2023 SCC OnLine Guj 2550

In the High Court of Gujarat at Ahmedabad

(BEFORE A.S. SUPEHIA AND M.R. MENGDEY, JJ.)

Dipakbhai Madhavbhai Baraiya

Versus

State of Gujarat

R/Special Civil Application No. 12592 of 2023

Decided on August 11, 2023

Advocates who appeared in this case:

Bhavin B. Thakar(9371) for the Petitioner(s) No. 1

DS Aff. not Filed (R) for the Respondent(s) No. 2, 3, 4

Mr. Jay Mehta, AGP for the Respondent(s) No. 1

The Judgment of the Court was delivered by

A.S. SUPEHIA, J.:— Draft amendment is allowed in terms of the draft. The same shall be carried out forthwith.

2. Heard learned advocates appearing for the respective parties.

3. The present petition is directed against order of detention dated 11.07.2023 passed by the respondent - detaining 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 petitioner - detenue as defined under section 2(b) of the Act.

4. Learned advocate for the detenue submits that the order of detention impugned in this petition deserves to be quashed and set aside on the ground of registration of the three FIRs for the ofences (i) under Sections 65(A)(E), 81 and 116(b) of the Prohibition Act, (ii) under Sections 65(A)(E), 116(b), 81 and 98(2) of the Prohibition Act, and (iii) under Sections 65(A)(E), 81, 83, 116(b) and 98(2) of the Prohibition Act respectively by itself cannot bring the case of the detenue within the purview of definition under section 2(b) of the Act. Learned advocate for the petitioner further submitted that illegal activity likely to be carried out or alleged to have been carried out, as alleged, cannot have any nexus or bearing with the maintenance of public order and at the most, it can be said to be breach of law and order. Further, except statement of witnesses, registration of above FIR/s, no other relevant and cogent material is on record connecting alleged anti-social activity of the detenu would not fall under the category of breach of public order. Learned advocate further submitted that it is not possible to hold, on the basis of the facts of the present case, that activity of the detenu with respect to the criminal cases had

affected and disturbed the social fabric of society, eventually which would become threat to the very existence of normal and routine life of people at large or that on the basis of registration of criminal cases, the detenu had put the entire social apparatus in disorder, making it difcult for whole system to exist as a system governed by rule of law by disturbing public order.

5. Learned AGP for the respondent State supported the detention order passed by the authority and submitted that sufficient material and evidences were found during the course of investigation, which was also supplied to the detenu indicate that detenu is in habit of indulging into the activity 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 detention order deserves to be upheld by this Court.

6. Having heard learned advocates for the parties and considering the documents and material available on record of the case, *prima facie*, it is found 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 as required under the Act and other relevant penal laws are sufficient enough to take care of the situation and that the allegations levelled against the detenu cannot be said to be germane for the purpose of bringing the detenu within the realm of meaning of section 2 (b) of the Act. Unless and until, the material is there to make out a case that the person has become a threat & menace to the Society so as to disturb the whole tempo of the society and that all social apparatus goes in peril disturbing public order at the instance of such person, in that circumstances, it cannot be said that the detenu is a person which would fall within the meaning of section 2 (b) of the Act. Except general statements, there is no material on record which shows that the detenu is acting in such a manner, which would become dangerous to the public order.

7. At this juncture, we would like to put reliance upon certain case laws of the Honourable Apex Court, wherein the Honourable Apex Court has crystalized the position of law in a very crystal manner.

8. In a recent decision of the Hon'ble Supreme Court in the case of *Shaik Nazeen* v. *State of Telanga* and *Syed Sabeena* v. *State of Telangana* rendered in Criminal Appeal No. 908 of 2022 (@ SLP (Crl.) No. 4260 of 2022 and Criminal Appeal No. 909 of 2022 (@ SLP (Crl.) No. 4283 of 2022 dated 22.06.2022, the Hon'ble Supreme Court has made following observations in para 17 and 18. The excerpts of paragraphs 17 and 18 are as under:—

> *"17. In any case, the State is not without a remedy, as in case the detenu is much a menace to the society as is being alleged, then the*

prosecution should seek for the cancellation of his bail and/or move an appeal to the Higher Court. But defnitely seeking shelter under the preventive detention law is not the proper remedy under the facts and circumstances of the case.

