

(2014) 09 GUJ CK 0141

In the Gujarat High Court

Case No : Special Civil Application No. 5664 of 2014

Vijaysinh

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 17-09-2014

Acts Referred:

Bombay Prohibition Act, 1949 — Section 3, 66(1)(B), 81
Constitution of India, 1950 — Article 22
Right to Information Act, 2005 — Section 8

Citation : (2015) 1 GLR 107

Hon'ble Judges : S.G. Shah, J

Bench : Single Bench

Advocate : Mohdshafi Shaikh, Advocates for the Appellant; Jirga Jhaveri, A.G.P, Advocates for the Respondent

Judgement

S.G. Shah, J.—Heard learned Advocate for the petitioner and learned A.G.P. for the respondent-State. Petitioner is apprehending his detention pursuant to F.I.R. being Prohibition C.R. No. 1-5013 of 2014 with Shahibaugh Police Station under Secs. 66(1)(B), 65(A)(E), 81, 116(B) of the Prohibition Act. Petitioner is one of the seven accused, against whom such F.I.R. was registered and he has preferred present petition at pre-execution stage to avoid his detention.

2. If we peruse the F.I.R., the basic allegation against the petitioner is to the effect that he is involved either in transporting, selling or supplying the prohibited liquor. Petitioner is challenging such order of detention stating that it is solitary offence registered against him and he has never been involved in any other offences.

2.1. However, with above background, if we consider the provisions of the Prevention of Anti-Social Activities Act (P.A.S.A. Act), the word "bootlegger" is defined under Sec. 2(b) of the Act, which reads as under:

"2(b) "bootlegger" means a person who distills, manufactures, stores, transports, imports, exports, sells or distributes any liquor, intoxicating drug or other

intoxicant in contravention of any provisions of the Bombay Prohibition Act, 1949 and the Rules and Orders made thereunder, or of any other law for the time being in force or who knowingly expends or applies any receptacles or any other material whatsoever in furtherance or support of the doing of any of the things described above by or through any other person, or who abets in any other manner the doing of any such thing."

2.2. Therefore, so far as definition of bootlegger is concerned, even single offence is enough for passing an order of detention since word "habitual" is not there in definition.

3. Perusal of the definition, makes it clear that there is no compulsion to wait for repeated offence to consider someone as bootlegger and that all the activities viz. distilling, manufacturing, storing, transporting, importing, exporting, selling or distributing and prohibiting of any provision of Bombay Prohibition Rules and Act or Orders made thereunder would be enough to term any person who is involved in any such activity either directly or support it or get it done by any other person or abets it in any manner. Thereby there is no second thought or there is no escape for the petitioner that he could certainly be termed as "bootlegger". It is clear and obvious from the definition of word "bootlegger" that word "habitually" is absent from the definition clause of "bootlegger". Thereby the only issue remains with reference to the propriety of passing the detention order, which is otherwise termed as drastic measure. The power to make orders detaining persons is enumerated in Sec. 3 of the Act which provides that the State Government if satisfied with respect to any person with a view to prevent him in acting any manner prejudicial to the maintenance of public order and when it is necessary to do so, the Government may pass an order directing such person to be detained. Sub-section (4) of Sec. 3 of the Act provides that for the purpose of this Section a persons shall be deemed to be "acting in any manner prejudicial to the maintenance of public order". When such person is engaged or making preparation of engaging in any of the activities whether as a bootlegger or common gambling house keeper or and person 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. Thereby the relevant provision which is material for present is deeming provisions under sub-sec. (4) of Sec. 3 of the Act which confirms that even if such activity affect adversely or likely to affect adversely or shall be deemed likely to affect the public order, then person shall be deemed to have acted in a manner prejudicial to the maintenance of public order. Whereas definition of such word makes it further clear that for the purpose of this sub-section, the public order, however, deemed to be affected adversely or shall be deemed likely to be affected adversely inter alia, if any of the activities or any person referred to in this sub-section directly or indirectly, is causing or is likely to cause any harm, danger or alarm of feeling of insecurity among the general public or any Section thereof or a grave or widespread danger to life, property or public health.

