2014 (0) AIJEL-HC 232356

GUJARAT HIGH COURT

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

Mahammad Gufran Versus State Of Gujarat

SPECIAL CIVIL APPLICATION No. 3301 of 2014 ; *J.Date :- SEPTEMBER 17, 2014

- ARMS ACT, 1959 Section - 25(1), 3, 3(4)
- CONSTITUTION OF INDIA Article - 22(5)
- RIGHT TO INFORMATION ACT, 2005 Section - 3

Gujarat Prevention of Anti-Social Activities Act, 1985 - S. 3 - Arms Act, 1959 - S. 3, 3(4), 25(1) - Constitution of India - Art. 22(5) - Right to Information Act, 2005 - S. 3 - preventive detention - petitioner is apprehending his detention pursuant to FIR u/s. 25(1) of the Arms Act - petitioner is one of the two accused, against whom such FIR was registered - petitioner filed present petition at pre-execution stage to avoid his detention - held, provision of the Constitution will prevail over any enactment of the legislature and that Clause 5 of Article 22 of the Constitution specifically provides that grounds for detention are to be served on the detenue after his detention - therefore, the question of allowing the prayers to direct respondent to produce the order of detention with grounds of detention for scrutinization and examination by the Court at pre-execution stage does not arise - since such order cannot be asked to produce in a petition at pre-execution stage, since such order may not be finalized till its actual issuance and execution and, therefore, in absence of specific grounds raised by petitioner, the application at pre-execution stage cannot be entertained - permitting such petition and allowing such prayer would result into anticipatory order to prevent detention, which is not permissible in law - 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 - this court directed Registry to place this matter before Honourable the Chief Justice for referring it to the larger bench - petition disposed of.

Imp.Para: [14] [15] [16] [23]

Cases Referred To :

1. Additional Secretary To The Govt. Of India And Ors. V/s. Alka Subhash Gadia And Anr., 1992 Supp1 SCC 496

2. Alpesh Navinchandra Shah V/s. State Of Maharashtra &ors., AIR 2007 SC 570
3. Chirag @ Vijay Bhikhubhai Chitrabhuj V/s. State Of Gujarat, LPA No. 1195 of 2013
4. Dahyabhai Ratnabhai Sojitra V/s. District Magistrate, Rajkot & Ors., 2006 1 GLH 28 : 2006 (4) GLR 3101 : 2006 (1) GLR 393 : 2006 (1) GCD 305 : 2006 AIR Guj 69
5. Deepak Bajaj V/s. State Of Maharashtra & Anr., AIR 2008 SC 628
6. Dipak Bajaj V/s. State Of Maharashtra, 2008 16 SCC 14 : 2009 (1) GLH 140 : 2009 (1) GCD 254 : 2008 (14) Scale 62 : JT 2008 (11) 609
7. Dropti Devi & Anr. V/s. Union Of India & Ors., AIR 2012 SC 2550
8. Hare Ram Pandey V/s. State Of Bihar & Ors., 2004 3 SCC 289
9. Hare Ram Pandey V/s. State Of Bihar & Ors., AIR 2004 SC 738
10. K.K.Kochunni V/s. State Of Madras, AIR 1959 SC 725
11. Khudiram Das V/s. State Of W.B., AIR 1975 SC 550
12. Manchharam Samaram Meena V/s. State Of Gujarat, 2013 2 GLH 128 : 2013 (3) GLR 1968 : 2012 JX(Guj) 1299 : 2012 AIJEL_HC 228914
13. Naresh Kumar Goyal V/s. Union Of India & Ors., AIR 2005 SC 4421
14. Navalshankar Ishwarlal Dave V/s. State Of Gujarat, AIR 1994 SC 1496
15. Rajindra Arora V/s. Union Of India & Ors., AIR 2006 SC 1719
16. Sayed Taher Bawamiya V/s. Govt. Of India, 2000 8 SCC 630
17. State Of Maharashtra V/s. Bhaurao Punjabrao Gawande, AIR 2008 SC 1705
18. State Of T.N. & Anr. V/s. R.Sasikumar, AIR 2008 SC 2827
19. State Of Tamilnadu V/s. P.K.Shamsudeen, AIR 1992 SC 1937
20. Subhash Popatlal Dave V/s. State Of Maharashtra, Writ Petition(Criminal) No. 137 of 2011
21. Sunil Fulchand Shah V/s. Union Of India, 2000 3 SCC 409 : 2000 (2) GLR 1532 : 2000 (2) GLH 212 : 2000 CrLJ 1444 : 2000 (1) Scale 660
22. Union Of India & Ors. V/s. Atam Prakash & Anr., 2009 1 SCC 585
23. Union Of India V/s. Amrit Lal Manchanda & Anr., 2004 3 SCC 75
24. Union Of India V/s. Amrit Lal Manchanda, AIR 2004 SC 1625
25. Union Of India V/s. Chaya Ghoshal, AIR 2005 SC 428
26. Union Of India V/s. Muneesh Suneja, AIR 2001 SC 854
27. Union Of India V/s. Parasmal Rampuria, 1998 8 SCC 402
28. Union Of India V/s. Vidya Bagaria, 2004 5 SCC 577

