
(1998) 11 GUJ CK 0043

In the Gujarat High Court

Case No : Special Civil Application No. 3057 of 1998

Shankarbhai Gokalbhai Vaghari

APPELLANT

Vs

District Magistrate

RESPONDENT

Date of Decision : 23-11-1998

Acts Referred:

Gujarat Prevention of Anti-social Activities Act, 1985 — Section 3(2)

Citation : (1998) 11 GUJ CK 0043

Hon'ble Judges : D.C. Srivastava, J

Bench : Single Bench

Advocate : D.R. Kachhavah, for the Appellant; Siddhi S. Talati, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

D.C. Srivastava, J.—The prayer of the petitioner in this writ petition is for issuing writ of certiorary quashing the detention order of the petitioner passed by the detaining Authority on 10th March 1998 and writ in the nature of Habeas Corpus directing immediate release of the petitioner from illegal detention.

2. Brief facts are that six cases under the Prohibition Act were registered against the petitioner. Still he continued in his illegal activity of distilling, storing, selling and transporting indigenous country made liquor and threatening the witnesses whosoever caused obstruction in the activities of the petitioner. It was also brought to the notice of detaining Authority that the petitioner was discharging affluent of his distillery in the canal as well as in the pond of concerned village Gutal as a result of which the crops of the farmer used to be damaged and the cattle were also taking harmful water causing danger to their health. The detaining Authority considered all the material placed before him. He also considered alternative remedies u/s 93 of the Prohibition Act and Sections 56(B) and 57(G) of the Bombay Police Act and found that these remedies were ineffective to prevent illegal and anti-social activities of the petitioner. Consequently the detention order u/s 3(2) of the Prevention of Anti-social

Activities Act 1985 (for short "PASA Act") was passed by the Detaining Authority. The grounds of detention were furnished to the petitioner.

3. The order of detention has been challenged by the learned Counsel for the petitioner on several grounds. The first is that the activities of the petitioner do not amount to disturbance of public order. The next ground is that there was delay in passing the detention order and as such it has been rendered invalid. Another ground is that the petitioner is patient of T.B. The last ground has been that the representation of the petitioner sent through his Counsel was not considered by the State Government which has rendered his detention as well as continued detention illegal.

4. Learned Counsel for the petitioner and the learned A.G.P. were heard on these grounds.

5. So far as petitioner's illness due to T.B. is concerned it is no ground for quashing the impugned order. Even if he is patient of T.B. he can indulge in his activity of distilling, storing, transporting and selling country made liquor. The so called ailment is not supported by any reliable material on record and hence this ground is without substance.

6. The contention that delay in passing the impugned order has rendered it invalid also has no substance. It was argued by the learned Counsel for the petitioner that there was 1 month and 12 days delay in passing the impugned order after the last offence committed by the detenu. The last offence at Sr.No.6 in the grounds of detention was registered on 25.1.1998. The petitioner was arrested for this offence on 5.2.1998. The detention order was passed on 10.3.1998. Proposal against the petitioner was submitted on 16.2.1998. Thus, from the date of proposal it cannot be said that the detention order was passed after 1 month and 12 days. After the commission of offence which was registered on 25.1.1998 some time must have been taken in investigation and for the satisfaction of the Sponsoring Authority in submitting proposal. The proposal was submitted on 16.2.1998 and the order of detention was passed within three weeks of the submission of proposal. On these facts it cannot be said that there was delay or inordinate delay in passing the impugned order. Even this three weeks delay has been explained in Para : 11 of the Affidavit of the detaining Authority wherein it is deposed that on account of administrative reasons, viz. Parliament Election in February, 1998 that the detention order was passed on 10.3.1998. Judicial notice can be taken that when the Parliament election takes place the District Magistrate, who is Returning Officer of the District, is likely to be engaged in election matters and he should have given Top Priority to the election matters and this business of the District Magistrate in election matters is sufficient explanation of three weeks' delay.

7. The case of Pradeep Nikanth Paturkar Vs. S. Ramamurthi and others, is distinguishable on facts. In this case the facts were that the detention order was passed on the basis of some criminal cases registered against the detenu as well

as on the basis of statement of witnesses after five months and eight days from the registration of last case, and more than four months after submission of proposal. On these facts the delay was found to be unsatisfactory and unexplained. From Para : 14 of this Judgment of the Apex Court it appears that the delay was unexplained, that is why the Apex Court observed that taking into consideration of the unexplained delay whether short or long especially when the detenu had taken a specific plea of delay, the detention order was liable to be quashed and was accordingly quashed. In the case before me the delay has been explained by the detaining Authority and three weeks delay, in the circumstances of the case, cannot be said to be unexplained delay or inordinate delay.

