IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 381 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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VIRJI @ JITULAL S/O VASUDEV BAROT

Versus

STATE OF GUJARAT

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Appearance:

MS BANNA DATTA AS AMICUS CURIAE for Petitioner (THROUGH JAIL)

MR KAMAL MEHTA ADDL.GOVERNMENT PLEADER for Respondents

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CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 30/04/98

ORAL JUDGEMENT

By this application under Sec. 226 of the Constitution of India, the petitioner challenges the legality and validity of the order of detention dt.7/10/1997 passed by the Police Commissioner for the city of Ahmedabad, invoking his powers under Sec. 3(2) of the Gujarat Prevention of Anti-Social Activities Act

(for short the "Act"), pursuant to which the petitioner is arrested and at present kept under detention.

2. The Police Commissioner had the information that the petitioner was by his nefarious and subversive activities terrorising the people. He was also committing several offences and was disturbing the public order by affray. When he inquired from different Police Stations, he knew that about five complaints with Satellite Police Station were lodged against the petitioner. All the complaints were of the offences of theft. From those complaints on record, the Police Commissioner found that the petitioner was committing the theft of scooter, Car-tape and alike articles of other vehicles. As many thefts were being committed in the area, the people of surrounding area were scared and because of his subversive activities, he was endangering the safety of the people. The Commissioner of Police, having come to know about such complaints, made detailed inquiry and after inquisition, he could note that the petitioner was a head-strong person i.e. a tartar & decimator and by different criminal activities, he was terrorising the people. He was extorting money, causing injuries and/or causing damage to the properties. By diabolism, he used to cause the people to bend his way. His hellish and infernal activities disturbing public order and spreading pandemonium were going berserk. No one was, therefore, ready to come forward and state against him. After a great persuation and when assurance was given that the facts about them disclosing their identity would be kept secret, some of the witnesses have under great tension stated against the petitioner. After a deep inquiry, the Police Commissioner found that to curb the anti-social, subversive and chaotic activities of the petitioner, unspeakable diabolism terrorising the society, and upsetting the public order and leading to anarchy, ordinary law was falling short and was sounding dull. The only way out to hold him in kittle was to detain him under the Act. He, therefore, passed the impugned order. Consequent upon the same, the petitioner came to be arrested and at present, is in custody.

3. Initially when the application was filed, no one was representing for and on behalf of the petitioner but at the time of hearing, learned advocate Ms. Banna Datta promptly showed her willingness to render her services as amicus curiae. She carefully studied the case and made necessary submissions. As per her contention, the order is bad, as the privilege under Sec.9(2) of the Act unjustly exercised. The authority passing the detention order is vested with the powers to exercise the

privilege, but the same has to be exercised judiciously and not arbitrarily or capriciously. Reading the order, it appears that without any application of mind, the Commissioner of Police exercised the powers and that too mechanically relying upon the report made by his subordinate. The subjective satisfaction is therefore vitiated rendering the order of detention illegal. She has not raised any other point to assail the order in question.

4. In reply to such contention, Mr.Kamal Mehta, the learned APP has vehemently refuted the allegations made, submitting that considering all the materials placed before the Police Commissioner, in the public interest, the authority has exercised the privilege, because it was made clear to the Police Commissioner that the petitioner, having retaliating tendency, might assault the witnesses and endanger their safety. When the privilege is exercised in true and proper perspective, the order cannot be held bad. In short, he submitted that the privilege was exercised on just ground. When both have confined to the only point of exercise of privilege, I will not dwell upon other points.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view

to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference of a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the authority passing the detention order has to satisfy the court that it was absolutely necessary to exercise the privilege and withhold the particulars. To satisfy the court accordingly, the authority has to file his explanatory affidavit. If the affidavit is not filed, the court is entitled to infer against the detaining authority. It is pertinent to note that in this case, the affidavit explaining the circumstances which led the authority to

exercise the privilege, is not filed. It can, therefore, be assumed that without any just cause, the privilege is exercised and particulars about witnesses are withheld. It also appears reading the order that the task to inquire whether the fear expressed by the witnesses was honest and genuine or sheer inference was assigned to the subordinate. The authority reposing trust in that officer, accepted the report made by him without applying the mind. The subjective satisfaction is, therefore, vitiated. The continued detention is, therefore, illegal. The same is required to be quashed.

7. For the aforesaid reasons, this petition is allowed. The order of detention dt. 7th October, 1997 passed by the Police Commissioner, for the city of Ahmedabad, is hereby quashed and set aside and the petitioner-detenu is ordered to be set at liberty forth with, if no longer required in any other case. Rule accordingly made absolute.

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