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2014 (5) GLR 4154 : 2015 CrLJ 388

JUDGMENT :-

1 Rule. Learned AGP waives service of notice of rule on behalf of respondent-State.

2 Heard learned advocate for the petitioner and learned AGP for the respondent-State.

3 Petitioner is apprehending his detention pursuant to FIR being C.R.No.II-3004/2014 registered with D.C.B. Police Station, Ahmedabad under Sections 25(1) B - A of the Arms Act. Petitioner is one of the two accused, against whom such FIR was registered and he has preferred present petition at pre-execution stage to avoid his detention.

4 If we peruse the FIR, the basic allegation against the petitioner is to the effect that he is involved in a heinous crime and injured some people by deadly weapons. Though at present petitioner is challenging such order stating that it is solitary offence registered against him, in same case it has been disclosed by the respondent that several other cases are registered against such petitioner.

5 The issue is 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 Section 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 Section 3 of the Act provides that 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 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 Section (4) of Section 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.

> 5.1 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. 5.2 Therefore, considering the above factual details and provisions of law, it becomes clear that petitioner can certainly be considered as a dangerous person when he is involved in a heinous crime and injured some people by deadly weapons, which certainly results into disturbance in public life. Therefore when there is a 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.

6 As against that, if we peruse the affidavit-in-reply filed by the Commissioner of Police, Ahmedabad City, Ahmedabad dated 15.03.2014, it makes it clear that detention order bearing No. PCB/DTN/PASA/148/2014 dated 21.02.2014 has been already passed by him against the present petitioner. However, petitioner has not surrendered before the authority.

7 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 predetention petition, has been considered by this Court as well as Honble 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. State of Maharashtra in Writ Petition (Criminal) No.137 of 2011 by the Apex Court. For consideration of such latest judgment and the issue, the following cases were scrutinized:-

1) Additional Secretary to the Govt. of India and Ors. Vs. Alka Subhash Gadia and Anr. reported in 1992 Supp (1) SCC 496;

2) Sunil Fulchand Shah vs. Union of India, (2000) 3 SCC 409;

3) Sayed Taher Bawamiya vs. Govt. of India, (2000) 8 SCC 630;

4) Hare Ram Pandey vs. State of Bihar & Ors. (2004) 3 SCC 289;

5) Union of India vs. Amrit Lal Manchanda & Anr. (2004) 3 SCC 75;

6) Union of India vs. Vidya Bagaria (2004) 5 SCC 577;

7) Union of India & Ors. Vs. Atam Prakash & Anr.(2009)1 SCC 585;

8) Union of India vs. Parasmal Rampuria,(1998)8 SCC 402;

9) Khudiram Das V/s. State of W.B., AIR 1975 SC550;

10) AIR 1992 SC 1937 between State of Tamilnadu Vs. P.K. Shamsudeen;

11) AIR 1994 SC 1496 between Navalshankar Ishwarlal Dave Vs. State of Gujarat;

12) AIR 2001 SC 854 between Union of India Vs. Muneesh Suneja;

13) AIR 2004 SC 1625 between Union of India Vs. Amrit Lal Manchanda; AIR 2004 SC 738 between Hare Ram Pandey Vs. State of Bihar &Ors.;

14) AIR 2005 SUPREME COURT 428 between Union of India v. Chaya Ghoshal;

15) AIR 2005 SC 4421 between Naresh Kumar Goyal Vs. Union of India & Ors.;

16) AIR 2006 SC 1719 between Rajindra Arora Vs. Union of India & Ors.;

17) AIR 2007 SC (Supp) 570 between Alpesh Navinchandra Shah Vs. State of Maharashtra &Ors.;

18) AIR 2008 SC 1705 between State of Maharashtra Vs. Bhaurao Punjabrao Gawande;

19) AIR 2008 SC 628 between Deepak Bajaj Vs. State of Maharashtra & Anr.,;

20) Dropti Devi & Anr. Vs. Union of India & Ors. reported in AIR 2012 SC 2550;

21) 1993(2) GLH (UJ) 27 in Dahyabhai Ratnabhai Sojitra Vs. District Magistrate, Rajkot & Ors. and 2006(1) GLH 28;

8 The common impression and argument at bar that in the judgment under reference, Honble Mr. Justice Altamas Kabir, CJI (as he then was) has held that litigants have absolute right to challenge the proposed order of detention at predetention 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 Govt. of India And Ors. Vs. Alka Subhash Gadia and Anr. reported in 1992 Supp (1) SCC 496, is not correct.

