

(2020) 07 GUJ CK 0011

In the Gujarat High Court

Case No : R/Special Civil Application No. 2011 Of 2020

Sajid @ Batko Jafarsha Diwan

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 06-07-2020

Acts Referred:

Constitution Of India, 1950 — Article 21, 22, 226
Gujarat Prevention Of Anti Social Activities Act, 1985 — Section 2, 2(c), 3, 3(1), 3(2), 3(4)
Indian Penal Code, 1860 — Section 114, 143, 147, 149, 294(B), 212, 214, 323, 324, 504, 506(2)
Gujarat Police Act, 1951 — Section 135
Arms Act, 1959 — Section 25

Citation : (2020) 07 GUJ CK 0011

Hon'ble Judges : Ilesh J. Vora, J

Bench : Single Bench

Advocate : Nanavati, Dhvani Tripathi

Final Decision : Allowed

Judgement

Ilesh J. Vora, J

1. Heard Mr. Maulik Nanavati, learned counsel for the petitioner and Ms. Dhawani Tripathi, learned AGP for the respondents through video conferencing.

2. By way of this petition under Article 226 of the Constitution of India, the petitioner through his brother Javidsha Jafarsha Diwan has challenged the legality of the order of detention of his brother viz. Sajid @ Batko Jafarsha Diwan, dated 30.12.2019 passed by respondent no.2 â?" Commissioner of Police, Vadodara City, under sub-section 2 of Section 3 of the Gujarat Prevention of Anti- Social Activities Act, 1985 (â??P.A.S.A Actâ? for short)

by detaining the detenie as a "dangerous person" as defined under Section 2(c) of the PASA Act with a view to prevent the detenie from

acting in any manner prejudicial to the maintenance of public order in the area of Ahmedabad City. In pursuance of the said order dated 30.12.2020,

the detenie has been detained in jail at Bhuj.

3. The detenie came to be detained as a "dangerous person" on his involvement in two offences i.e. FIR being C.R.No.I- 113/2019 registered at

Panigate Police Station, Vadodara under Sections 143, 147, 149, 323, 324, 504 and 114 of IPC and Section 135 of the G.P. Act, and the second FIR

being C.R. No. II-133/2019 is also registered at Panigate Police Station under Sections 323, 294(B), 506(2) of IPC and Section 135 of Gujarat Police

Act.

4. Learned counsel for the petitioner has raised the following contentions:

(i) The order of detention passed against the detenie is passed in violation of the Article 21 and 22 of the Constitution of India;

(ii) The detaining authority has failed to substantiate that the alleged anti social activities of the petitioner adversely affect or are likely to affect the

maintenance of public order. If assuming that the petitioner is a dangerous person, he cannot be preventively detained under the provision of the Act

unless, as laid down in sub-section 4 of section 3 of the Act.

(iii) The material collected by the detaining authority and looking to the statement recorded by the detaining authority, it cannot be said that the alleged

activities of the petitioner come within the purview of dangerous person, therefore, the order passed by the detaining authority required to be quashed

and set aside.

(iii) The documents which has bearing on the aspect of the detention of detenie are not placed before the detaining authority and if placed, the same

have not been supplied to the detenie, therefore, the order of detention required to be quashed and set aside.

(iv) The impugned order was passed mechanically on presumption and assumption that, the alleged activities of the detenie may cause danger to life

of general public in future, which is nothing, but passing the order on the conjectures and surmises.

(v) That there was no concrete material available with the detaining authority to indicate as to how the public health or public order was disturbed in

any manner.

5. On the other hand, Ms. Tripathi, learned AGP has supported the impugned order of detention passed by respondent no.2 and submitted that the

detenue is a "dangerous person" and sufficient material and evidence was found during the course of investigation, indicating that the detenue is in

habit of indulging himself into activities as defined under Section 2 (c) of the PASA Act and therefore, considering the facts of the case, the detaining

authority has rightly passed the order of detention, which deserves to be upheld by this Court.

6. Learned AGP further contended that there are two offences registered against the detenue and he has been arrested in connection with the same.

