

Ahmedhussain Shaikhussain @ Ahmed Kalio

Vs

Commissioner of Police, Ahmedabad and Another

Writ Petition (Criminal) No. 54 of 1989

(G. L. Oza, Ranganath Misra JJ)

19.09.1989

JUDGMENT

RANGANATH MISRA, J. –

1. The Commissioner of Police, Ahmedabad by his order dated December 26, 1988, directed the detention of the petitioner under Section 3(2) of the Gujarat Prevention of Anti-Social Activities Act, 1985 (hereinafter referred to as 'the Act'). The petitioner was taken into custody under the order on that very day.

2. The material portion of the order of detention stated :

"WHEREAS, I, S. N. Sinha, Commissioner of Police, Ahmedabad City, am empowered in this behalf by the Government of Gujarat by its order, Home Department No. G.G./155/SB-IV/PASA/1085/1191 dated May 28, 1985 under sub-section (2) of Section 3 of the Gujarat Prevention of Anti-Social Activities Act, 1985.

AND WHEREAS, I am satisfied with respect to person known as Shri Ahmedhussain @ Kalio Shaikhussain Shaikh resident of Dariyapur, Bukhari Mahallo, Ahmedabad City, that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order in the area of Ahmedabad City, it is necessary to make an order directing that the said Shri Ahmedhussain @ Shaikhussain Shaikh be detained.

NOW, THEREAFTER, in exercise of the powers conferred by sub-section (1) of Section 3 of the Gujarat Prevention of Anti-Social Activities Act, 1985, I, S. N. Sinha, Commissioner of Police, Ahmedabad City, hereby direct that the said Shri Ahmedhussain @ Kalio Shaikhussain Shaikh be detained."

3. The grounds communicated to the petitioner under Section 9(1) of the Act alleged that the petitioner was conducting anti-social activities of illegally storing indigenous and foreign liquor in his possession and was selling it by himself and through his men in the area of Dariyapur and three prosecutions had been launched against him under the Bombay Prohibition Act of 1949. From the particulars it appeared that one case was pending in court while the other two were under investigation. The detaining authority thereafter stated :

"Thus on careful study of the abovesaid complaints and entire papers with the

proposal, it is found that you are a prohibition 'bootlegger' and are conducting anti-social activities of selling indigenous and foreign liquor illegally. You and your companions beat the innocent citizen as of the abovestated area in public and create an atmosphere of fear and terror for continuing your criminal anti-social activities. Moreover, you and your companions are creating atmosphere of fear by beating the innocent citizens, threaten them to kill while passing through that area by showing dangerous weapons suspecting them to be the informants of the police. The customers of your adda in drunken condition play mischief, and beat the persons in open; people residing there have fear and terror is spread in the said area. Moreover, you beat those who oppose your bringing the quantity of wine and you threaten to kill and you create an atmosphere of fear and terror. Because of such activities, the citizens residing in the abovestated area have fear of damage to their property and the safety for themselves. Thus you become an obstructionist in the maintenance of public order.

The citizen residing or doing their trade in the said area have stated the facts corroborating your abovestated criminal anti-social activities as a result of which you become obstructionist in the maintenance of public order. Such incidents have been stated in detail. The copies of the statements thereof are given to you herewith."

Reference was made to a previous order of detention of July 12, 1987, which was set aside by the High Court on December 3, 1987 and to the fact that notwithstanding the previous detention, the petitioner continued to carry on his criminal and anti-social activities affecting maintenance of public stated :

In the grounds it was further stated :

"I had also considered to prevent your anti-social activities of selling wine by taking action under Section 93 of the Prohibition Act. But according to the provision of Section 93, of the only surety for good conduct can be taken. I am fully satisfied that even if you give the surety for good conduct, you will not obey the same. Looking to your activities until now, I feel that you will not obey the same. So I do not think it possible to prevent your such anti-social activities immediately by taking action against you under Section 93 of the Prohibition Act.

I had considered to take action against you under Section 57(c) of the Bombay Police Act for externment. But under the provision of Section 57(c), three conviction within a period of three years under the Prohibition Act are necessary. In your case, of the cases which are registered against you under the Prohibition Act, one in pending in the court and two cases are pending for police investigation. In your case there is no such conviction; so it is not possible under the law to take action against you under Section 57(c) for externment.

