IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 16372 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE S.H.VORA

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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 or any order made thereunder ?	

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KULDIP ASHOKBHAI PATEL....Petitioner(s)

Versus

STATE OF GUJARAT & 3....Respondent(s)

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Appearance:

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

DS AFF.NOT FILED (N) for the Respondent(s) No. 2 , 4

MS ASMITA PATEL AGP for the Respondent(s) No. 1

NOTICE SERVED BY DS for the Respondent(s) No. 3

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CORAM: HONOURABLE MR.JUSTICE S.H.VORA

Date : 30/10/2015

ORAL JUDGMENT

1. Rule. Learned A.G.P. waives service of Rule for the

respondent – State.

2. With the consent of the learned advocates appearing for the respective parties, the present petition is taken up for final hearing today.

3. By way of this petition under Article 226 of the Constitution of India, the petitioner prays to issue a writ of mandamus or any other appropriate writ, order or direction to quash and set aside at pre-execution stage the order of detention passed by the respondent No.2 under PASA Act as being illegal, invalid, null and void, arbitrary, suffering from non-application of mind, without jurisdiction and competence suffering from malafides and violative of Articles 21, 22 and 226 of the Constitution of India.

4. The petitioner apprehends that the petitioner is likely to be detained under the Act on the pretext of two F.I.R/s. being C.R.Nos.I-50 of 2015 and 29 of 2015 registered with Chawkbazar and Adajan police stations respectively.

5. During the course of hearing, the State was directed to place on record the detention order for Court’s perusal and consequently, the State has placed on record the detention order bearing No.PCB/PASA/DTN/142/2015 dated 31.07.2015 passed by the detaining authority.

6. Learned advocate for the petitioner has submitted that the petition in the present form is maintainable and tenable both on law as well as on facts to substantively challenge the order of detention at pre-execution stage in view of the

decision of the Hon'ble Apex Court in the case of Deepak Bajaj V/s. State of Maharashtra and another reported in (2008)16 SCC 14. According to him, the Hon'ble Apex Court, considering its earlier decision in the case of Additional Secretary to the Government of India and others V/s. Smt. Alka Subhash Gadia and another reported in 1992 Supp.(1) SCC 496 and the objections taken at the pre-execution stage by the other side therein, on the identical ground, has held that "we are of the opinion that the five grounds mentioned therein on which the Court can set-aside the detention order at pre execution stage are only illustrative not exhaustive". Learned advocate for the petitioner also relied upon the decision of the Division Bench of this Court in the case of Mahendrasinh Mangalsinh Jadeja V/s. State of Gujarat and other delivered in Letters Patent Appeal No.1495 of 2013 on 24.12.2013. Lastly, he has submitted that it is an established law that the detention in case of offence registered against detenu under the Act, is against the law. According to him, except aforesaid offence, there is no material to indicate that the alleged activity of the petitioner is affecting or likely to affect adversely to the maintenance of public order and hence, the order of detention is illegal and bad in law.

7. Learned A.G.P. for the State, on the other hand, submitted that this petition is at pre-execution stage without surrendering before challenging the order of detention. Unless and until the petitioner surrenders, he would not be entitled to get the order as well as the grounds thereunder and the petitioner would not be entitled to copies of the same by filing the present petition.

8. Before the petition is taken on merits, it is necessary to keep in mind the law as reiterated by the Division Bench of this Court in the case of Mahendrasinh Mangalsinh Jadeja (supra) in the matter of petitions challenging the detention order at pre-execution stage and, more particularly, para 11 thereof, which reads as under:-

> "11 The learned Single Judge has dismissed the writ petition filed by the appellant without perusing the order of detention and the grounds of detention solely on the premise that as per the prevailing position of law the writ petition to challenge the order at pre-execution stage stage is not maintainable and that the authorities cannot be directed to produce the detention order and the grounds on the record of the petition. It is bounden duty of the Court to call for the order of detention for its own perusal to satisfy itself as to the validity of the detention order. Unless the Court directs the authorities to produce the detention order for its perusal, it would not be possible for the Court to test the detention order and come to the conclusion whether the detention order stands scrutiny of the norms and the guiding principles enunciated in the case of Alka Subhash Gadia (supra) and Subhash Poptalal Dave (supra). In this premise, we are of the opinion that the impugned judgment of the learned Single Judge cannot be sustained. The matter needs to be remanded to the learned Single Judge to decide the petition afresh after calling for the detention order and grounds for detention for its own perusal and to independently decide whether it is a fit case to quash the detention order at a pre-detention stage or not. The appeal, therefore, succeeds to the aforesaid extent. Interim relief granted in the writ petition by the learned Single Judge shall continue till final disposal of the main writ petition by the learned Single Judge. In view of the disposal of main appeal, no order is required to be passed on the Civil Application and the same stands disposed of accordingly. Direct Service is permitted."

