

(2013) 12 GUJ CK 0083

In the Gujarat High Court

Case No : Special Civil Application No. 14750 of 2012

Sabir A. Samad Kanunga

APPELLANT

Vs

State of Gujarat and 7

RESPONDENT

Date of Decision : 21-12-2013

Acts Referred:

Citation : (2013) 12 GUJ CK 0083

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

Bench : Single Bench

Advocate : H.R. Prajapati, for the Appellant; L.B. Dabhi, AGP for the Respondent No. 1, for the Respondent

Final Decision : Allowed

Judgement

S.H. Vora, J.—By way of this petition under Article 226 of the Constitution of India, the petitioner challenges the legality and validity of the order of detention dated 17.10.2012 passed by the respondent No. 3 in purported exercise of powers under Sub-Section (2) of Section 3 of the Gujarat Prevention of Anti Social Activities Act, 1985 (for short, the "Act") at pre-detention stage. Brief facts as arising from the petition are that five offences registered against the petitioner vide III-C.R. No. 8 of 2010 for the offence punishable under Sections 285 and 114 of the Indian Penal Code, II-C.R. No. 12 of 2011 for the offence punishable under Sections 143, 147, 148, 149, 323, 504, 506(2), 427, 452 and 395 of the Indian Penal Code, II-C.R. No. 23 of 2011 for the offence punishable under Sections 143, 147, 148, 149, 323, 504, 506(2), 427 and 337 of the Indian Penal Code, II-C.R. No. 11 of 2012 for the offence punishable under Sections 143, 148, 149, 323, 504 and 307 of the Indian Penal Code, Section 25(1) of the Arms Act and Section 135 of the B.P. Act and II-C.R. No. 16 of 2012 for the offence punishable under Sections 143, 147, 148, 149, 323, 506(2) and 279 of the Indian Penal Code, Sections 177, 184 and 134 of the M.V. Act and Section 135 of the B.P. Act before Hansot police station. According to the petitioner, he is the member of the Hansot Gram Panchayat since last five years, President of

Hansot Maha Muslim Education Society, member of Hansot Muslim Welfare Society and the petitioner is also the General Secretary of Bharuch District Congress of a National Party Indian National Congress. The petitioner submitted that at a very young age, he has earned lot of reputation in the area of his constituency and there are chances of his being elected as MLA from "Ankleshwar Constituency" in the coming elections of Legislative Assembly. It is submitted that in the last election of legislative assembly, respondent No. 6 of ruling political party-Bharatiya Janta Party elected from the "Ankleshwar Constituency" and is at present holding portfolio of Ministry of Agricultural and Co-operation, Government of Gujarat. It is submitted that delimitation of the Ankleshwar Constituency has made worried the ruling BJP party and more, particularly, the respondent No. 7 and, therefore, apprehending that the presence of the petitioner in the constituency is likely to reduce votes being casted in his favour and he might not be elected, the respondent No. 7 with a view to see that the petitioner is kept away from the constituency and also to see that the petitioner may not contest election against him from the constituency, approached the respondent No. 2 who is holding the portfolio of Home Ministry. According to the petitioner, respondent Nos. 2 and 6, in collusion and connivance with each other decided to keep away the petitioner from the constituency and as a part of conspiracy, respondent Nos. 2 and 7, used their political powers and under the political pressure, the respondent No. 3 has exercised powers u/s 3(2) of the Act and passed the order of detention against the petitioner. According to the petitioner, he was arrested and was also released on bail by the competent authority.

2. Upon serious apprehension that the order of detention has already been passed against the petitioner, the present petition is preferred.

