the Court's order.

(3) The subjective satisfaction of the detaining authority is to be considered as on date of the detention order and not on the date of its scrutiny and, therefore, material or fact after the date of order of detention, which may include absence of further illegal and nefarious activities subsequent to the order of detention, cannot be the ground for quashing the order of detention.

5. We are unable to agree with the legal position summed up by the learned single Judge. The aforesaid perusal of the judgment of the Supreme Court in the case of Subhas Popat Lal Dave (supra) explicitly clear that the Supreme Court has come to the conclusion that a proposed detenu has a right to challenge the detention order which is passed against him before the detention order executed on him. Therefore, it is not correct to say that no petition can be entertained to quash the proposed order of detention without it being served upon the detenu and without considering the ground on which he is detaining.

6. The question which falls for our consideration in this appeal is" whether a detention order which is yet to be passed can be challenged by the so-called proposed detenu or not.

7. The lead authority of the Supreme Court on this question is in the case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, , wherein it is held as under in paragraph No. 30 while holding that the right to challenge the detention order at pre-execution stage is not absolute:

30. As regards his last contention, viz. That to deny a right to the proposed detenu to challenge the order of detention and the grounds on which it is made

before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution, we find that this argument is also not well merited based as it is on absolute assumptions. Firstly, as pointed out by the authorities discussed above, there is a difference between the existence of power and its exercise. Neither the Constitution including the provisions of Article 22 thereof nor the Act in question places any restriction on the powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. However, the courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These selfimposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the courts. To accept Shri Jain's present contention would mean that the courts should disregard all these time-honoured and well-tested judicial self-restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibal for the appellants, as far as detention orders are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period. 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 under 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. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the

abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.

8. In the case of Deepak Bajaj Vs. State of Maharashtra and Another, . It is held as follows in paragraph No. 15.

15. If a person against whom a preventive detention order has been passed comes to court at the pre-execution stage and satisfies the court that the detention order is clearly illegal, there is no reason why the court should stay its hands and compel the petitioner to go to jail even though he is bound to be released subsequently (since the detention order was illegal). As already mentioned above, the liberty of a person is a precious fundamental right under Article 21 of the Constitution and should not be lightly transgressed. Hence, in our opinion, Alka Subhas Gadia case cannot be construed to mean that the five grounds mentioned therein for quashing the detention order at the pre-execution stage are exhaustive.

[Emphasis supplied.]

9. Thus it could be seen from the above position of law as expounded by the Apex Court that the detention order which had already been passed can be challenged by the proposed detenu at a pre-execution stage i.e. before it is executed upon the detenu. Herein in the present case admittedly, the detaining authority has not passed any detention order against the appellants. Here, admittedly appellants have approached this Court by filing the writ petition to quash the detention order before it is passed by the detaining authority. This is evident from the averment made in paragraph No. 4, wherein it is stated that it is important to note that relying on solitary prohibition offence respondent No. 2 is likely to pass the order of detention or it is already passed against the petitioners. When no detention order had been passed by the detaining authority, the so-called detenu cannot file the writ petition apprehending detention order against him. For the foregoing reasons, we are of the opinion that the writ petition filed by the appellants before detention order is passed against them was not at all maintainable. We do not find any reason to interfere with the judgment passed by the learned single Judge. Accordingly, this Letters Patent Appeal as well as Civil Application both stand dismissed. Direct service is permitted.