3.1. Therefore, in fact, there are two deeming provisions where presumption can be had against the person who has involved himself in any of such illegal activities for which he could be detained.

3.2. Therefore, considering the above factual details and provisions of law, it becomes clear that petitioner can certainly be considered as a bootlegger when he is transferring and supplying the huge quantity of liquor in the city, though there is a prohibition on liquor which certainly results into disturbance in public life. Therefore, when there is & prima facie evidence and observations against the petitioner, I do not see any reason to interfere in the order of detention which may be passed against the petitioner, which would be otherwise result of the subjective satisfaction of the competent authority and more particularly when petitioner is unable to show that why such subjective satisfaction can be treated as illegal, erroneous, arbitrary or otherwise, without its existence at such pre-detention stage.

4. Such issue i.e. right of the person to challenge the proposed order of detention and jurisdiction of the Court to grant appropriate relief in such petition, which is more particularly described as pre-detention petition, has been considered by this Court as well as Hon"ble the Apex Court in several reported cases. Since there was some difference of opinion, and thereby, different decisions by the Apex Court in different cases, all such matters are being dragged since long, considering the pending decision in the case of Subhash Popatlal Dave Vs. Union of India (UOI) and Another, by the Apex Court. For consideration of such latest judgment and the issue, the following cases were scrutinised:

"(1) Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, ;

(2) Sunil Fulchand Shah Vs. Union of India and Others, ;

(3) Sayed Taher Bawamiya Vs. Joint Secretary to the Govt. of India and Others, ;

(4) Hare Ram Pandey Vs. State of Bihar and Others, ;

(5) Union of India (UOI) Vs. Amrit Lal Manchanda and Another, ;

(6) Union of India (UOI) and Others Vs. Vidya Bagaria, ;

(7) Union of India (UOI) and Others Vs. Atam Parkash and Another, ;

(8) Union of India and Others Vs. Parasmal Rampuria, ;

(9) Khudiram Das Vs. The State of West Bengal and Others, ;

(10) State of Tamil Nadu Vs. P.K. Shamsudeen, ;

(11) Navalshankar Ishwarlal Dave and another Vs. State of Gujarat and others, ;

(12) Union of India (UOI) and Others Vs. Muneesh Suneja, ;

- (13) Union of India (UOI) Vs. Amrit Lal Manchanda and Another, ; Hare Ram Pandey Vs. State of Bihar and Others, ;
- (14) Union of India (UOI) and Another Vs. Shrimati Chaya Ghoshal and Another, ;
- (15) Naresh Kumar Goyal Vs. Union of India (UOI) and Others, ;
- (16) Rajinder Arora Vs. Union of India (UOI) and Others, ;
- (17) Alpesh Navinchandra Shah Vs. State of Maharashtra and Others, ;
- (18) State of Maharashtra and Others Vs. Bhaurao Punjabrao Gawande, ;
- (19) Deepak Bajaj Vs. State of Maharashtra and Another, ;
- (20) Dropti Devi and Another Vs. Union of India (UOI) and Others, ;
- (21) 1993 (2) GLH (UJ) 27 in Dahyabhai Ratnabhai Sojitra v. District Magistrate, Rajkot; Mukesh Himatlal Sheth Vs. State of Gujarat and Others, "

5. The common impression and argument at bar that in the judgment under reference, Hon"ble Mr. Justice Altamas Kabir, C.J.I. (as he then was) has held that litigants have absolute right to challenge the proposed order of detention at pre-detention stage and the Court has to allow such application irrespective of restrictions laid down by the another three-Judges Bench of the Apex Court in the case of Additional Secretary to the Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, , is not correct.