3. An affidavit-in-reply is filed by the respondent No. 3 contending that the petition filed by the petitioner is not maintainable under the law. It is submitted that the petitioner is a habitual offender having no regard for the law. It is submitted that the petitioner has been booked under the various sections of the Indian Penal Code and also under the provisions of the Arms Act. According to the respondent No. 3, the present petition has been filed with misconception of facts and law at the stage of pre-execution of detention order. It is submitted that the petitioner is repeatedly violating the notifications under the provisions of the Gujarat Police Act promulgated by the office of District Magistrate. It is submitted by respondent No. 3 that the order of detention has been passed only after going through the relevant materials and representations placed before him and after perusal of the materials, the petitioner was declared as a "dangerous person" as he has been in habit of violating law. It is submitted by respondent No. 3 that the petitioner had made all the endeavours to avoid the service of detention order and has filed this petition to avoid the possible detention. It is also submitted in the reply that the order of detention has been passed by the authorities under the said Act keeping in view past criminal records and activities of the petitioner as recorded in the said FIRs. filed against the petitioner showing

his disregard for Law and Order and keeping in view the forthcoming Gujarat Assembly Elections to be held in December. It is further submitted that the order of detention has not been passed under any political pressure as alleged. According to the respondent No. 3, the detaining authority, after carefully considering, pursuing, examining and applying its mind to all the relevant materials placed before it as well as legal provisions applicable to the same, was subjectively satisfied that the petitioner is a "dangerous person" as defined u/s 2(c) of the Act and hence, passed the order of detention against the petitioner to prevent him from acting in any manner prejudicial to the maintenance of public order. Along with the reply, the respondent No. 3 also placed copy of the detention order dated 17.10.2012 being No. POL/PASA/DET/CASE No. 32/2012.

4. Respondent No. 3 has also filed additional affidavit submitting that the petitioner has, on earlier occasion before this Court, taken ground that he is going to file his nomination for the election of Gujarat Legislative Assembly and got interim protection from this Court. It is submitted that the petitioner has not filed any nomination to fight the Legislative election. It is submitted that the petitioner has come out with new case that he has been given responsibilities as chief observer for Hansot Taluka Area by his party for election and due to the responsibilities given by the party as chief observer, the petitioner is not required to be protected by this Court as the order of detention passed by the detaining authority is legal and proper and is required to be executed on the petitioner. It is also submitted in the additional affidavit that under the garb of responsibilities given by the party as chief observer, person like petitioner is not required to be protected and, therefore, interim relief granted by this Court is required to be vacated.

5. Learned advocate Mr. H.R. Prajapati for the petitioner has submitted that the petition in the present form is maintainable and tenable both on law as well as on facts to substantively challenge the order of detention at pre-execution stage in view of the decision of the Hon"ble Apex Court in the case of Deepak Bajaj Vs. State of Maharashtra and Another, . According to him, the Hon"ble Apex Court, considering its earlier decision in the case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, and the objections taken at the pre-execution stage by the other side therein, on the identical ground, has held that "we are of the opinion that the five grounds mentioned therein on which the Court can set-aside the detention order at pre execution stage are only illustrative not exhaustive". Learned advocate Mr. Prajapati also relied upon the decision of the Hon"ble Apex Court in the case of Rekha Vs. State of T. Nadu tr. Sec. to Govt. and Another, . According to him, except the above offences, there is no material to indicate that the alleged activity of the petitioner is affecting or likely to affect adversely to the maintenance of public order and hence, the order of detention is illegal and bad in law. Learned advocate for the petitioner submitted that from the said F.I.Rs., it appears that the alleged incidents are individual in nature and it has nothing to do with public order and, therefore, the subjective satisfaction of the detaining

