IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 6670 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE A.S. SUPEHIA sd/-
and
HONOURABLE MR. JUSTICE DIVYESH A. JOSHI sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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FARHAN S/O MOHAMMAD SHABIR KURESHI
Versus
STATE OF GUJARAT

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Appearance:
MR. KISHAN H DAIYA(6929) for the Petitioner(s) No. 1
DS AFF.NOT FILED (R) for the Respondent(s) No. 2,3
MR JAY MEHTA, AGP for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE A.S. SUPEHIA**
and
HONOURABLE MR. JUSTICE DIVYESH A. JOSHI

Date : 03/05/2023

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)

1. Heard the learned advocates appearing for the respective parties.

2. The present petition is directed against the order of detention dated **01.04.2023** passed by the respondent – detaining authority in exercise of powers conferred under section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 (for short "the Act") by detaining the petitioner–detenue as defined under section 2(c) of the Act.

3. Learned advocate for the detenue submitted that the impugned order of detention of the detenue requires to be quashed and set aside because the detaining authority has passed order of detention solely on the ground of registration of two FIRs, first for the offences under Sections 332, 337, 353, 186, 143, 145, 146, 147, 149, 224, 225 & 225(B) of the Indian Penal Code, and another for the offences under Section 25(1-B)(A) of the Arms Act and Section 135(1) of the Gujarat Police Act respectively by itself cannot bring the case of the detenue within the purview of definition under section 2(c) 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 detenue 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 detenue 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 detenue had put the entire social apparatus in disorder, making it difficult for whole system to exist as a system governed by rule of law by disturbing public order. It is also submitted that the detaining authority has also not applied its mind to the fact that the petitioner is released on bail in all offences.

4. 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 detenue indicate that detenue is in habit of indulging into the activity as defined under section 2(c) 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.

5. Having heard the 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 detenue cannot be said to be germane for the purpose of bringing the detenue within the realm of meaning of section 2(c) of the Act. Unless and until, the

material is there to make out a case that the person has become a threat and 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 detenue is a person which would fall within the meaning of section 2(c) of the Act. Except general statements, there is no material on record which shows that the detenue is acting in such a manner, which would become dangerous to the public order.

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

6.1 In the case of ***Sushanta Kumar Banik v. State of Tripura*, AIR 2022 S.C. 4715** before Apex Court, the fact of the accused/detenue being released on bail for the offences under the NDPS Act, 1985 was suppressed and hence, the Apex Court has held that such vital fact could not have been withheld by the sponsoring authority before the detaining authority. In the present case, though the detaining authority was aware of the fact that the detenue is released on bail in all these offences, the order does not anyway contain that the detaining authority has applied its mind to the afore-noted facts. The Apex Court has observed as under in aforesaid judgment:

> *"22. As noted above, in the case on hand, in both the cases relied upon by the detaining authority for the purpose of preventively detaining the appellant herein, the appellant was already ordered to be released on bail by the concerned Special Court. Indisputably, we do not find any reference of this fact in the proposal forwarded*

by the Superintendent of Police, West Tripura District while requesting to process the order of detention. The reason for laying much stress on this aspect of the matter is the fact that the appellant though arrested in connection with the offence under the NDPS Act, 1985, the Special Court, Tripura thought fit to release the appellant on bail despite the rigours of Section 37 of the NDPS Act, 1985. Section 37 the NDPS Act, 1985 reads thus:

"Section 37. Offences to be cognizable and non-

bailable.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

23. A plain reading of the aforesaid provision would indicate that the accused arrested under the NDPS Act, 1985 can be ordered to be released on bail only if the Court is satisfied that there are reasonable grounds for

believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. If the appellant herein was ordered to be released on bail despite the rigours of Section 37 the NDPS Act, 1985, then the same is suggestive that the Court concerned might not have found any prima facie case against him. Had this fact been brought to the notice of the detaining authority, then it would have influenced the mind of the detaining authority one way or the other on the question whether or not to make an order of detention. The State never thought to even challenge the bail orders passed by the special court releasing the appellant on bail.

24. In Asha Devi v. Additional Chief Secretary to the Government of Gujarat and Anr., 1979 Crl LJ 203, this Court pointed out that:

> *"... if material or vital facts which would influence the minds of the detaining authority one way or the other on the question whether or not to make the detention order, are not placed before or are not considered by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal."*

25. .....

