

(2013) 12 GUJ CK 0062
In the Gujarat High Court

Case No : Letters Patent Appeal No. 1490 of 2013

Vinod alias Vijay Murlidhar Udhwani

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 24-12-2013

Acts Referred:

Citation : (2014) CriLJ 1708

Hon'ble Judges : Vijay Manohar Sahai, J;Abdullah Gulamahmed Uraizee, J

Bench : Division Bench

Judgement

Abdullah Gulamahmed Uraizee, J.—We have heard learned counsel, Mr. Mohd. Shafi Shaikh for the appellant and Mr. N.J. Shah, learned Assistant Government Pleader for the respondents. Admitted. Mr. N.J. Shah, learned Assistant Government Pleader waives service of notice of admission. With the consent of the learned counsel for the parties, the matter is taken up for final disposal today itself. The appellant has challenged the judgment dated 11th December, 2013 passed by the learned single Judge in Special Civil Application No. 15966 of 2013 whereby the learned Judge has dismissed the writ petition filed by the appellant to quash the detention order under the Prevention of Anti Social Activities Act, 1985 ("PASA", for short) at pre execution stage. Learned counsel for the appellant submitted that from the averments made in paragraph 5 of the affidavit-in-reply filed by the respondent before the learned single Judge it clearly appears that the detention order is passed against the appellant but the same has not been served upon the detenu.

2. The brief facts of the present appeal are that the appellant filed writ petition to quash the detention order passed against him at pre-execution stage on the ground that the detention order is passed against the appellant on an ulterior ground on the basis of a solitary criminal case registered against him.

3. The learned single Judge has summed up the legal position in paragraph 7 of the impugned judgment as emerging from the judgement of the Supreme Court in the case of Subhash Popatlal Dave Vs. Union of India (UOI) and Another, .

Said paragraph 7 is extracted hereinbelow:

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

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

(2) 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.

4. We are unable to agree with the proposition of law culled out by the learned single Judge as aforesaid and the aforementioned conclusion arrived at by the learned single Judge.

5. The lead authority of the Hon'ble Supreme Court on challenge to detention order at pre-execution stage is in the case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, wherein it is held as under:--

30. As regards his last contention, viz. That to deny a right to the proposed detenu to challenge the order of detention and the grounds on which it is made before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution, we find that this argument is also not well merited based as it is on absolute assumptions. Firstly, as pointed out by the authorities discussed above, there is a difference between the existence of power and its exercise. Neither the Constitution including the provisions of Article 22 thereof nor the Act in question places any restriction on the powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. However, the courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in

pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary-extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the courts. To accept Shri Jain's present contention would mean that the courts should disregard all these time-honoured and well-tested judicial self-restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibal for the appellants, as far as detention orders are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this is more important, it is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.

(Emphasis supplied)

6. The Honourable Supreme Court in the case of Subhash Popatlal Dave Vs. Union of India (UOI) and Another, has, while confirming the ratio laid down in the case of Alka Subhash Gadia (supra) has further held that the grounds which the detention order can be challenged at pre-execution stage as mentioned in Alka Subhash Gadhiya (supra) are illustrative and not exhaustive. In Subhash Popatlal Dave Vs. Union of India (UOI) and Another, the Supreme Court has, while holding that five exceptions mentioned in Alka Subhash Gadia (supra) are not exhaustive, but illustrative, observed as under:--

47. With due respect to the Hon''ble Judges, we have not been able to read into the judgment in Alka Subhash Gadia's case (supra) any intention on the part of

the Hon"ble Judges, who rendered the decision in that case, that challenge at the pre-execution stage would have to be confined to the five exceptions only and not in any other case. Both the State and the Hon"ble Judges relied on the decision in *Sayed Taher Bawamiya Vs. Joint Secretary to the Govt. of India and Others*, . As submitted by Mr. Rohatgi, to accept that it was the intention of the Hon"ble Judges in *Alka Subhash Gadia's case (supra)* to confine the challenge to a detention at the pre-execution stage, only on the five exceptions mentioned therein, would amount to imposing restrictions on the powers of judicial review vested in the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution. The exercise of powers vested in the superior Courts in judicially reviewing executive decisions and orders cannot be subjected to any restrictions by an order of the Court of law. Such powers are untrammelled and vested in the superior Courts to protect all citizens and even non-citizens, under the Constitution, and may require further examination.

7. Similar view is taken by the Honourable Supreme Court in the case of *Deepak Bajaj Vs. State of Maharashtra and Another*, . In the said case the Honourable Supreme Court has held that the observations in *Alka Subhash Gadia (supra)* are illustrative and not exhaustive. Paragraph 6 of the said judgment is extracted hereinbelow:

6. We have carefully perused the above observations in *Alka Subhash Gadia case* and we are of the opinion that the 5 grounds mentioned therein on which the Court can set aside the detention order at the pre-execution stage are only illustrative, not exhaustive.

8. In view of the above clear position of law, enunciated by the Honourable Supreme Court, the law is set at rest and the powers of the judicial review vested in the High Court under Article 226 of the Constitution of India are unfettered and untrammelled so as to protect the citizens under the Constitution. Hence, the detention order can be challenged at pre-execution stage by the proposed detainee in the High Court by invoking Article 226 of the Constitution of India and thereafter if it becomes obligatory on the part of the High Court to satisfy its conscience as to whether the detention order is passed in consonance with the scheme of enactment under which the detention order is passed or whether the detention order suffers from the vice of illegality or not.

9. It is trite that at a pre-execution stage the proposed detainee has no right whatsoever to access the detention order and grounds of detention so as to enable him to articulate the grounds of challenge. At the same time, when, as per the settled proposition of law, the High Court under Article 226 of the Constitution of India and the Honourable Supreme Court under Article 32 of the Constitution of India are invested with the power of review to ascertain whether the detention order passed by the detaining authority, which is yet to be executed upon the detainee is legally tenable or not. This exercise can be done only if the detention order along with grounds of detention are made available to the court for perusal unless the detention order and grounds of detention it

would not be possible for the High Court to satisfy its conscience as to whether the detention order stands scrutiny on the yardstick prescribed by the Supreme Court in the case of Alka Subash Gadia (supra) in paragraph 30, as extracted above. The learned single Judge has dismissed the writ petition filed by the appellant without perusing the order of detention and the grounds of detention solely on the premise that as per the prevailing position of law the writ petition to challenge the order at pre-execution stage is not maintainable and that the authorities cannot be directed to produce the detention order and the grounds on the record of the petition. It is bounden duty of the Court to call for the order of detention for its own perusal to satisfy itself as to the validity of the detention order. Unless the Court directs the authorities to produce the detention order for its perusal, it would not be possible for the Court to test the detention order and come to the conclusion whether the detention order stands scrutiny of the norms and the guiding principles enunciated in the case of Alka Subhash Gadia (supra) and Subhash Poptalal Dave (supra). In this premise, we are of the opinion that the impugned judgment of the learned single Judge cannot be sustained. The matter needs to be remanded to the learned single Judge to decide the petition afresh after calling for the detention order and grounds for detention for its own perusal and to independently decide whether it is a fit case to quash the detention order at a pre-detention stage or not. The appeal, therefore, succeeds to the aforesaid extent. Interim relief granted in the writ petition by the learned single Judge shall continue till final disposal of the main writ petition by the learned single Judge. In view of the disposal of main appeal, no order is required to be passed on the Civil Application and the same stands disposed of accordingly. Direct service is permitted.