6. In my opinion, though decision in Sayed Taher Bawamiya (supra) is not followed in order dated 10-7-2012, it is mainly due to specific factual details in Sayed case wherein 16 years had lapsed and when in operative portion of order dated 10-7-2012 in Subhash Popatlal Dave case (supra) directs to club all such cases for further hearing, in following words, the discussion on Sayed case in the order dated 10-7-2012, Subhash Popatlal Dave case (supra) is not material and it does not overrule the decision in Sayed case.

"30. In the light of the above, let the various Special Leave Petitions and the Writ Petitions be listed for final hearing and disposal on 7th August, 2012 at 3-00 p.m. This Bench be reconstituted on the said date, for the aforesaid purpose."

7. It cannot be ignored that case of Subhash Popatlal Dave (supra) is decided by the Bench of three Hon"ble Judges of the Supreme Court. When judgment of Alka Subhash Gadia (supra) is also by the Bench of three-Judges and when again another Bench of three-Judges have confirmed the judgment of Alka Subhash Gadia (supra) (which fact can be ascertained from Paragraph 11 of judgment Subhash Popatlal Dave case (supra) wherein the entire Paragraph 30 of Alka Subhash Gadia (supra) has been reproduced). Now, such order cannot be reversed or modified or overruled by equal or similar Bench. It can be done only by a higher Bench of the Apex Court. It is also clear that in the judgment dated 16-7-2013 in Subhash Popatlal Dave case (supra), majority of two Judges have not approved the view expressed by the Hon"ble third-Judge, and hence, and

though all Judges are agreed to extend the scope of scrutiny restricted by Alka Subhash Gadia case (supra) that case is neither overruled nor reversed.

8. Thus, to summarise 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 petition can be entertained to quash the proposed order of detention without it being served upon the detainee 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 scrutinised by the Court.

(2) Petitioner is 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 he has 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."

9. In some of the petitions, prayer by the petitioner, to call upon the detaining authority to produce and disclose the order of detention or grounds of detention before the Court for its scrutiny, may require consideration at this stage before arriving at any specific conclusion.

10. For the purpose, the order dated 10-7-2012 in the case of Subhash Popatlal Dave Vs. Union of India (UOI) and Another, is relevant, wherein while clubbing all other matters of similar nature together for consolidated one judgment, which is delivered on 16-7-2013 when Apex Court had, while dealing with some of the matters only, held, after referring to Right to Information Act, 2005, that application to provide ground of detention to the detainee does not arise prior to arrest of detainee despite provision of Right to Information Act, 2005. To hold so, the same Bench of the Supreme Court has considered the provisions of clause (5) of Art. 22 which confirms that what is to be communicated to the detainee when he is actually detained i.e. grounds of detention, making it clear that Sec. 8 of the Right to Information Act makes an exception from disclosure of such information. It is made clear that grounds for detention are to be served on detainee after his detention, and provisions of R.T.I. Act cannot be applied to case of preventive detention at the pre-execution stage. Therefore, though petitioner/s has/have not prayed for production of detention order or its grounds under the R.T.I. Act, since in some petitions petitioners has prayed for direction to the detaining authority to disclose and produce the copy of detention order and grounds for detention even prior to actual detention, in such pre-detention petition, I am of the clear opinion that unless such order is under challenge for specific exception as carved out in the case of Alka Subhash Gadia (supra) or any

other pronouncement, statutory or judicial, there is no reason to ask the detaining authority to disclose the information which could prejudice to the interest of the Society at large and the Nation. Even if it is argued that reason and ground of detention of a particular person may not affect the law and order, public order or security of the Nation, it would certainly affect the right of the State irrespective of activities which of petitioner will result into nullifying the provision of P.A.S.A. Act. The fact remains that such act has never been declared unconstitutional and that preventive detention is otherwise permissible under the Constitution and under the Common law.