18. In fact, in a recent decision of this Court, the Court had to make an observation regarding the routine and unjustified use of the Preventive Detention Law in the State of Telangana. This has been done in the case of Mallada K. Sri. Ram *v.* The State of Telangana *(2022) 6 Scale 50, it was stated as under:"17.It is also relevant to note, that in the last five years, this Court has quashed over five detention orders under the Telangana Act of 1986 for inter alia incorrectly applying the standard for maintenance of public order and relying on stale materials while passing the orders of detention. At least ten detention orders under the Telangana Act of 1986 have been set aside by the High Court of Telangana in the last one year itself. These numbers evince a callous exercise of the exceptional power of preventive detention by the detaining authorities and the respondent-state. We direct the respondents to take stock of challenges to detention orders pending before the Advisory Board, High Court and Supreme Court and evaluate the fairness of the detention order against lawful standards."*

9. The distinction between a disturbance to "law and order" and a disturbance to public order has been clearly settled by a Constitution Bench in *Ram Manohar Lohia* v. *State of Bihar*, AIR 1966 SC 740. The Court has held that every disorder does not meet the threshold of a disturbance to public order, unless it afects the community at large. The Constitution Bench held:

"51. We have here a case of detention under Rule 30 of the Defence of India Rules which permits apprehension and detention of a person likely to act in a manner prejudicial to the maintenance of public order. It follows that if such a person is not detained public disorder is the apprehended result. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. Does the expression "public order" take in every kind of disorders or only some of them? The answer to this serves to distinguish "public order" from "law and order" because the latter undoubtedly takes in all of them. Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival

communities and one of them tried to raise communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before if can be said to affect public order, it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances which subvert the public order are. A District Magistrate is entitled to take action under Rule 30(1)(b) to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances.

52. It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those afecting "security of State", "law and order" also comprehends disorders of less gravity than those afecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. By using the expression "maintenance of law and order" the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules."

(emphasis supplied)

10. In the case of *Mallada K Sri. Ram* v. *State of Telangana*, (2022) 6 Scale 50, Honourable Apex Court has observed as under:—

"15 A mere apprehension of a breach of law and order is not sufficient to meet the standard of adversely affecting the "maintenance of public order". In this case, the apprehension of a disturbance to public order owing to a crime that was reported over seven months prior to the detention order has no basis in fact. The apprehension of an adverse impact to public order is a mere surmise of the detaining authority, especially when there have been no reports of unrest since detenu was released on bail on 8 January 2021 and detained with effect from 26 June 2021. The nature of the allegations against the detenu are grave. However, the personal liberty of an accused cannot be sacrificed on the altar of preventive detention merely because a person is implicated in a criminal proceeding. The powers of preventive detention are exceptional and even draconian. Tracing their origin to the colonial era, they have been continued with strict constitutional safeguards against abuse. Article 22 of the Constitution was specifically inserted and extensively debated in the Constituent Assembly to ensure that the exceptional powers of preventive detention do not devolve into a

draconian and arbitrary exercise of state authority. The case at hand is a clear example of non-application of mind to material circumstances having a bearing on the subjective satisfaction of the detaining authority. The two FIRs which were registered against the detenu are capable of being dealt by the ordinary course of criminal law."

11. It will be fruitful to refer to a decision of the Supreme Court in *Pushker Mukherjee* v. *State of West Bengal* [(1969) 1 SCC 10 : 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."

12. Same fact situation exists in the State and number of detention orders under PASA are passed day in and day out, relying on stale material and without drawing distinction between "law and order" problem and "public order" problem as mentioned under the PASA Act.

13. It is also noticed by us that while passing the impugned detention order, the respondent authorities have also totally ignored the guidelines dated 03.05.2023 as well as the order dated 05.05.2023 passed in Special Civil Application No. 5506 of 2023.

14. In view of above, we are inclined to allow this petition, because simplicitor registration of FIR/s by itself cannot have any nexus with the breach of maintenance of public order and the authority cannot have recourse under the Act and no other relevant and cogent material exists for invoking power under section 3 (1) of the Act. In the result, the present petition is hereby allowed and the impugned order of

detention dated 11.07.2023 passed by the respondent - detaining 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.