authority that the alleged activities of the petitioner are prejudicial to the maintenance of public order is based on irrelevant and extraneous materials. It is also submitted by him that against the F.I.R. registered against the petitioner being II-23 of 2011, cross F.I.R. being II-24 of 2011 was given by Mr. Mohammad Jafar @ Babu which was registered for the offence punishable under Sections 143, 147, 148, 149, 427, 337, 504 and 506(2) of the Indian Penal Code and Section 135 of the Bombay Police Act and also another cross F.I.R. being I-C.R. No. 17 of 2012 came to be registered by the wife of his brother for the offence punishable under Sections 143, 147, 148, 149, 323, 452, 337, 504 and 457 of the Indian Penal Code and Section 135 of the Bombay Police Act. It is submitted that the detaining authority has not considered the cross F.I.Rs. which is a very vital and important document and the detaining authority supposed to consider all the relevant and vital materials including the said cross F.I.Rs. and, therefore, non consideration of the vital and important document i.e. cross F.I.Rs. being II-C.R. No. 24 of 2011 and I-C.R. No. 17 of 2012 would vitiate the subjective satisfaction of the detaining authority. Therefore, it is submitted by the learned advocate for the petitioner that the order of detention is required to be quashed and set aside.

6. The petitioner has also filed the affidavit-in-rejoinder submitting that he was served with show cause notice as to why he should not be externed from Bharuch and other contiguous areas. It is submitted that in the said notice, offences which were considered for passing the order of detention being III-C.R. No. 8 of 2010 and II-C.R. No. 12 of 2011 were also considered and the said notice was withdrawn. It is also submitted that in both the affidavits filed by the respondent No. 3, the detaining authority has not pointed out as to how the alleged activities of the petitioner are prejudicial to the maintenance of public order. It is submitted that as per detaining authority, in view of election, the petitioner has been detained but election has already been declared and only few days are left out and the date of voting for "Ankleshwar Constituency" is fixed on 13.12.2012.

7. Learned A.G.P. Mr. L.B. Dabhi for the State, on the other hand, submitted that this petition is at pre-execution stage without surrendering before challenging the order of detention. Unless and until the petitioner surrenders, he would not be entitled to get the order as well as the grounds thereunder and the petitioner would not be entitled to copies of the same by filing the present petition.

8. Before the petition is taken on merits, it is necessary to keep in mind the law as settled by the Division Bench of this Court in the case of (2013) 3 GLR 1968 (Guj) in the matter of petitions challenging the detention order at pre-execution stage and, more particularly, paras 7.11 to 7.14 thereof, which read as under:--

7.11 in Bhaurao (Supra), the Apex Court took notice of the decision of a coordinate Bench in Subhash Muljimal Gandhi Vs. L. Himingliana and Another, . In Subhash Muljimal Gandhi (Supra) an order of detention was challenged by the detainee at the pre-execution stage and it was contended by the detainee that the

contingency noted in Alka Subhash Gadia (Supra) were illustrative and not exhaustive. Quoting the decision of Subhash Muljimal Gandhi (Supra), the Apex Court made the following observations in Para- 56 and 57;

56. In this connection, it may be profitable if we refer to a decision of this Court in Subhash Muljimal Gandhi Vs. L. Himingliana and Another, . There, an order of detention was challenged by the detenu at pre-execution stage. It was contended by the detenu that the contingencies noted in Alka Subhash Gadia were illustrative and not exhaustive. It was submitted that there might well be other contingencies where such order could be questioned at pre-execution stage. In that case also, it was alleged that the detenu was harassed, humiliated and beaten by authorities and the case called for grant of relief before execution of order of detention.

57. Negating the contention and referring to N.K. Bapna Vs. Union of India (UOI) and Others, , the Court said;

The above principles laid down in Alka Subhash Gadia have been quoted with approval by another three-Judge Bench in N.K. Bapna Vs. Union of India (UOI) and Others, . Bound as we are by the above judgments, we must hold that the other contingencies, if any, must be of the same species as of the five contingencies referred to therein. Coming now to Mr. Jethmalanis submission, that the detention order was passed for a wrong purpose, namely, to harass and humiliate the appellant by concocting a false case of smuggling, based primarily on a confession obtained from him after subjecting to him to assault, illegal detention and extortion we find that the detaining authority has denied the allegations of assault and extortion. Needless to say these are disputed questions of fact, which we cannot entertain much less delve into or decide upon. In any case, the said fact, even if true cannot vitiate the order of detention.