I had also considered to take proceeding against you under Section 56-B of the Bombay Police Act for externment : but if the proceedings under Section 56-B of the Bombay Police Act are taken against you, first of all show cause notice is required to be given to you under Section 59(1) of the Bombay Police Act. Then such order can be passed only after giving you full opportunity to defend by examining your defence witnesses. Even if such order is passed against you, you can go in appeal against the

externment under Section 60 of the said Act and the possibility of granting stay to you cannot be avoid. So a long time is taken in the proceedings of externment under Section 56-B and during this period you may continue your anti-social activities and there are all chances that you become obstructionist in the maintenance of public order; so it is not possible to prevent your anti-social activities immediately by taking action under Section 56-B and I do not think proper to take action against you under Section 56-B.

You and your companions of Dariyapur-Kalupur are keeping dangerous weapons and making conspiracy to beat the innocent persons and because of your activities and atmosphere of fear and terror is spread in the said area and people have fear of safety for themselves and damage to their property. Because of your such activities you have become obstructionist to the maintenance of public order and because of your such activities the atmosphere of public order has been disturbed. Thus considering all the above facts, I am fully satisfied that you are a prohibition bootlegger and you are conducting anti-social activities of selling indigenous and foreign liquor and you are creating an atmosphere of fear and terror by beating innocent persons in public and threaten them to kill by keeping dangerous weapons in the abovestated area and you are conducting activity of selling the wine in persons or through your persons. Action under the ordinary law has been taken for preventing your such activities. At present you are in jail under the Prohibition Act.... There is every possibility that your will be bailed out by giving surety by the court because this offence is bailable. It is quite possible that you may continue your criminal anti-social activities after release on bail from court.... As it has become necessary to prevent your anti-social activities to prevent the same as there is no other alternative and as the last alternate I pass the order to take you in detention under the said Act."

4. A list of documents relied upon by the detaining authority was appended to the grounds and the said list is Annexure D to the petition.

5. The detaining authority has filed his affidavit in support of the order of detention. In Paragraph 7 of such affidavits the deponent has stated :

"With reference to paragraph 7 of the petition. I submit that the averments made therein are absolutely wrong in view of the fact that the petitioner has not been wrongly involved by me under the PASA Act. It is only on perusal of the relevant record which has been supplied to the petitioner and after considering the prognosis about the futuristic activities of the petitioner. I was subjectively satisfied that it is necessary to detain the petitioner preventively under the provisions of the PASA Act with a view to preventing him from indulging in like activities and, therefore, the impugned order was passed by me."

In paragraph 8(c) of the counter-affidavit the detaining authority has further stated :

"I further submit that so far as the petitioner's detention in the year 1987 is concerned, it is true that the Hon'ble Gujarat High Court had directed the authorities to release the petitioner and the said fact had already been clearly mentioned in the grounds of detention. I further submit that since the Hon'ble Gujarat High Court has passed the order, the order being judicial one, I have nothing to comment on it.

However, I submit that there is no nexus between the order of the Hon'ble High Court in that petition and the facts of the present case and, therefore, the judicial pronouncement by the Hon'ble Gujarat High Court has no application whatsoever to the facts of the present case. Since the present order is passed on totally fresh grounds which are sufficient enough to give subjective satisfaction to me for the purpose of passing the order of detention... I further submit that the fact that the petitioner was earlier detained and the fact that the order of detention was quashed by the Hon'ble Gujarat High Court was considered by me and that has also been mentioned in the grounds of detention...."

6. The Bombay Prohibition Act of 1949 is in force in the State of Gujarat and prohibition is in force in this State.

7. We have extracted a substantial portion of the grounds of detention communicated to the petitioner to show how helpless the authorities feel in the matter of enforcing prohibition within the State. Obviously neither the Prohibition Act nor the other statutes referred to by the detaining authority could be called in aid to meet the requirements of the situation. On his own showing, afraid of the petitioner being released on bail and resorting to anti-social activities, and with a view to ensuring his detention in jail the impugned order has been made.

8. The satisfaction of the detaining authority is not open to judicial review but as has been pointed out by several Constitution Bench decisions of this Court a citizen is entitled to protection within the meaning of Articles 22(5) of the Constitution of the procedural guarantees envisaged by law. The court frowns upon any deviation or infraction of the procedural requirements. That in fact is the only guarantee to the citizen against the State's action of preventive detention.