26. From the above decisions, it emerges that the requisite subjective satisfaction, the formation of which is a condition precedent to passing of a detention order will get vitiated if material or vital facts which would have bearing on the issue and weighed the satisfaction of the detaining authority one way or the other and influence his mind are either withheld or suppressed by the sponsoring authority or ignored and not considered by the detaining authority before issuing the detention order.

27. It is clear to our mind that in the case on hand at the time when the detaining authority passed the detention order, this vital fact, namely, that the appellant detenu had been released on bail by the Special Court, Tripura

despite the rigours of Section 37 of the NDPS Act, 1985, had not been brought to the notice and on the other hand, this fact was withheld and the detaining authority was given to understand that the trial of those criminal cases was pending."

6.2 In the case of ***Vijay Narain v. State of Bihar,*** **1984 (3) S.C.C. 14,** the Apex Court asserted that when a person is enlarged on bail by a competent Court, great caution should be exercised in scrutinizing the validity of an order of preventive detention order which is based on the same charge, which is to be tried by the criminal Court. It is also noticed by this Court that the order does not refer to any application for cancellation of bail having been filed by the State authorities.

6.3 In a recent decision of the Hon'ble Supreme Court in the case of ***Shaik Nazeen vs. State of Telanga and Ors*****. and** ***Syed Sabeena vs. State of Telangana and Ors***. 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 paragraph Nos.17 and 18. The excerpts of paragraph Nos.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 definitely 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 Vs. The State of Telangana & Ors. 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."*

6.4 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 vs. 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 affects 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 affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "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)

6.5 In the case of ***Mallada K Sri Ram vs. State of Telangana*, 2022 (6) Scale 50**, the 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."*

6.6 It will be fruitful to refer to a decision of the Supreme

Court in ***Pushker Mukherjee vs. State of West Bengal*****, AIR 1970 S.C. 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."*

7. 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.

8. In case of ***K.Nageswara Naidu Versus Collector And District Magistrate Kadapa*****, 2012 (13) SCC 585,** the Apex

Court has reiterated thus:

> *"4. After the aforesaid decision, the same issue again came up for consideration before a two-Judge Bench of this Court in Munagala Yadamma v. State of Andhra Pradesh and Ors., (2012) 2 SCC 386, where a similar order had been passed under the 1986 Act. In the said case, the detention order had been passed in regard to the detenu, who had been indulging in illicit distillation of liquor and the same submission was advanced on behalf of the State, that recourse to ordinary law would involve more time and would not be an effective deterrent in preventing a person from indulging in prejudicial activities. In the said decision while considering the decision, both in Rekha's case (supra) and Reddeiah 's ease (supra) and also in Yumman Ongbi Lemhi Leima's case (supra), it was held that the personal liberty of an individual is the most precious and prised right guaranteed under the Constitution in Part III thereof. It was observed that the State has been granted the power to curb such rights under criminal laws and also under the laws of preventive detention, which, therefore, are required to be exercised with due caution, as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order. It was also observed that no doubt the offences alleged to have been committed by the Appellant are such as to attract punishment under the Andhra Pradesh Prohibition Act. but such punishment would have to be awarded under the said laws and taking recourse to preventive detention laws would not be warranted. It had been emphasised that preventive detention involves detaining of a person without trial in order to prevent him/ her from committing certain types of offences, but such detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating crimes, which the detenu may have committed. It had also been observed that after all, preventive detention. in most cases, is for a year only and*

cannot be used as an instrument to keep a person in perpetual custody without trial."

9. Thus, the Supreme Court has emphasized that preventive detention involves detaining of a person without trial in order to prevent him/ her from committing certain types of offences, but such detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating crimes, which the detenue may have committed. It had also been observed that after all, preventive detention. In most cases, is for a year only and cannot be used as an instrument to keep a person in perpetual custody without trial.

