

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 9752 of 2013****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE S.G.SHAH**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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RAJUBHAI GANESHBHAI RABARI....Petitioner(s)

Versus

STATE OF GUJARAT & 2....Respondent(s)

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Appearance:

MR MITESH R AMIN, ADVOCATE for the Petitioner(s) No. 1

MS MOXA THAKKAR, ASST. GOVERNMENT PLEADER for the Respondent(s) No. 1

RULE SERVED BY DS for the Respondent(s) No. 1 - 3

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CORAM: HONOURABLE MR.JUSTICE S.G.SHAH

Date : 30/08/2013

ORAL JUDGMENT

1. Heard learned advocate Mr. Mitesh R. Amin for the petitioner and learned AGP Ms.Moxa Thakkar for the respondent on merits.
2. The petitioner has filed this petition praying to quash the proposed order of detention taking all the grounds on merits of such order of detention even in absence of grounds of detention. The sum and substance of the petition is to the effect that petitioner apprehends his detention because of some pending criminal cases against him for which FIR/s is/are filed against him or he apprehends detention because of similar order against co-accused with with him in FIR/s which are pending investigation. Therefore, petitioner has taken several grounds in petition challenging the subjective satisfaction of the detaining authority and arguing that for such reason i.e. only because of pendency of some FIR, the detaining authority cannot pass order of detention. Thereby, practically, this petition is filed under apprehension and even without knowing the real reason, cause and grounds for detention. In support of his case, petitioner has relied upon several decisions of this Court as well as Apex Court where order of detention were quashed and set-aside. However, all such decisions are after considering the actual order of detention and in some cases it was quashed mainly because

of technicality and in some cases in absence of proper evidence, Court has come to the conclusion that there was no subjective satisfaction or that there was no application of mind by the competent authority to arrive at such subjective satisfaction. However, in the present case, in absence of actual order of detention, there cannot be scrutiny and determination about the validity, legality and thereby consideration of subjective satisfaction by the competent authority.

3. Such issue i.e. right of the persons to challenge the proposed order of detention and jurisdiction of the Court to grant appropriate relief in such type of petitions, which are more particularly described as predetention petitions, has been considered by this Court as well as Hon'ble 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. State of W.B.*, AIR 1975 SC
550;
- 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;

4. The common impression and argument at bar that in the judgment under reference, Hon'ble Mr. Justice Altamas Kabir, CJI (as he then was) has held that litigants have absolute right to challenge the proposed order of detention at pre-detention 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.
5. 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 where in 16 years had

lapsed and when in operative portion of order dated 10.7.2012 in Subhash Popatlal Dave's case (supra) directs to club all such cases for further hearing, in following words, the discussion on Sayed's case in the order dated 10.7.2012 Subhash Popatlal Dave's case (supra) is not material and it does not overruled the decision in Sayed's 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."

6. It cannot be ignored that case of Subhash Potatlal Dave (supra) is decided by the Bench of three Hon'ble Judges of the Supreme Court. When judgment of Alka Subhash Gadia 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 Dave's 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 Dave's case (supra), majority - two Judges have not approved the view express by the Hon'ble third Judge and hence and though all Judges are agreed to extend the scope of scrutiny restricted by Alka Gadia's case, that case is neither overruled nor reversed.

7. 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 petitions can be entertained to quash the proposed order of detention without it being served upon the detenu 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) Petitioners are 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 they have evaded the execution of detention order on any ground like abscondment or protection by the Court's 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.

8. 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.
9. 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 detenu does not arise prior to arrest of detenu 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 detenu 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 detenu after his detention, and provisions of RTI Act cannot be applied to case of preventive detention at the pre-execution stage. Therefore, though petitioners have not prayed for production of detention order or its grounds under the RTI Act, since in some petitions petitioner's 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 pre-detention 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 be 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.

10. 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 pre-execution stage is permissible on grounds other than those mentioned in the Alka Subhash Gadia's case. However, in the order dated 10.7.2012 itself, the same Bench has specifically rejected the right of a detenu 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 detenu 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

(Cr1) No.35 of 2011). This aspect is material because K.K. Kochunni's 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 detenu after his detention.

11. 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 pre-execution 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.
12. Therefore, even if we entertain the petition at pre-execution 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

scrutinizing 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 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 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 pre-execution 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 Gadia's 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 in to anticipatory order to prevent detention, which is not permissible in law, in as much 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.

13. 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 lose 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.

14. 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, since at present we are not certain that order of detention, if any is under consideration, is based upon such facts only. Therefore, I do not think it proper to discuss all such points.
15. The residual plea about the desirability to continue the proposed order of detention of petitioner and whether there is any live link between the alleged act/s which formed the foundation for detention is a matter for the Detaining Authority to decide. Let a decision in this regard be taken by the Detaining Authority considering the settled legal position that emerges from several decisions on the subject which includes observations by the Apex Court in the cases of *Golam Hussain vs. Commissioner of Police, Calcutta* reported in (1974) 4 SCC 530 *Anil Dey vs. State of West Bengal* reported in AIR (1974)4 SCC 514.
16. Learned AGP submits that since the matter has been heard on merits and decided in Open Court and dismissed on the point of jurisdiction, this Court shall not extend the interim order. However, considering the fact that interim order is in force since 20.6.2013 more particularly,

because of the fact that one case was under consideration before the Apex Court on the same issue namely; **Subhash Popatlal Dave v. Union of India**, in Criminal (Writ) Petition No.137 of 2011. It is also clear that even in such case of Subhash Popatlal Dave (Supra) there are different views and therefore to enable the petitioner to challenge the present order, it would be appropriate to continue the interim order which would be in force for last couple of months.

17. For the foregoing reasons, the petition is dismissed. However, considering the appreciation of the detaining authority that the petitioner may misuse his liberty granted by the Court, which otherwise cannot be granted. In view of the case of **Additional Secretary to the Government of India v. Alka Subhas Gadia** reported in 1992 Supp (1) SCC 496, it would be appropriate to put strict conditions upon the petitioner. Thereby, interim order which is in force since 20.6.2013 is extended for further period for 15 days from today with the condition that petitioner shall mark his presence before the Nandasan police station on every third day without fail and petitioner shall disclose his whereabouts and perfect address to the said police station within two days. If petitioner fails to comply with any of such conditions, such extension shall stand cancelled automatically without referring to any authority. **Direct Service** is permitted. Rule

discharged.

(S.G.SHAH, J.)

VATSAL