9. The fact that the detenu was in jail at the time the order of detention was made and the possibility of his release from jail being made a ground of detention was not approved of by this Court in *Ramesh Yadav v. District Magistrate, Etah* ((1985) 4 SCC 232 : 1985 SCC (Cri) 514) and *Binod Singh v. District Magistrate, Dhanbad, Bihar* ((1986) 4 SCC 416 : 1986 SCC (Cri) 490). In *Smt. Shashi Aggarwal v. State of U.P.* ((1988) 1 SCC 436 : 1988 SCC (Cri) 178 : AIR 1988 SC 596) this Court pointed out : (SCC pp. 439-440, para 10)

"Every citizen in this country has the right to have recourse to law. He has the right to move the court for bail when he is arrested under the ordinary law of the land. If the State thinks that he does not deserve bail the State could oppose the grant of bail. He cannot, however, be interdicted from moving the court for bail by clamping an order of detention. The possibility of the court granting bail may not be sufficient. Nor a bald statement that the persons would repeat his criminal activities would be enough. There must also be credible information or cogent reasons apparent on the record that the detenu, if enlarged on bail, would act prejudicially to the interest of public order."

10. We may now refer to two decisions of this Court under the present Act. In the case of *Abdul Razak Abdul Wahab Sheikh v. S. N. Sinha, Commissioner of Police, Ahmedabad* ((1989) 2 SCC 222 : 1989 SCC (Cri) 326) it has been held that the detaining authority must disclose in a case where the detenu is already in jail that there is cogent and relevant material constituting fresh facts to necessitate making of an order of detention. In that case, as here, the detenu was in jail in connection with a criminal case and the order of detention was served on him in jail. The detenu's

mere complicity in earlier incidents was not considered adequate and the detention under the Act was set aside. In the case of *Ramesh v. State of Gujarat* ((1989) 4 SCC 124 : (1989) SCC (Cri) 716 : JT (1989) 3 SC 279) an order of detention under the Act was under challenge. The Court found that referring to incident which constituted the subject matter of an earlier order of detention vitiated the impugned order.

11. Apart from these, in the instant case, the material disclosed is quite vague with reference to the persons affected or victimised as also the time and place of such victimisation. This Court has on several occasions indicated that there is a wide gap between law and order and public order. The criminal offence may relate to the field of law and order but such an offence would not necessarily give rise to a situation of public order. Depending upon peculiar situations an act which may otherwise have been overlooked as innocuous might constitute a problem of public order. Selling of liquor by the petitioner would certainly amount to an offence under the Prohibition Act but without something more would not give rise to a problem of public order. Similarly commissioner of any other criminal offence - even assault or threat of assault - would not bring the matter within the ambit of public order.

12. Disclosure of adequate facts to enable a full and adequate representation to the Preventive Detention Board is one of the positive guarantees within the scope of Article 22(5) of the Constitution. In *A. K. Roy* case a Constitution Bench of this Court indicated that fullest disclosure of material should be made to enable the representations to be effective. In the present case the grounds which we have extracted show that the allegations are more or less vague and have the effect of making it difficult for the petitioner to make an adequate representation.

13. Four witnesses had deposed against the petitioner. Their statements were supplied to the petitioner without disclosing their names. It is the stand of the respondents that if the names were disclosed the witness were likely to be bodily injured or even eliminated. There may be certain situations where the disclosure has to be withheld but in view of the infirmities already indicated it is not necessary for us to examine whether in the facts of the present case such withholding would not by itself vitiate the order of detention.

14. We are satisfied that the impugned order cannot be sustained. Accordingly, we quash the order and direct that the petitioner be set at liberty forthwith.

15. It is perhaps necessary to indicate that the provisions of the Prohibition Act of 1949 or the Bombay Police Act should be suitably amended to meet the requirements of society. Even if the provisions under those Acts are made stringent the persons proceeded against has the benefit of a trial or a regular hearing and pursuing an appeal against adverse orders, but in a case of preventive detention trial is avoided and liberty of a citizen is taken away without providing a right to defend himself. The grounds provided by the detaining authority have clearly exhibited a sense of helplessness to meet the requirements of the situation; that, however, is a matter for the legislature and the administration to consider but the Court has to zealously guard encroachments on the liberty of the citizen.

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