9. The order of detention is passed on the basis of what has come to be known as the subjective satisfaction of the detaining authority such subjective satisfaction has to be arrived at on two points. Firstly, on the veracity of facts

imputed to the person to be detained and secondly, on the prognostication of the detaining authority that the person concerned is likely to indulge again in the same kind of notorious activities. Whereas, normal laws are primarily concerned with the act of commission of the offence, the detention laws are concerned with character of the person who has committed or is likely to commit an offence. The detaining authority has, therefore, to be satisfied that the person sought to be detained is of such a type that he will continue to violate the laws of the land if he is not preventively detained. So, the commission of infraction of law, not done in an organized or systematic manner, may not be sufficient for the detaining authority to justifiably come to the conclusion that there is no alternate but to preventively detain the petitioner.

10. No doubt, neither the possibility of launching of a criminal proceedings nor pendency of any criminal proceedings is an absolute bar to an order of preventive detention. But, failure of the detaining authority to consider the possibility of either launching or pendency of criminal proceedings may, in the circumstances of a case, lead to the conclusions that the the detaining authority has not applied its mind to the vital question whether it was necessary to make an order of preventive detention. Since there is an allegation that the order of detention is issued in a mechanical manner without keeping in mind whether it was necessary to make such an order when an ordinary criminal proceedings could well serve the purpose. The detaining authority must satisfy the court that the question too was borne in mind before the order of detention was made. In the case on hand, the detaining authority failed to satisfy the court that the detaining authority

so bore the question in mind and, therefore, the court is justified in drawing the inference that there was non application of mind by detaining authority to the vital question whether it was necessary to preventively detain the detenue. It is also fruitful to refer to the decision of the Hon’ble Apex Court rendered in the case of Rekha V/s. State of Tamil Nadu through Secretary to Government and another reported in (2011)5 SCC 244 wherein, it is observed by the Hon’ble Apex Court that if a person is liable to be tried, or is actually being tried for a criminal offence but the ordinary criminal law will not be able to deal with the situation, then and only then, preventive detention be taken recourse to.

11. In light of the abovementioned decisions of the Hon'ble Apex Court and as discussed by the Division Bench of this Court in the case of Mahendrasinh Mangalsinh Jadeja (supra), now, it is right time to examine whether in the facts of this case, the Court should interfere with the preventive detention order at the pre-execution stage. It is true that this petition is filed at a pre-execution stage. However, from the grounds of detention, produced for Court’s perusal, it appears that the offence/s, as aforesaid, has been registered against the petitioner. This fact has not been controverted by the detaining authority. It also appears that on the basis of the above offence/s, the detaining authority has come to the subjective satisfaction that the activities of the petitioner as "dangerous person" have disturbed the public order. The preventive detention order mentions that the petitioner is a "dangerous person".

12. It appears that the subjective satisfaction arrived at by

the detaining authority cannot be said to be legal, valid and in accordance with law inasmuch as the offences alleged in the FIR/s cannot have any bearing on the public order since the laws of the land are sufficient enough to take care of the situation and that the allegations as have been levelled against the detenue cannot be said to be germane for the purpose of bringing the detenu within the meaning of Section 2(c) of the Act and unless and until the material is there to make out a case that the person concerned has become a threat and a menace to the society so as to disturb the whole tempo of the society and that the whole social apparatus is in peril disturbing public order at the instance of such person. In view of the allegations alleged in the aforesaid F.I.R/s., the Court is of the opinion that the activities of the detenue cannot be said to be dangerous to the maintenance of public order and at the most fall under the maintenance of ”law and order.” In this connection, it will be fruitful to refer to a decision of the Supreme Court in ***Pushker Mukherjee v/s. State of West Bengal*** [AIR 1970 SC 852], where the distinction between 'law and order' and 'public order' has been clearly laid down. The Court observed as follows :

> “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 individuals 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."

13. Therefore, it cannot be said that for the aforesaid offence/s registered against the petitioner, the petitioner could be considered to be a "dangerous person", whose preventive detention is must for maintenance of public order. So, the Court is of the considered opinion that the petitioner is not a "dangerous person" and his act, as alleged in the detention order cannot disturb maintenance of public order and, therefore, the instant case would fall within 3rd and 4th grounds namely it is passed for wrong purpose or it is passed on vague, extraneous and irrelevant grounds mentioned in the case of Alka Gadia (supra) and, therefore, order of preventive detention at pre-execution stage calls for interference of this Court. As the order of detention has been passed by the detaining authority without having adequate grounds for passing the said order, it cannot be sustained and deserves to be quashed and set aside.

14. In the result, the petition is hereby allowed. Impugned order of detention bearing No.PCB/PASA/DTN/142/2015 dated 31.07.2015 passed by the detaining authority passed by the detaining authority against the petitioner is hereby quashed and set aside. Rule is made absolute to the aforesaid extent. Direct service is permitted.

(S.H.VORA, J.)

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