IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 20182 of 2015

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 or any order made thereunder ?	

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DILIP @ LAKHAN MUKESHBHAI BHIL....Petitioner(s)

Versus

COMMISSIONER OF POLICE & 2....Respondent(s)

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Appearance:

MR SANJAY PRAJAPATI, ADVOCATE for the Petitioner(s) No. 1

ADVANCE COPY SERVED TO GP/PP for the Respondent(s) No. 2

MR DHAWAN JAISWAL, AGP for the Respondent(s) No. 3

RULE SERVED BY DS for the Respondent(s) No. 1 - 2

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

Date : 23/12/2015

ORAL JUDGMENT

1. Perused the petition, materials supplied to the detenu, detention order and heard learned counsel for the parties.

2. This petition under Article 226 of the Constitution of India is directed against the order of detention dated 16.11.2015 passed by the respondent authority in exercise of powers conferred under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (for short the Act) by detaining the detenue as a ”bootlegger” as defined under Section 2(b) of the Act.

3. Learned advocate for the detenue submits that order of detention impugned in this petition deserves to be quashed and set aside on the ground that offences registered against the detenu before the concerned police station vide III C.R. Nos.5233/2014 and 5358/2015 for the offences punishable under Sections 66(1)(b), 65(a)(e) etc. of Prohibition Act are not of such magnitude and intensity as to have the effect of disturbing the public order so as to pass an order under Section 3(1) of the PASA Act. Learned advocate for the petitioner has further submitted that the detaining authority has not applied its mind to the vital facts and there was non-application of mind before recording the order of detention.

4. Learned A.G.P. for the respondent-State supported the detention order passed by the authority and submitted that sufficient material and evidence was found during the course of investigation, which was also supplied to the detenue, indicating that the detenue is in the habit of indulging into activities as defined under Section 2(b) of the Act and, considering the facts of the case, the detaining authority has rightly

passed the order of detention and the detention order deserves to be upheld by this Court. For such submission, the learned A.G.P. took me through the grounds upon which detaining authority satisfied to detain the petitioner.

5. Section 2(b) of the Act defines the term "bootlegger" as under:-

> "2(b). "bootlegger" means a person who distills, manufactures, slurcs, transports, imports, exports, sells or distributes any liquor, intoxicating drug or other intoxicant in contravention of any provision of the Bombay Prohibition Act, 1949 (Born. XXV of 1949) and the rules and orders made thereunder, or of any other law for the time being in force or who knowingly expends or applies any money or supplies any animal, vehicle, vessel or other conveyance or any receptacle or any other material whatsoever in furtherance or support of the doing of any of the things described above by or through any other person, or who abets in any other manner the doing of any such thing."

6. 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.

7. Having heard learned counsel for the parties and considering the facts and circumstances of the case, 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 law of the land i.e. Indian Penal Code and other relevant penal laws 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(b) 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 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."

8. It is generally seen that though some of the accused are repeatedly detained on different occasions for different offences, only because of non-disclosure of proper information and in all such detention orders, such orders are generally quashed and set aside by the Court. It is also seen that because of quashing of previous detention order, competent authority could not consider the grounds of detention under such order which is already quashed as a ground for detention for subsequent offences by the same detenue. However, when competent authorities are not abiding all other cited cases while passing the order of detention based upon offences, it is surprising to note that at no point of time they challenged the observation of any Court that when previous order of detention has been quashed, it cannot be considered in subsequent detention. It goes without saying that if a particular detenue continuous to commit the similar offence repeatedly, and if he is required to be detained repeatedly then at-least at some point of time, the competent authority shall compile all the information and shall consider it for fresh detention order as and when necessary and shall produce all such information before the Court so as to avoid the quashing of such detention order. If competent authority fails to take care of such exercise

and when in impugned order of detention all such facts were not disclosed or considered for passing such order, the detention order is required to be dealt with as it is without considering the additional disclosure in affidavit-in-reply by the respondents.

8.1 In the present case, it seems that petitioner has been detained several times but at present, the detention order under challenge does not disclose all such facts so as to enable the petitioner to properly represent his case. Hence, there is no option but to consider that present order of detention is solely based upon offences. Therefore, considering the settled legal position that no person can be detained for offences, the Court has no option but to quash and set aside the order of detention, irrespective of quantity of *LIQUOR* found from the detenue and other material that might have been found in the affidavit-in-reply.

8.2 In view of above facts and circumstances, it would be necessary to observe that the competent authority is not precluded to disclose all material facts while detaining the petitioner if so require for any offence that he might commit hereinafter. In other words, though impugned order is quashed and set aside at present, it would not come in way of the competent authority for quoting such FIRs and order of detention, thereby to treat petitioner as a habitual offender in case of commission of offence repeatedly.

8.3 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 no 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.

9. As a result of hearing and perusal of the record, it appears that the material that was available with the detaining authority was the offences registered against the detenu and on that basis, it cannot be said that the activity of the detenu has become a threat to the maintenance of 'public order' and 'public health'. Mere involvement of the detenu in such activity may not amount to dangerous activity by the detenu and mere mention of them, unless supported by any evidence, cannot be said to be material germane for the purpose of arriving at the subjective satisfaction that the activity of the detenu is prejudicial to the maintenance of 'public order' and 'public health'. For the sake of repetition, the commission of offence does not exhibit or disclose that

the petitioner is doing infraction of law in an organized or systematic manner so as to come to the conclusion that there is no alternate but to preventively detain the petitioner.

10. In the result, this Special Civil Application is allowed. The impugned order of detention dated 16.11.2015 passed by the respondent authority is hereby quashed and set aside. The detenu is ordered to be set at liberty forthwith if not required in any other case. Rule is made absolute accordingly. ***Direct Service*** is permitted.

(S.G.SHAH, J.)

* Vatsal