8. On the point of delay the Division Bench of this Court in *Osman Ali Khatri v/s. Commissioner of Police, Rajkot*, reported in 1994 (1) G.L.H. 512 referring to the Supreme Court verdict in *Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others*, , observed that distinction must be drawn between the delay in making an order of detention under law relating to preventive detention and the delay in complying with the procedural safe-guards of Article 22, Clause (5) of the Constitution. Rule as to unexplained delay in taking action is not inflexible. The Courts should not merely on account of delay in making of an order of detention assume that such delay, if not satisfactorily explained, must necessarily give rise to an inference that there was no sufficient material for subjective satisfaction of detaining Authority or that such subjective satisfaction was not genuinely reached. Thus, according to this case and the case of *Rajendrakumar Shah (supra)* even where the delay is unexplained no absolute rule of law can be said to have been laid down that such delay necessarily renders detention order invalid.

9. In the case before me in the first place there is no undue delay in passing detention order and secondly the so called delay has been explained by the detaining Authority. Thus, the detention order cannot be set aside on this ground.

10. Next contention has been that the representation of the petitioner, sent through his Advocate, was not considered by the State Government and that this in action of the State Government has rendered petitioner's detention illegal.

11. Para : 3 of the Counter Affidavit of Under Secretary Shri J.R.Rajput shows that the representation of the petitioner dated 15.4.1998 was received through letter dated 17.4.1998 from the District Magistrate on 20.4.1998. Since the representation did not bear the signature of detenu nor Vakalatnama of Advocate and therefore it was not taken into consideration. This is, however, no explanation or reason for not considering the representation of detenu. From this Counter Affidavit it is now clear that the representation of the detenu sent to the State Government was not considered. The reasons for non-consideration are wholly unfounded. The Apex Court on similar facts in *Balchand Choraria Vs. Union of India (UOI) and Others*, , struck down and quashed the detention order by observing that the representation sent by the Advocate of the detenue could not be rejected or not considered by the concerned Government on technical

ground that it was sent by the Advocate who was also member of Parliament.

12. There is no requirement of law that an Advocate sending the representation under instruction of his or her client must attach Vakalatnama from the client along with representation. It is also not necessary that the representation sent by the Advocate must bear signature or thumb impression of the detenu. English translation of representation dated 15.4.1998 has been filed by the learned A.G.P. which clearly shows that the representation was sent by the Advocate under instruction from her client. It should have been considered. Since it was not done the detention order is rendered illegal and cannot be sustained.

13. So far as the activities of the petitioner are concerned they have been disclosed in detail in the grounds of detention. Since the petitioner is engaged in the business of distilling, storing, transporting and selling country made liquor it can be said that he is a bootlegger within the definition of Section 2(b) of the PASA Act. However, simply because a person is bootlegger it cannot be said that his illegal activity must necessarily cause disturbance of public order. Distilling illicit liquor per se can not create disturbance of public order. According to the Detaining Authority bad smell coming out of distillery caused annoyance and danger to health of the residents of the locality. If action of the petitioner is illegal and it causes annoyance to the public residing in the locality it cannot be held that it causes disturbance of public order. Even in locality where sugar mills are situated and sugar is manufactured bad smell from molasses create constant irritation and foul smell causes annoyance to the residents of nearby locality. For that reason it cannot be said that manufacture of sugar create disturbance of public order. Likewise if effluent of the distillery is discharged in the village pond or in the canal it cannot be said that the entire crop in the village can be destroyed or animal of the village had lost their lives. On bare allegation of damage to the crop and loss of animal is not a ground for holding that such activity amounts to disturbance of public order.

14. The instances which were narrated by the witnesses are nothing, but individual and stray incidents between the petitioner and the witnesses. Such individual incidents even at public places can not amount to disturbance of public order. Repetition of activity by the petitioner itself does not amount to disturbance of public order. Unless by the complained activities of the petitioner even tempo of life of the locality, peace and tranquility in the locality is disturbed it can hardly be believed that such activities cause disturbance in maintenance of public order.

15. Having considered the entire allegations against the petitioner and the summary of statements of witnesses it is difficult to conclude that the activities of the petitioner amounted to disturbance of public order. As such on the basis of petitioner involving in bootlegging activity he could not be preventively detained. This is another ground for quashing the detention order.

16. For the reasons stated above the writ petition succeeds and is hereby allowed.

The impugned order of detention dated 10.3.1998 contained in Annexure : A to the writ petition is hereby quashed. The petitioner shall be released forthwith unless he is wanted in any other criminal case.