10. It appears that the state authorities tend to forget the aforementioned settled proposition of law and orders are being passed being oblivious of the fact that the freedom of human being is supreme and the same cannot be curtailed or restricted unless the detention is extremely necessary and the activities of the detenue affects the "public order". It is also noticed by this Court that the state authorities are absolutely oblivious of the expression between the "law and order" and "public order". In numerous decisions, the Supreme Court and the High Court has reiterated and explained the difference between the two expressions, however, from the orders of detentions, it is noticed that no attention is being paid by the detaining authorities on such vital aspect. While passing the detention orders, the authorities have to be mindful of the characteristic of Article 21

and 22 of the Constitution of India. Article 22 cannot be read in isolation but must be read as an exception to Article 21, and such exception can apply only in rare and exceptional cases. The Apex Court and this Court time and again have articulated that the personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention is meticulously accords with the procedure established by law. We have also come across cases that in a single case of prohibition, the provisions of PASA are invoked and the order of detentions are not executed and the provisions of PASA are invoked even after such detenue have been granted bail. Thus, it appears that, in numerous cases such orders are executed in order to frustrate the orders of bail

11. The Division Bench of this Court in case of **Vijay Alias Ballu Bharatbhai Ramanbhai Patni(Kaptiywala) Versus State Of Gujarat, 2021 (2) GLR 1450** with regard to the recording the statement of witnesses whose names are not disclosed has held thus:

> ***"42*** *In this view of the matter, the detaining authority while exercising powers under Section 9[2] of the PASA Act for claiming privilege is expected to consider the general background, character, antecedents, criminal tendency of propensity etc. of the detenu. In the instant case, if the grounds of detention are considered, all that is recorded by the detaining*

authority is that the fear expressed by the witnesses is found to be genuine and correct by the detaining authority. The detaining authority has recorded that it has carefully scrutinized, examined and considered all the materials that were produced before him by the sponsoring authority. It is, therefore, clear that the detaining authority, while verifying the statements of the witnesses and while considering the question of exercising the privilege under Section 9(2) of the PASA Act, has not taken any independent steps for considering general background, character, antecedents, criminal tendency etc. while recording subjective satisfaction, but has relied solely on the material produced by the sponsoring authority. There is no contemporaneous record to indicate the steps taken by the detaining authority and the grounds and reasons for arriving at the subjective satisfaction. It is therefore very difficult to conclude that the detaining authority has considered general background, character, antecedents, criminal tendency and propensity etc. of the detenu while arriving at the subjective satisfaction, for the need for exercise of powers under Section 9(2) of the PASA Act and claim privilege by not disclosing identity of the anonymous witnesses."

12. Thus, the Division Bench has held that, while verifying the statements of the witnesses and while considering the question of exercising the privilege under Section 9(2) of the PASA Act, has to take independent steps for considering general background, character, antecedents, criminal tendency etc. while recording subjective satisfaction, apart from placing reliance on the material produced by the sponsoring authority. It is also held that the that the detaining authority is required to be considered general background, character, antecedents, criminal tendency and propensity etc. of the detenue while

arriving at the subjective satisfaction. The impugned order does not reflect such aspects and hence the same is required to be quashed.

13. So far as first offence under Sections 332, 337, 353, 186, 143, 145, 146, 147, 149, 224, 225 & 225(B) of the Indian Penal Code is concerned, it is noticed by us that the petitioner along with other co-accused have been released by the learned Magistrate vide order dated 14.03.2023. So far as the second offence under Section 25(1-B)(A) of the Arms Act and Section 135(1) of the Gujarat Police Act, is concerned, it is noticed by us that the petitioner has been enlarged on bail by 8th Additional Sessions Judge, Surat vide order dated 29.03.2023. The contents of the FIRs as well as the orders passed in the bail applications, it is apparent that the local made pistol was found, which did not have any cartridge, when the raid was carried out. The detaining authority, while passing the order of branding the petitioner as dangerous person, has also placed reliance on the statement of the secrete witnesses.

14. Thus, it is high time that the State Authorities should introspect their action of passing detention order in a casual manner since this Court is confronted with the orders of detention, which do not stand the test of settled legal proposition of law.

15. 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 **01.04.2023** passed by the respondent – detaining authority is hereby quashed and set aside. The detenue is ordered to be set at liberty forthwith if not required in any other case. Rule is made absolute accordingly. Direct service is permitted.

Sd/-
(A. S. SUPEHIA, J)

Sd/-
(DIVYESH A. JOSHI,J)

MB/29