11. Even if we consider both the Subhash Popatlal Dave Vs. Union of India (UOI) and Another, and judgment dated 16-7-2013, in the case of Subhash Popatlal Dave, (Writ Petition (Cri.) No. 137 of 2011), one thing is clear that the Apex Court has specifically disclosed that matter requires further examination for consideration of limited issue that whether challenge of preventive order at pre-execution stage is permissible on grounds other than those mentioned in the Alka Subhash Gadia's case (supra). However, in the order dated 10-7-2012 itself, the same Bench has specifically rejected the right of a detainee to get the grounds of detention prior to his arrest. To that extent, contention of learned Advocate Mr. Rohatgi was rejected by all Judges, which can be confirmed in Paragraph 29 of such judgment. Whereas Paragraph 23 confirms that Court agrees with the learned A.S.G. Mr. P.P. Malhotra that the State is not under any obligation to provide the grounds of detention to detainee prior to his arrest and detention irrespective of judgment in Choith Nanikram Harchandai (Writ Petition (Cri.) No. 88 of 2010) and Suresh Hotwani, (Writ Petition (Cri.) No. 35 of 2011). This aspect is material because K.K. Kochunnis case Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others, was finally decided by this judgment, dismissing his petition at pre-execution stage. While confirming such stand, the Apex Court has categorically observed that the provision of the Constitution will prevail over any enactment of the Legislature and that clause (5) of Art. 22 of the Constitution specifically provides that grounds for detention are to be served on the detainee after his detention.

12. Therefore, the question of allowing the prayers to direct the respondent to produce the order of detention with grounds of detention for securitisation and examination by the Court at pre-execution stage does not arise, though there may be some such decisions or practice followed by Division Bench of this Court, when there is clear and direct decision of the Apex Court on same issue.

13. Therefore, even if we entertain the petition at pre-execution stage against the order of detention well before its service and arrest of the petitioner, practically, the petitioner has to specifically disclose that on which ground he wants to challenge such order, except the ground of subjective satisfaction by the competent authority, which can be considered only after scrutinisation of the order of detention, but as discussed hereinabove, since such order cannot be asked to produce in a petition of present nature i.e. at pre-execution stage, since

such order may not be finalised till its actual issuance and execution and, therefore, in absence of specific grounds raised by the petitioner, so as to prove that even otherwise there is no reason for passing the order of detention against the petitioner, the application at pre-execution stage cannot be entertained. Therefore, even if petitioner is entitled to file application for the grounds other than the grounds listed in the Alka Subash Gadia "s case (supra) in absence of any other such ground which may be relevant for consideration before actual execution of order of detention, the proposed detention order cannot be quashed without being executed or even before confirming its existence. Needless to say that permitting such petition and allowing such prayer would result into anticipatory order to prevent detention, which is not permissible in law, inasmuch as for the reason that if it is allowed then each and every culprit may file a petition well in advance like an application for anticipatory bail so as to confirm that there may not be an order of his detention, even if there is sufficient grounds to detain him. The outcome of the latest judgment in Subhash Popatlal Dave (supra) only confirms that some grounds may not be exhaustive, but in any case, in absence of details of order of detention, its validity cannot be challenged and it cannot be said that it is illegal or perverse and needs to be quashed, even before its existence.

14. In Union of India (UOI) and Another Vs. Shrimati Chaya Ghoshal and Another, , the Apex Court has, while dealing with the Law relating to Preventive Detention, observed and held as under:

"8. Before dealing with rival submissions, it would be appropriate 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 Executive 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 Executive in detaining a person being only precautionary, normally the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct in an exhaustive manner, the failure to conform to which should lead to detention. The satisfaction of the Detaining Authority, therefore, is considered to be of primary importance, with great latitude in the exercise of its discretion. 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 tests of legal proof on which alone a conviction for offence will be tenable. The compulsions of the primordial need to maintain order in society without which the enjoyment of all rights, including the right to personal liberty of citizens would loose all their meanings, provide the justification for the laws of preventive detention. Laws that provide for preventive detention posit that an individual"s conduct

prejudicial to the maintenance of public order or to the security of State or corroding financial base provides grounds for satisfaction for a reasonable prognostication of possible future manifestations of similar propensities on the part of the offender. The above judgment has been confirmed by the Bench of three-Judges of the Apex Court reported in State of Tamil Nadu and Another Vs. R. Sasikumar, ."

