

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 17770 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 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? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

DEVKARAN @ TEMPO LALSINH RATHOD

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 17770 of 2003
MR HR PRAJAPATI for Petitioner No. 1
MR MR PRAJAPATI for Petitioner No. 1
Ms Mita Panchal, AGP for Respondents
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CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 07/05/2004

ORAL JUDGEMENT

The petitioner above named has preferred this

petition under Article 226 of the Constitution of India for appropriate writ, order or direction, for quashing and setting aside an order of detention dated 18.9.2003 passed by respondent no.2 herein, in exercise of the powers u/s.3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (for short, "the said Act").

2. It was alleged against the petitioner that two prohibition offences were registered against him before Shahibaug Police Station and Prantij police station at C.R.No.5132 and 208 of 2003 on 22.6.2003 and 21.7.2003 for an offence punishable u/s.66, 65, 81 and 116 of the Bombay Prohibition Act, 1949.

3. It was also alleged against the petitioner that two witnesses had given statements that on 27.7.2003 and on 19.8.2003 the petitioner had quarrelled with the said witnesses and the said witnesses were beaten by the petitioner in public place. Therefore, many persons had gathered together and at that time, the petitioner had threatened them with weapon in his hand. Therefore, an atmosphere of fear was generated and the said persons had run away from the said place. On the strength of the aforesaid registered offence and unregistered cases, the petitioner was found to be bootlegger and with a view to prevent him from carrying on his bootlegging activities leading to a threat to public order, he was ordered to be detained by the impugned order.

4. Feeling aggrieved by the said order of his detention, the petitioner has preferred this petition before this Court. It has been contended here that on a mere fact that two offences were registered, it could not be said that there was a threat to public order. It has also been contended that names of the witnesses were not disclosed to the petitioner, and therefore, there was a violation of the principle of natural justice. That, therefore, the order of detention is illegal and hence, it may be quashed and set aside.

5. On receipt of the petition, Rule was issued and in response to the service of notice of Rule, Ms.Mita Panchal, learned AGP has appeared on behalf of the respondents. She has produced affidavit of the detaining authority which is taken on record. I have heard the learned advocates for the parties and have perused the papers.

6. It is not much in dispute that the petitioner was detained in exercise of the powers u/s.3(2) of the said Act on the ground that the petitioner was a "bootlegger"

and his activities amounted to a threat to public order. The learned advocate for the petitioner has contended that three offences under the Bombay Prohibition Act, 1949, were registered against the petitioner. That simply the aforesaid offences have been registered against the petitioner, the petitioner cannot be branded as a "bootlegger" and that his alleged bootlegging activities raised a threat to public order.

7. In support of the arguments, learned Advocate for the petitioner has relied upon a decision of the Apex Court in the case of Piyush Kantilal Mehta V/s. Commissioner of Police, Ahmedabad City & Anr. reported in AIR 1989 SC 491. It would be worthwhile to refer to the observations made in paras 17 and 18 of the said decision as follows:

Para 17 : "Does the expression 'public order' take in every kind of infraction of order or only some categories thereof? It is manifest that every act of assault or injury to specific persons does not lead to public disorder. When two people quarrel and fight and assault each other inside a house or in a street, it may be said that there is disorder but not public disorder. Such cases are dealt with under the powers vested in the executive authorities under the provisions of ordinary criminal law but the culprits cannot be detained on the ground that they were disturbing public order. The contravention of any law always affects order but before it can be said to affect public order, it must affect the community or the public at large. In this connection we must draw a line of demarcation between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individual and only in a secondary sense public interest. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Preventive Detention Act but a disturbance which will affect public order comes within the scope of the Act."

Para 18 : In the instant case, the detaining authority, in our opinion, has failed to substantiate that the alleged anti-social activities of the petitioner adversely affect or are likely to affect adversely the maintenance of

public order. It is true some incidents of beating by the petitioner had taken place, as alleged by the witnesses. But, such incidents, in our view, do not have any bearing on the maintenance of public order. The petitioner may be punished for the alleged offences committed by him but, surely, the acts constituting the offences cannot be said to have affected the even tempo of the life of the community. It may be that the petitioner is a bootlegger within the meaning of S.2(b) of the Act, but merely because he is a bootlegger he cannot be preventively detained under the provisions of the Act unless, as laid down in sub-section (4) of S.3 of the Act, his activities as a bootlegger affect adversely or are likely to affect adversely the maintenance of public order. We have carefully considered the offences alleged against the petitioner in the order of detention and also the allegations made by the witnesses and, in our opinion, these offences or the allegations cannot be said to have created any feeling of insecurity or panic or terror among the members of the public of the area in question given rise to the question of maintenance of public order. The order of detention cannot, therefore, be upheld."

8. In view of the aforesaid pronouncement of the Hon'ble Supreme Court, it would be difficult to accept that simply because two prohibition offences have been registered, the petitioner could be treated to be a bootlegger and his activities would lead to a threat to public order.

9. In the present case also the detention order has been passed on registration of three prohibition offences and, therefore, applying the above principles on the facts of the case on hand, it is clear that the order of detention cannot be sustained in the eye of law on mere registration of two prohibition offences. Therefore, the detention order is required to be held to be illegal and it is required to be quashed and set aside.

10. So far as the statements of the witnesses are concerned, names have not been disclosed to the petitioner. It has also been contended that when the names of the witnesses were not disclosed, the petitioner could not submit effective representation against the detention and, therefore, his valuable right to make effective representation has been denied. On the other

hand, it has been contended by the learned AGP that privilege under section 9(2) has been exercised by the detaining authority. It is true that under section 9(2), the detaining authority has privilege to withhold names of the witnesses from the notice and knowledge of the detenu. In this connection learned Advocate for the petitioner has relied upon a decision of this Court in Special C.A. No.14792/2003 dated 23.3.2004 wherein in para 13, this Court has observed as under:

"13. In the present case, the names of the witnesses have not been supplied and on the other hand, it is found that the detaining authority had adequate materials with it for exercising powers of privilege under section 9(2) of the said At. In the premises, the order of detention cannot be sustained in the eyes of law. So, on the one hand, the alleged bootlegging activities of the petitioner are not found to be a threat to public order or public health and on the other hand, the power of privilege under section 9(2) of the said act, cannot be said to have been claimed by proper exercise of power thereunder. In absence of the above position, the order of detention cannot be sustained in the eye of law."

11. This shows that the impugned order cannot be sustained on the strength of the prohibition offences registered against the petitioner. With respect to the statements of the witnesses who had rendered statements against the petitioner, the power of privilege under section 9(2) has not been properly exercised. Therefore, when the names of the witnesses were not disclosed, the petitioner could not submit effective representation and, therefore, it can be said that there is implied denial to the right of the petitioner to submit effective representation under Article 22 (5) of the Constitution of India. Therefore, further continuance of the detention of the petitioner cannot be justified. The petitioner is, therefore, required to be released from detention. This can be done by allowing the petition and by quashing the detention order.

12. For the foregoing reasons, this petition is allowed. The impugned order dated 18.9.2003 passed by respondent No.2 is ordered to be quashed and set aside. The detenu is ordered to be set at liberty forthwith, if no longer required in any other case. Rule is made absolute to the aforesaid extent. No order as to costs. D.S. permitted.

[D P Buch, J.]

msp