IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 11243 of 2012

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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JIGARBHAI BABABHAI RAVAT....Petitioner(s)

Versus

STATE OF GUJARAT THRO PUBLIC PROSECUTOR & 2....Respondent(s)

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Appearance:

MR BH SOLANKI, ADVOCATE for the Petitioner(s) No. 1

MS JIRGA JHAVERI, AGP for the Respondent(s) No. 1-3

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CORAM: **HONOURABLE MR.JUSTICE S.G.SHAH**

Date : 25/10/2013

CAV JUDGEMNT

Heard learned advocate Mr. BH Solanki for the petitioner and learned AGP Ms. Jirga

Jhaveri for for respondent No.1-State 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 petitioner is to the effect that petitioner apprehends his detention because of pending criminal case against him for which FIR/s is/are filed against him or he apprehends detention because of similar order against co-accused 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 FIR/s, 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 orders 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 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 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. Union of India reported in AIR 2012 SC 3370 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 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 (2004) 3 SCC 75;
6) Union of India vs. Vidya Bagaria (2004) 5 SCC 577;
7) Union of India & Ors. Vs. Atam Prakash (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 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
14) AIR 2005 S C 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
17) AIR 2007 SC (Supp) 570 between Alpesh Navinchandra Shah Vs. State of Maharashtra
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
20) Dropti Devi Vs. Union of India, reported in AIR 2012 SC 2550;
21) 1993(2) GLH (UJ) 27 in Dahyabhai Ratnabhai Sojitra Vs. District Magistrate, Rajkot 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 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.

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 wherein 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 overrule 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(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 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 of two Judges have not approved the view expressed 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 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 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 [supra] 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 petitioner’s has 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.

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 [in Writ Petition [Crl] No. 137/2011], 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 Gadia’s 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. 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 detenue 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 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.

12 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 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 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.

13 In the case reported in AIR 2005 SC 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."

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 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 and Anil Dey Vs. State of West Bengal reported in (1974)4 SCC 514.

16 It has been argued that respondents have filed an affidavit-in-reply wherein also, it is contended that order of detention is pending and it could not be served either because of this pending petition where stay is granted in favour of the petitioner or petitioner has been absconded from the date of order of detention till interim relief is granted in present petition. It is sufficient to note here that legal position would not change because of such fact inasmuch as, now, legal position is clear which is to the effect that order of detention cannot be called for scrutiny by the Court prior to its execution and in absence of service and execution of order of detention, the same cannot be quashed and set aside, since petitioner has right to represent against such actual order of detention only after its service and execution. However, at the same time, it would be appropriate to observe and thereby direct the respondents that if the order of detention is solely based upon the allegations which are found in pending FIR/s against the present petitioner, for which petitioner has shown cogent reason for

quashing and setting aside such order, the detaining authority shall not serve and execute the detention order based solely upon such allegations. Thereby, the detaining authority, may, if they so desire, reexamine the order of detention and shall take necessary steps to see that if at all there is need of detention of the petitioner, there must be cogent reasons considering different judicial pronouncements against such detention order and considering the detention order of co-accused which are quashed and set aside by the Competent Court. Thereby, if any detention order is served without application of mind, then, competent officer may invite claim for damages and action for misuse of their power. Thereby, the petition is to be dismissed with certain observation and directions.

17 Learned advocate Mr. Solanki for the petitioner has argued that considering the allegations in the FIR, which is lodged against him, he could not be termed as a habitual offender or dangerous person and, therefore, based upon the allegation in such solitary incident only, he cannot be detained in view of settled legal position. It is also submitted that while passing the interim order, the Court has called for the proposed order of detention and after satisfying from such order only, the Court

has granted interim relief at relevant time.

18 Mr. Solanki, learned advocate for the petitioner has argued that while passing the order of detention if the Competent Authority does not disclose relevant information and relies upon the solitary FIR, it would not be appropriate to ask the petitioner first to surrender and then remain in detention for couple of months, when ultimately, the order is detention is going to be quashed and set aside. For such submission, he has relied upon the judgment of Division Bench of this Court in case of Ramzan Hanifbhai Qureshi(Gandhi) vs. State of Gujarat, reported in I(2013)CCR 40A(DB)(CN) as well judgment in Letters Patent Appeal No.604 of 2012 in case of Yusuf Hanifbhai Qureshi(Gandhi) vs. State of Gujarat, decided on 26.03.2012, submitting that the Division Bench of this Court has also considered the issue and relying upon the case of Deepak Bajaj(supra), the Division Bench has allowed the Special Civil Application which was dismissed by the Single Judge and thereby, the order of detention was set aside at pre-execution stage. However, as already explained in detail in Special Civil Application No.8955 of 2012 decided on 16.08.2013, since the decision of Deepak Bajaj (supra) by Bench of two Judges considering with the judgment in Alka

Subhash Gadia and Bhaurao Punjabrao Gawande(supra), by Bench of three Judges, the decision in Deepak Bajaj(supra) cannot be said as a binding precedent. So far as order of detention if any in existence relying upon the FIR under reference is concerned, necessary direction and precaution that the Competent Authority shall not execute the order without considering appropriate subjective satisfaction in accordance with law as pointed out in Special Civil Application No.8955 of 2013 decided on 16.08.2013 would be necessary. However, in absence of confirmation of the proposed order of detention without subjective satisfaction and more particularly, such confirmation cannot be arrived at before actual execution of the order of detention, considering the fact that it may be revised or modified before execution, practically, the order of preventive detention cannot be quashed and set aside at preexecution stage.

19 In view of such factual details, it would be appropriate for the respondent not to pass order of detention based upon such FIR only and if detention order pending for execution is based solely upon such FIR, the same shall not be executed.

20 Whereas, prayer in this petition to

issue a writ of mandamus or any other appropriate writ, order or direction to quash and set aside the order of detention passed by the respondent No.2 under PASA Act at pre-execution stage, cannot be allowed with blanket direction that respondent shall not pass and execute any order under PASA Act against the present petitioner. Thereby, the detaining authority is free to pass appropriate order of detention based upon appropriate subjective satisfaction.

21 However, considering the fact that interim order is in force since 10.01.2013, 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.

22 For the foregoing reasons, the petition is dismissed. However, considering the apprehension 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 10.01.2013 is extended for further period for 30 [thirty] days from today with the condition that petitioner shall mark his presence before the nearest police station on every third day without fail and petitioner shall disclose his whereabouts and perfect address to the nearest 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.

Rule is discharged. Direct Service is permitted.

(S.G.SHAH, J.)

* Pansala