15. In view of above legal position, it would not be necessary to deal with all the issues raised in the petition, which are mainly with reference to the pending F.I.Rs. and investigation,

16. Therefore, though some of such orders of rejecting the petitions at pre-execution stage have been quashed and set aside by Division Bench of this Court in L.P.A. No. 1195 of 2013 between Chirag @ Vijay Bhikhubhai Chitrabhuji v. State of Gujarat, if we perused the judgment of L.P.A. No. 1195 of 2013 all some other judgments with judgment in case of State of Tamil Nadu and Another Vs. R. Sasikumar, it becomes clear that there are two different views regarding maintainability of such petitions at pre-execution stage by two different Division Benches of this High Court. In background of such diverse views of two different Division Benches of this High Court, I am of the opinion to take help of the provisions of Rule 6 of the Gujarat High Court Rules, 1993, which reads as under:

"6. Powers of Chief Justice to order hearing by a Larger Bench:-Notwithstanding anything contained in these Rules, the Chief Justice may by a special or general order, direct that any matter or class of matters be placed before a Division Bench or a Special Bench of two or more Judges."

17. Considering the trend of filing of several such pre-detention petition, wherein immediately at lodging of F.I.R., so many accused are preferring petitions at pre-execution stage against the proposed order of detention and seeking relief to protect them against the order of detention based upon such F.I.R. In some cases, it would be difficult to verify immediately when it is listed for admission and for interim relief that whether petitioner is involved in such solitary offence or in several other offences. In some cases, such other offences may not be registered before the same police station or even within same district, and therefore, it would be difficult even for the respondents to respond immediately. For the same reasons it cannot be presupposed or presumed that the competent authority cannot call for the relevant information before passing such order and thereby unless competent authority exercise the powers Wested upon them by the statute, it would be too early to entertain such petition by giving interim relief of not to detain the petition only because he preferred such petition like an application for anticipatory bail.

18. It also cannot be ignored that in many cases, orders of detention are generally quashed and set aside on technical grounds like non-supply of copies or translation, non-consideration of representation in proper manner of considering the nature of incident, which may not be treated as disturbance of

public order. Further, when the same person commits the offences repeatedly, only because of quashing of previous order of detention, results into an argument and statement that now second offence is to be treated as a solitary offence and, therefore, he should not be detained.

19. Similarly, since there is no definition of word "habitual" or "public order", I am of the view that selling of huge quantity of liquor in the society and involvement of similar offence repeatedly whether such petitioners have caused injuries to victim, it cannot be said that it is not disturbance of public order. It is clear and obvious that only riots cannot be treated as disturbance of public order. Basically, any crime and particular nature of crime like when they found with Arms and ammunition or chain snatching or looting passengers from rickshaw either by rickshaw driver or by co-passengers, demanding protection money, grabbing land because of money or muscle power or even by cheating that may be argued as offence against particular person, when statute not declared any such activity cannot be left outside the purview of the definition of such type of persons under the Act, more particularly when there is serious incident and allegations. Needless to say that day and day out several such petitions are allowed when there is lack of subjective satisfaction or when there is no chance of disturbance of public order and when there is dispute between the parties for some previous or personal grievance but because of number of citations confirming the quashing and setting aside the detention order it cannot be said that all such petitions are to be allowed irrespective of facts and without following the decision of the Larger Bench i.e. three and more Judges of the Hon''ble Supreme Court, relying upon the solitary judgment on the issue like the judgment in Deepak Bajaj Vs. State of Maharashtra and Another, .

20. In view of above facts and circumstances, Registry is directed to place this matter before Hon''ble the Chief Justice for referring it to the Larger Bench, if so deem fit and proper considering the fact that there are diverse judgments on such issue by different Division Benches of this High Court. Interim relief granted by an order dated 21-4-2014 is extended for four weeks from today.