The detenue is strong person and has indulged into anti-social activities, which are prejudicial to the maintenance of public order. In view of this, there

is sufficient material to arrive to the satisfaction that the detenue is a dangerous person and is involved into anti-social activities, which are prejudicial

to the maintenance of public order. He also contended that the order of detention is passed based on material subjective satisfaction and therefore, he

prays this Court to dismiss this petition.

7. Having heard learned counsel for the parties and having gone through the material on record, the only question arises for consideration in this

petition is, whether the order of detention deserves to be quashed ?

8. The authority concerned has considered two offences registered against the detenue as well as the allegations therein made against the detenue. It

appears that the first incident reported against the detenue with regard to causing injury to Aakash by the detenue and there was a specific allegation

that the detenue has inflicted injuries upon the injured by baseball and the injuries were found on the vital part of the body. After perusal of the police

case papers, it appears that the dispute was arise on petty issue and the alleged incident, cannot be termed as disturbance to public order. The second

incident taken into consideration by the authority is the dispute arise on 15.12.2019, whereby, the detenue had caused injury to one Vasim Hanif

Shaikh. The case record shows that the complainant had asked to repay his money and on refusal for the same by the detenue the incident was

happened.

9. After perusal of the case records, it appears that the incident reported against

the detenu is an issue of law and order and ordinary law would sufficient to deal with the alleged offences. The subjective satisfaction arrived at by the authority shows that the authority concerned did not have applied its mind while passing the order. Record further indicate that no any past antecedent found by the authority. Therefore, the two incidents where single individual having no adverse affect prejudicial to the maintenance of public order disturbing the piece and tranquility of the locality. The activities of the detenu cannot be said to be a 'dangerous person' as defined under the Act and there is no any nexus with question of maintenance of public order. In this background, the detention of the petitioner is not passed in accordance with law.

10. It is apt to refer to the case of *Mustakmiya Jabbarmiya Shaikh Vs. M.M. Mehta, Commissioner*, reported in 1995 (3) SCC 237, wherein the Apex

Court observed thus:

6. With a view to deal with the aforementioned submissions advanced by the learned counsel for the petitioner and to examine the legality/validity of

the impugned order of detention it would be appropriate to look into the relevant provisions of the Act in question under which the detention order has

been passed. It may be pointed out that the Act provides for preventive detention of bootleggers, dangerous persons, drug offenders, immoral traffic

offenders and property grabbers for preventing their anti-social and dangerous activities prejudicial to the maintenance of public order. In the present

case having regard to the grounds of detection the detaining authority on being satisfied that the detenu - petitioner was a 'dangerous person' within the

meaning of clause (C) of Section 2 of the Act and passed the order of detention. Section 2(C) of the Act reads as under:

"Dangerous person" means a person, and 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 or any of the offences punishable under

Chapter V of the Arms Act, 1959".

Here it would also be appropriate to reproduce the relevant part of Section 3 of the Act as under:-

3(1)-The State 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 public order, it is necessary so to do, make an order directing that such person be detained."", (2) If having regard to the

circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police,

the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct that the District Magistrate or the Commissioner of

Police, may also, if satisfied as provided in sub-section (1) exercise the powers conferred by the said sub-section"".

(3).....

(4) For the purpose of this section, a person shall be deemed to be 'acting in any manner prejudicial to the maintenance of public order when such

person is engaged in or is making preparation for engaging in any activities whether as a bootlegger or dangerous person or drug offender or immoral

traffic offender or property grabber, which affect adversely or are likely to affect adversely the maintenance of public order,

Explanation. - For the purpose of this sub-section, public order shall be deemed to have been affected adversely or shall be deemed likely to be

affected adversely inter alia if any of the activities of any person referred to in this sub-section directly or indirectly, is causing or is likely to cause any

harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or

public health.