(emphasis supplied)

7.12 It will also be profitable for us to quote the observations made by the Apex Court in Para-63 of the said decision;

63. From the foregoing discussion, in our judgment, the law appears to be fairly well settled and it is this. As a general rule, an order of detention passed by a Detaining Authority under the relevant preventive detention law cannot be set aside by a Writ Court at the pre-execution or pre-arrest stage unless the Court is satisfied that there are exceptional circumstances specified in Alka Subhash Gadia. The Court must be conscious and mindful of the fact that this is a suspicious jurisdiction i.e. jurisdiction based on suspicion and an action is taken with a view to preventing a person from acting in any manner prejudicial to certain activities enumerated in the relevant detention law. Interference by a Court of Law at that stage must be an exception rather than a rule and such an exercise can be undertaken by a Writ Court with extreme care, caution and circumspection. A detenu cannot ordinarily seek a writ of mandamus if he does not surrender and is not served with an order of detention and the grounds in

support of such order.

7.13 Thus, in our opinion, the decision of the Supreme Court in Deepak Bajaj (Supra) would not save the situation for the appellant. Even otherwise, the appellant has relied upon the Clauses (3) and (4) as laid down in Alka Subhash Gadia (Supra) i.e. the order is passed for a wrong purpose and the same is on vague, extraneous and irrelevant grounds. We have already discussed in the earlier part of our judgment as to why this submission is without any merit.

7.14 As held by the Supreme Court in Subhash Muljimal Gandhi (Supra), the other contingencies, if any, must be of the same species as of the five contingencies referred to by the Supreme Court in Alka Subhash Gadia (Supra). This is suggestive of the fact that even if there be any other ground available to the detainee i.e. other than the contingencies laid down in Alka Subhash Gadia (Supra), the said contingencies must be of the same species.

9. In light of the abovementioned decisions of the Hon"ble Apex Court and as discussed by the Division Bench of this Court in the case of Mancharam Samaram Meena (supra), now, it is right time to examine whether in the facts of this case, the Court should interfere with the preventive detention order at the pre-execution stage. It is true that this petition is filed at a pre-execution stage. However, from the grounds of detention, annexed with the affidavit-in-reply, it appears that the five offences have been registered against the petitioner with Hansot police station. This fact has not been controverted by the detaining authority in the affidavit-in-reply filed in the present matter. It also appears that on the basis of the said offences registered against the petitioner, the respondent No. 3 has come to the subjective satisfaction that the activities of the petitioner means activities of the "dangerous person" which have disturbed the public order. The preventive detention order mentions that the petitioner is a "dangerous person". The "dangerous person" has been defined u/s 2(c) of the Act, which reads as under:--

2(c). "dangerous person" means a person, who either by himself or as a member or leader of a gang, habitually commits, or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Indian Penal Code (GLV of 1860) or any of the offences punishable under Chapter V of the Arms Act, 1959 (54 of 1959).

10. In the aforesaid definition, the word "habitual" is relevant to be considered. For passing the order of preventive detention, said offences cannot be said to be forming habit of person for bringing person within the definition of "dangerous person" as defined in Section 2(c) of the Act. There should be continuous or repeated act on the part of the detenu. The Hon"ble Apex Court in the case of Vijay Narain Singh Vs. State of Bihar and Others, and, more particularly, in para 31, has observed as under:

..... The expression "habitually" means "repeatedly" or "persistently". It implies thread of continuity, stringing together similar repetitive acts. Repeated,

persistent and similar, but not isolated, individual and dissimilar acts are necessary to justify an interference of habit. It connotes frequent commission of acts or omissions of the same kind referred to in each of the said sub-clauses or an aggregate of similar acts or omissions".

