
(1995) 03 GUJ CK 0030
In the Gujarat High Court

Zubedabibi Rasidkhan Pathan

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 09-03-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437, 437 , 437(5)

Citation : (1995) 2 GLR 1134

Hon'ble Judges : Sharad D. Dave, J;K.J. Vaidya, J

Bench : Division Bench

Judgement

S.D. Dave, J.—Arifkhan Pathan, the detenu has been detained preventively under the PASAA-1985 as a "bootlegger" vide the orders dated February 4, 1994, passed by the Commissioner of Police, City of Surat, the respondent No. 1 herein. These orders of detention are in challenge before us in the present petition, which has been filed by the mother Smt. Zubedabibi Pathan.

2. The grounds of detention bearing even date would go to show that, a subjective satisfaction has been recorded to the effect that, the detenu is a "bootlegger". This subjective satisfaction admittedly rests upon certain prohibition cases registered against the detenu and the statements of the witnesses recorded by the Sponsoring Authority. After reaching the subjective satisfaction that the detenu indulges in the nefarious activities as a bootlegger the detaining authority has proceeded further to say that the detenu has been released on bail by the competent Court in all the cases registered against him under the Bombay Prohibition Act, 1949. But as he has been released on the usual terms and conditions by the competent Court, and as the detenu has not committed any breach of any of the conditions imposed by the Court releasing the detenu on bail, the proceedings u/s 437 of the Code of Criminal Procedure, 1973 could not be initiated. This part of the subjective satisfaction comes under a heavy criticism at the hands of the learned Counsel Mr. R.S. Sanjanwala who appears on behalf of the petitioner. We propose to advert to this part of the subjective satisfaction presently. Any how, before going to that part of our

opinion, it shall have to be appreciated that the grounds of detention speak of 2 Schedules which would rest on the offence registered against the detenu. Annexure-1 speaks of 3 prohibition offences registered against the detenu at the Athwalines Police Station within the City of Surat. Annexure-2 is in respect of the prohibition offence again registered against the detenu at the very same police station. The grounds of detention also do make a reference to the statements of certain witnesses who allegedly have said regarding the anti-social activities carried on by the petitioner acting in the capacity of a bootlegger.

3. The orders of detention have been challenged as usual on very many counts adumbrated in the memo of the petition. Any how, as we propose to decide the petition only on one, we would prefer to concentrate upon the same contention. The learned Counsel for the petitioner urges that the subjective satisfaction recorded by the detaining authority that, as the detenu has been released on bail by the competent Court on usual terms and conditions and as the detenu has not committed any breach of any conditions of the bail orders, the procedure as prescribed u/s 437 of the Code of Criminal Procedure, 1973 could not be adopted is bereft of any significant legal assistance. This contention, according to us, is, well founded.

4. When the reference is made to the provisions contained u/s 437, Sub-section (5) of the Code of Criminal Procedure, 1973, it is clear that, the provision for the cancellation of bail can be resorted to in many more eventualities. The verbalism used in Sub-section (5) of Section 437 of the Code is of wide import and the Court which has released a person on bail has been empowered to direct that, such person be arrested and committed to the custody if the Court considers it necessary so to do. The consideration is of the Court and is in respect of the necessity of directing the arrest and the committal to the custody. The Court may upon such consideration ask or direct a person already released to be arrested and to be committed to the custody. These provisions are not limited in the sense that, they do not say that the cancellation procedure can be adopted only when there has been a condition in the bail order, and that, such a condition has been violated. In other words, according to us, the powers granted to the Court for the cancellation of the bail u/s 437(5) are far more wide in import and intent.

5. Looking to this interpretation which is the only permissible interpretation of the relevant provisions contained in Section 437(5) of the Code of Criminal Procedure, 1973, we must say that, there has been a clear non-application of mind on the part of the authority passing the order qua the statutory requirement or the existing legal process. Any how the matter does not rest here because, the learned Counsel for the petitioner has been able to demonstrate a further aspect of a glaring non-application of mind on the part of the authority passing the order. Elaborating his contention, the learned Counsel urges that, the subjective satisfaction recorded by the detaining authority is that, the detenu has been released in all the criminal cases shown under Annexure-1 and Annexure-2 under certain terms and conditions, and that, as no term or condition has been

violated, there can be no resort to the provisions contained u/s 437(5) of the Code of Criminal Procedure; but when the conditions of bail orders are perused, it is clear that in none of the bail orders, any condition has been imposed. Naturally, therefore, there could not be any eventuality under which the detenu would be able to commit the breach of the terms and conditions to be imposed by the competent Court while admitting him to bail. Therefore, it appears very clearly to us that, there was a further non-application of mind on the part of the authority passing the orders qua the factual situation also. If there would be the necessary application of mind on the part of the authority passing the order such subjective satisfaction could not have been recorded. We are, therefore, satisfied that, there has not been a non-application of mind qua the legal position but qua the factual aspect of the case also. This, in our view is sufficient to vitiate the orders of detention. It could also have been urged that, if the detenu was found to be indulging in the very same activity, the competent Court could have been approached with the prayer for the cancellation of the bail u/s 437(5) of the Code because as amplified above the powers of the Court for cancellation of the bail are not limited to those cases only in which the conditions have been imposed and the person released on bail is guilty of violating the terms and conditions of bail. In view of this position, we are inclined to accept the contention coming from the learned Counsel Mr. Sanjanwala for the petitioner.

6. Our attention has been drawn to the unreported Bench Decision of this Court in Special Criminal Application No. 1329 of 1992 decided on July 7, 1993 *Meeraben Gatulal Kahar v. Commi. of Police, Vadodara* by the learned Government Counsel in his effort to urge that, possibly on the very same question a different view has been taken. We have examined the question which was resting before the Bench and the conclusion arrived at in the orders. The fact situation, according to us, in the said case was entirely different. There was a bald assertion in the grounds of detention by way of subjective satisfaction recorded by the detaining authority that in cases under the Bombay Prohibition Act, 1949, the provisions u/s 437(5) could not have been resorted to. As we have pointed out, here, we are concerned with a case in which there has been a non-application of mind not only qua the statutory provisions alone, but qua the factual aspect of the case. Even at the cost of repetition we would make it clear that, though no conditions were imposed in the bail orders, the authority passing the detention orders has preferred to say that, as the conditions have not been violated, the procedure u/s 437(5) cannot be resorted to. Thus, in our view, the said decision on which the reliance has been placed by the learned Government Counsel would not assist him in the instant petition before us.

7. In view of this, we accept the contention being canvassed by the learned Counsel for the petitioner Mr. Sanjanwala. In our view the orders of detention suffer from the patent vice of non-application of mind and on that ground alone the present petition requires to be allowed. We hereby accordingly allow the present petition and quash and set aside the impugned orders of detention.

8. We direct that the detenu shall be released forthwith from the detention, if not required in any other criminal case or proceedings. Rule is made absolute accordingly.