7. A reading of the preamble of the Act will make it clear that the object of provisions contained in the Act including those reproduced above is to

prevent the crime and to protect the society from anti-social elements and dangerous characters against perpetration of crime by placing them under

detention for such a duration as would disable them from resorting to undesirable criminal activities The provisions of the Act are intended to deal with

habitual criminal dangerous and desperate outlaws who are so hardened and incorrigible that the ordinary provisions of the penal laws and the moral

fear of punishment for crime are not sufficient deterrents for them. Section 3 of the Act is, therefore, intended to deal with such criminals who cannot

readily be apprehended to be booked under the ordinary law and who for special reasons, cannot be convicted under the penal laws in respect of the

offences alleged to have been perpetrated by them, But this power under the Act

to detain a person should be exercised with restraint and great caution. In order to pass an order of detention under the Act against any person the detaining authority must be satisfied that he is a 'dangerous person' within the meaning of Section 2(C) of the Act who habitually commits, or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or XVII of the Penal Code or any of the offences punishable under Chapter V of the Arms Act as according to sub-section (4) of Section 3 of the Act it is such 'dangerous person' who for the purpose of Section 3 shall be deemed to be a person 'acting in any manner prejudicial to the maintenance of public order' against whom an order of detention may lawfully be made.

8. The Act has defined 'dangerous person' in clause (C) of Section 2 to mean 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 the chapters XVI or XVII of the Penal Code or any of the offences punishable under Chapter V of the Arms Act. The expression 'habit' or 'habitual' has however, not been defined under the Act, According to the Law Lexicon by P. Ramanatha Iyyar, Reprint Edition 1987 page 499 'habitually' means constant, customary & addicted to specified habit and the term habitual criminal may be applied to any one who has been previously convicted of a crime to the sentences and committed to prison more than twice. The word 'habitually' means 'usually' and 'generally'. Almost similar meaning is assigned to the words 'habit' in Aiyar's Judicial Dictionary, 10th Edition page 485. It does not refer to the frequency of the occasions but to the invariability of practice and the habit has to be proved by totality of facts. It, therefore, follows that the complicity of a person in an isolated offence is neither evidence nor a material of any help to conclude that a particular person is a 'dangerous person' unless there is material suggesting his complicity in. such cases which lead to a reasonable conclusion that the person is a habitual criminal. In *Gopalan Chari v. State of Kerala*, AIR (1981) SC 674 this Court had an occasion to deal with expressions like 'bad habit', 'habitual', 'desperate', 'dangerous', and 'hazardous'. This Court observed that the word habit implies frequent and usual practice. Again in *Vijay Narain Singh v. State of Bihar*, [1984] 3 SCC 14, this Court construed the expression 'habitually' to mean repeatedly or

persistently and observed that it implies a thread of continuity stringing together similar repetitive acts but not isolated, individual and dissimilar acts and

that repeated, persistent and similar acts are necessary to justify an inference of habit. It, therefore, necessarily follows that in order to bring a person

within the expression 'dangerous person' as defined in clause (C) of Section 2 of the act, there should be positive material to indicate that such person

is habitually committing or attempting to commit or abetting the commission of offences which are punishable under Chapter XVI or XVII of the I.P.C.

or under Chapter V of the Arms Act and that a single or isolated act falling under Chapters XVI or XVII of I.P.C, or Chapter V of Arms Act cannot

be characterised as a habitual act referred to in Section 2(C) of the Act.

9. Further, sub-section (1) of Section 3 of the Act confers power on the State Government and a District Magistrate or a Commissioner of Police

under the direction of the State Government to detain a person on being satisfied that it is necessary to do so with a view to preventing him from

acting in any manner prejudicial to the maintenance of 'public order'. The explanation attached to sub-section (4) of Section 3 reproduced above in the

foregoing para contemplates that 'public order' shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely

inter-alia if any of the activities of any person referred to in sub- section (4) directly or indirectly, are causing or is likely to cause any harm, danger or

alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or public health. Sub-

section (4) of Section 3 also provides that for the purpose of Section 3, a person shall be deemed to be 'acting in any manner prejudicial to the

maintenance of public order' when such person is a 'dangerous person' and engaged in activities which affect adversely or more likely to affect

adversely the maintenance of public order. It, therefore, becomes necessary to determine whether besides the person being a 'dangerous person' his

alleged activities fall within the ambit of the expression 'public order'. A distinction has to be drawn between law and order and maintenance of public

order because most often the two expressions are confused and detention orders are passed by the authorities concerned in respect of the activities of

a person which exclusively fall within the domain of law and order and which have nothing to do with the maintenance of public order. In this