9 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 Daves case(supra) directs to club all such cases for further hearing, in following words, the discussion on Sayeds case in the order dated 10.7.2012 Subhash Popatlal Daves case(supra) is not material and it does not overrule the decision in Sayeds 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.

10 It cannot be ignored that case of Subhash Potatlal Dave(supra) is decided by the Bench of three Honble 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 (which fact can be ascertained from paragraph 11 of judgment Subhash Popatlal Daves case (supra) wherein the entire paragraph-30 of Alka Subhash Gadia 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 Daves case (supra), majority of two Judges have not approved the view expressed by the Honble third Judge and hence and though all Judges are agreed to extend the scope of scrutiny restricted by Alka Gadias case, that case is neither overruled nor reversed.

11 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 detenue 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 Courts 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.

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

13 For the purpose, the order dated 10.7.2012 in the case of Subhash Popatlal Dave i.e. in Writ Petition (Criminal) No.137 of 2011, reported in AIR 2012 SC 3370 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 detenue does not arise prior to arrest of detenue 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 Article 22 which confirms that what is to be communicated to the detenue when he is actually detained i.e. grounds of detention, making it clear that Section-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 detenue after his detention, and provisions of RTI Act cannot be applied to case of preventive detention at the preexecution stage. Therefore, though petitioner/s has/have not prayed for production of detention order or its grounds under the RTI Act, since in some petitions petitioners have 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 predetention 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 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 PASA 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.

14 Even if we consider both the order dated 10.7.2012 [reported in AIR 2012 SC 3370] and judgment dated 16.7.2013, in the case of Subhash Popatlal Dave [Writ Petition (Criminal) 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 preexecution stage is permissible on grounds

other than those mentioned in the Alka Subhash Gadias case. However, in the order dated 10.7.2012 itself, the same Bench has specifically rejected the right of a detenue 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 detenue prior to his arrest and detention irrespective of judgment in Choith Nanikram Harchandai (Writ Petition (Crl) No.88 of 2010 and Suresh Hotwani and Ors. (Writ Petition (Crl) No.35 of 2011). This aspect is material because K.K. Kochunnis case [K.K. Kochunni v. State of Madras [(1959) Supp (2) SCR 316]: (AIR 1959 SC 725)] 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 Article 22 of the Constitution specifically provides that grounds for detention are to be served on the detenue after his detention.

15 Therefore, the question of allowing the prayers to direct the respondent to produce the order of detention with grounds of detention for scrutinization and examination by the Court at preexecution 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.

16 Therefore, even if we entertain the petition at preexecution 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 scrutinization of the order of detention, but as discussed herein above, since such order cannot be asked to produce in a petition of present nature i.e. at preexecution stage, since such order may not be finalized 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 preexecution 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 Gadias case, 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.

17 In AIR 2005 SUPREME COURT 428 between Union of India v. Chaya Ghoshal, 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 AIR 2008 SC 2827 in the case of State of T.N. & Anr. Vs. R.Sasikumar.

18 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 FIR/s and investigation

19 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 LPA No. 1195 of 2013 between Chirag @ Vijay Bhikhubhai Chitrabhuj vs. State of Gujarat, if we perused the judgment of LPA No. 1195 of 2013 all some other judgments with judgment in case of Manchharam Samaram Meena vs. State of Gujarat reported in 2013 (2) GLH 128 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."

20 Considering the trend of filing of several such pre - detention petition, wherein immediately at lodging of FIR, 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 FIR. 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 and application for anticipatory bail.

21 It also cannot be ignored that in many cases, order of detention are generally quashed and set aside on technical grounds like nonsupply 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 arguments and statement that now second offence is to be treated as a solitary offence and, therefore, he should not be detained.

22 Similarly, since there is no definition of word "habitual" or "public order", I am of the view that he is involved in a heinous crime and injured some people by deadly weapons, which certainly results into disturbance in public life. 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 Honourable Supreme Court, relying upon the solitary

judgment on the issue like the judgment in Dipak Bajaj vs. State of Maharashtra reported in 2008 (16) SCC 14.

23 In view of above facts and circumstances, Registry is directed to place this matter before Honourable 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.

24 The interim relief granted by order dated 13.3.2014 is extended for four weeks from today.