11. Therefore, it cannot be said that for the aforesaid offences registered against the petitioner, the petitioner could be considered to be a "dangerous person", whose preventive detention is must for maintenance of public order. So, the Court is of the considered opinion that the petitioner is not a "dangerous person" and his act, as alleged in the detention order dated 17.10.2012, cannot disturb maintenance of public order and, therefore, the instant case would fall within 4th ground mentioned in the case of Alka Gadia (supra) and, therefore, order of preventive detention at pre-execution stage calls for interference of this Court. As the order of detention has been passed by the detaining authority without having adequate grounds for passing the said order, it cannot be sustained and deserves to be quashed and set aside.

12. One of the grounds on which the order of preventive detention can be declared invalid is that there is no nexus between the material which form the basis for the State to record its subjective satisfaction and opinion of the State that it is necessary to preventively detain the petitioner from acting in any manner, prejudicial to the public interest or security of the State. In the instant case, the detaining authority has relied upon five cases registered against the petitioner with Hansot police station in the years 2010 to 2012. From the detention order, it appears that the first offence was registered on 25.02.2010 for the offence punishable under Sections 285 and 114 of the Indian Penal Code whereas, the last offence was registered on 04.04.2012 and detention order was passed by the competent authority on 17.10.2012. So, there is unreasonable delay in forming basis of the satisfaction of the State that it is necessary to preventively detain the petitioner is definitely fatal to the preventive detention order. In the case on hand, the detention order was passed after six months of registration of the last F.I.R. on 04.04.2012. Not only that, it is stated by the competent authority in paras 15 and 18 of the affidavit-in-reply that the assembly elections are at the threshold and so, for the purpose of conducting free and fair election, the detention order dated 17.10.2012 needs to be upheld in the larger interest of society. Thus, there is no nexus between the material and the order of detention for the purpose of which, it has been issued at relevant point of time. Thus, there is time log between the prejudicial activity of the petitioner and detention order made because of that activity is ex-facie long, the detaining authority failed to explain delay in making of detention order with a view to show that there was proximity between the prejudicial activity and the detention order. Therefore, the live link with regard to the above prejudicial activity stands snapped because of delay in passing of the order of detention.

13. From the detention order dated 17.10.2012, it appears that the detaining authority has considered the offence punishable under Sections 285 and 114 of

the Indian Penal Code but, it does not fall under Chapter XVI and/or Chapter XVII of the Indian Penal Code. So, it can be said that there is non application of mind on the part of the detaining authority.

14. 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.

15. 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 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 petitioner cannot be said to be germane for the purpose of bringing the petitioner as a "dangerous person" within the meaning of Section 2(c) 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, it cannot be said that the petitioner is a dangerous person within the meaning of Section 2(c) of the Act. Except general statement, there is no material on record which shows that the petitioner is acting in such a manner which is dangerous to the public order. In view of the ratio laid down by the Hon"ble Supreme Court in the cases of (i) Ranubhai Bhikhabhai Bharwad (Vekaria)(supra); (ii) Ashokbhai Jivraj @Jivabhai Solanki (supra); and (iii) Mustakmiya Jabbarmiya Shaikh (supra), the Court is of the opinion that the activities of the petitioner 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.

16. 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 petitioner. It is also fruitful to refer to the decision of the Hon'ble Apex Court rendered in Rekha's case (supra) 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.

17. As a result of hearing and perusal of the record, it appears that the only material that was available with the detaining authority was the offences registered against the petitioner and on that basis, it cannot be said that the activity of the petitioner has become a threat to the maintenance of "public order" and "public health". Mere involvement of the petitioner in such activity may not amount to dangerous activity by the petitioner 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

petitioner 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, the petition is hereby allowed. Impugned order of detention dated 17.10.2012 passed by the District Magistrate, Bharuch against the petitioner is hereby quashed and set aside. Rule is made absolute to the aforesaid extent. Direct service is permitted.