connection it may be stated that in order to bring the activities of a person within the expression of 'acting in any manner prejudicial to the maintenance of public order"', the fall out and the extent and reach of the alleged activities must be of such a nature that they travel beyond the capacity of the ordinary law to deal with him or to prevent his subversive activities affecting the community at large or a large section of society. It is the degree of disturbance and its impact upon the even tempo of life of the society or the people of a locality which determines whether the disturbance caused by such activity amounts only to a 'breach of law and order' or it amounts to 'public order.' If the activity falls within the category of disturbance of 'public order' then it becomes essential to treat such a criminal and deal with him differently than an ordinary criminal under the law as his activities would fall beyond the frontiers of law and order, disturbing the even tempo of life of the community of the specified locality. In the case of *Arun Ghose v. State of West Bengal*, [1970] 1 SCC 98 this Court had an occasion to deal with the distinction between law and order and public order. Hidayatullah, C.J. (as he then was), speaking for the Court observed that public order would embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to breach of law and order. It has been further observed that the implications of public order are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different, Again in the case of *Piyush Kantilal Mehta v. Commissioner of Police*, [1989] Suppl. 1SCC322, this Court took the view that to order that an activity may be said to affect adversely the maintenance of public order, there must be material to show that there has been a feeling of insecurity among the general public. If any act of a person creates panic or fear in the minds of the members of the

public upsetting the even tempo of life of the community, such act must be said to have a direct bearing on the question of maintenance of public

order. The commission of an offence will not necessarily come within the purview of public order which can be dealt with under ordinary general law

of the land.

10, Now reverting to the grounds of detention and the summary of incidents alleged against the petitioner as mentioned in the beginning of this

judgment, it may be stated that the first incident is said to have taken place on 24.4.1993 at about 6.45 PM in which the detenu - petitioner alongwith

some of his associates is alleged to have dragged out the complainant, one Mohd. Hussain from inside the Hair Cutting Saloon of Shahpur and

associates of the petitioner fired four rounds from the revolver injuring the complainant and one another customer. The report lodged by the

complainant Mohd. Hussain himself on 24.4.1993, a copy of which has been placed on record, goes to show that a day earlier, that is on 23.4.1993 at

about 9.30 PM there was a quarrel between Amjad Khan, the younger brother of the complainant Mohd. Hussain and the petitioner upon sounding the

scooter horn in the gali of the house of the petitioner and it was in that connection that next day i.e. on 24.4.1993 the alleged incident of assault by the

petitioner and his associates to the complainant Mohd. Hussain took place. From the narration of facts in the said complaint it is abundantly clear that

the criminal activity was directed against an individual and from the nature of the incident it is difficult to assume that it gave rise to public order

disturbing the tranquillity of the locality.

At the most it was a criminal act directed only against an individual which has nothing to do with the question of public order It appears that it was on

account of the earlier day incident that the petitioner made a plan alongwith his associates to teach a lesson to the complainant by assaulting him when

he was seen in the Hair Cutting Saloon on 24.4.1993, This apart the incident had occurred on 24.4.1993 while the detention order was passed on

19.8.1994 after the lapse of more than 16 months. This long lapse of time between the alleged prejudicial activity and the detention order loses its

significance because the said prejudicial conduct was not approximate in point of time and had no rational connection with the conclusion that the

detention was necessary for maintenance of public order. Such a stale incident

can not be construed as justifiable ground for passing an order of detention. The second incident dated 11.4.1994 was that the detenu - petitioner was harbouring offender which is an offence under Sections 212/214 of the I.P.C, An offence under Section 212/214 of the I.P.C. cannot be made a basis for passing an order of detention against the petitioner as the said offence does not fall either under Chapters XVI or XVII of the I.P.C. In order to bring a person within the definition of Section 2(C) of the Act it is essential to show that such person either by himself or as a member of or a leader of a gang habitually commits or attempts to commit or abets the commission of offences punishable under Chapter XVI or XVII of the Indian Penal Code or any of the offences punishable under Chapter V of the Arms Act. But as pointed out earlier the offence registered against petitioner under F.I.R. of C.R.No. 7/94 of DCB dated 11,4. 1994 is one under Sections 212/214 of the I.P.C. which falls under Chapter XI of the I.P.C. and not under any of the chapters XVI or XVII which is the requirement of Section 2(C) of the Act. This incident, therefore, can not be made a basis for satisfaction of the detaining authority that petitioner is a habitual offender, so as to sustain the order of detention.

11. This brings us to criminal activities of the detenu - petitioner which are said to have taken place on 10.8.1994 at 4.00 PM and on 12.8.1994 at 7.00 PM. In the incident dated 10.8.1994 the petitioner is alleged to have purchased goods worth Rs. 5(K) from a businessman and on the demand of the price of the goods, the petitioner is alleged to have dragged him out on the public road and not only gave a beating to him but also aimed his revolver towards the people gathered over there. Similarly it is alleged that on 12.8.1994 at about 7.00 PM the detenu - petitioner stopped the witness on the road near eastern side of Sardar Garden and beat him as the petitioner doubted that he was informing the police about the anti-social activities of the petitioner and his associates. The petitioner is also alleged to have rushed towards the people gathered there with the

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revolver. Taking the aforesaid two incidents and the allegations on their face value as they are, it is difficult to comprehend that they were the incidents involving public order. They were incidents directed against single individuals having no adverse affect prejudicial to the maintenance of

public order disturbing the even tempo of life or the peace and tranquillity of the locality. Such casual and isolated incidents can hardly have any implications which may affect the even tempo of life or jeopardize the public order or incite people to make further breaches of the law and order which may result in subversion of the public order. As said earlier the Act by itself is not determinant of its own gravity but it is the potentiality of the act which matters.

12. The alleged incident dated 12.8.1994 relating to the beating of some person on suspicion that he was informing the police about criminal activities of the petitioner, the allegation is sweeping without any material to support it. Neither any timely report appears to have been made about it to the police nor any offence appears to have been registered against the detenu - petitioner concerning the said incident. There remains the solitary incident dated 10.8.1994 pertaining to the alleged beating of a businessman which as said earlier directed was against an individual having no adverse impact on public at large. Besides, the solitary incident dated 10.8.1994 alone would not provide a justification to hold that the petitioner was habitually committing or attempting to commit or abetting the commission of offences as contemplated in Section 2(C) of the Act because the expression 'habitually' postulates a thread of continuity in the commission of offence repeatedly and persistently. However, in our considered opinion none of the aforementioned two incidents can be said to be incidents affecting public order nor from these stray and casual acts the petitioner can be branded as a dangerous person within the meaning of Section 2(C) of the Act, who was habitually engaged in activities adversely affecting or likely to affect adversely the maintenance of public order. Similar is the position with regard to the recovery of .32 bore country made revolver from the possession of the petitioner without any permit or licence which is an offence under Section 25 of the Arms Act. The said revolver was found to be rusty and had a broken barrel. Mere possession of a firearm without anything more cannot bring a case within the ambit of an act affecting public order as contemplated in Section 3 of the Act unless ingredients of Section 2(C) of the Act are also made out. From the facts discussed above it turns out that there was no material which may lead to a reasonable and definite conclusion that the detenu - petitioner was habitually engaged in criminal activities

and, therefore, a dangerous person. The detaining authority thus passed the impugned order of detention against the petitioner without application of mind on the aforesaid aspects of the case and, therefore, the detention order could not be sustained.â??

11. In light of the aforesaid principles as propounded by the Supreme Court in the above cited judgment and considering the facts of the present case, the detaining authority has failed to substantiate that the alleged anti-social activities of the detenue affect adversely or are likely to affect adversely to the maintenance of public order. The alleged activities of the detenue were not of dangerous to the public at large. As a result, the grounds for passing such detention order cannot be sustained and therefore, it deserves to be quashed and set aside.

12. In the result, present petition is allowed. The impugned order of detention dated 30.12.2019 passed by respondent no.2 â?" Commissioner of Police, Vadodara City, is hereby quashed and set aside. The detenue is ordered to be set at liberty forthwith, if not required in connection with any other case.

13. Registry is directed to communicate this order to the concerned jail authority by fax/e-mail forthwith.