

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 1055 OF 2021

Rahul Jyoti Sahani

Aged : 42 years, Occ : Service

Residing at R/o C2, 102, Jas Exotica,

Naroli Road, Silvassa,

Dadra and Nagar Haveli

At present under detention and lodged

at Sub Jail, Dadra and Nagar Haveli

...Petitioner

vs.

1. Union Territory of Daman

& Diu

Through the Public Prosecutor,

Daman and Diu

2. The District Collector and

Magistrate,

Administration of Union Territory

of Daman & Diu, Collectorate,

Daman 396 220

3. The Secretary (Home),

Home Department,

Secretariat, Daman

...Respondents

Mr.Sudeep Pasbola i/b Mr. Karl Rustomkhan for petitioner.

Mr.H.S.Venegavkar for respondent No.-UOI.

Mr.S.R. Shinde, APP for State.

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CORAM : S.S. SHINDE &

N.J. JAMADAR, JJ.

Reserved for Judgment on : 8th July 2021.

Judgment Pronounced on : 28th July 2021.

(THROUGH VIDEO CONFERENCE)

JUDGMENT (PER N.J. JAMADAR, J.) :

1. Rule. Rule made returnable forthwith and, with the consent of the learned counsels for the parties, heard finally.

2. In this petition, the petitioner-detenué assails the detention order passed by the respondent No.2-District Magistrate, Dadra and Nagar Haveli, on 29th January 2021 in exercise of the powers conferred on him under section 3(2) of the Gujarat Prevention of Anti-social Activities Act, 1985 ('The Act, 1985') as extended to the Union Territory of Dadra and Nagar Haveli.

3. The petition arises in the backdrop of the following facts :-

(a) The petitioner claimed to be a Manager of Hotel Malhar Bar and Restaurant, Silvassa. Pursuant to a telephonic information, raid was conducted by Crime Branch, Dadra and Nagar Haveli at Hotel Malhar. It transpired that large quantity of Indian made foreign liquor (IMFL/Beer) was unloaded from a tempo of Eicher make bearing registration No. DN-09-C-9639 and stored in room at the said hotel. Upon further investigation, it was revealed that 3743 litres liquor was sold in the said hotel from 19th November 2020 to 12th January 2021, which was

highly unlikely having regard to the occupancy and footfall in the Hotel Mahlar. The investigation further revealed that the petitioner, allegedly a notorious bootlegger in the neighbouring State of Gujarat, was employed as a Manager in the said hotel with a view to carry out smuggling of liquor on large scale. A huge stock of 12,873 bulk litres was purchased from OIDC in a short span of three months and smuggled out therefrom.

(b) The Detaining Authority took note of the fact that in all seven cases were registered against the petitioner for the offences punishable under Bombay Prohibition Act, 1949. Having satisfied that the petitioner was a bootlegger and the continuous activity of bootlegging on large scale was causing feeling of insecurity among the general public and thus prejudicial to the maintenance of public order within the meaning of section 3 of the Act, 1985, the Detaining Authority ordered the detention of the petitioner under section 3 of the Act, 1985 by the impugned order dated 29th January 2021.

(c) The petitioner came to be arrested and detained on the very day. Upon being served with the grounds of detention, the petitioner made a representation against the detention order. However, the respondents did not consider and decide the representation. Hence, this petition for quashing the order of detention with the assertion that the detention is in gross violation of the fundamental rights of the petitioner and the statutory provisions which authorize the preventive detention.

4. Multi-fold grounds are raised in the petition assailing the impugned order of detention. First and foremost, there was no material to indicate that the petitioner is a 'bootlegger' within the meaning of section 2(b) of the Act, 1985. Secondly, even if the case of the Detaining Authority is taken at par and it is assumed that the petitioner is a bootlegger, yet, there is not a shred of material to indicate that the acts and conduct of the petitioner were, in any manner, prejudicial to the maintenance of public order. Mere allegations, or for that matter proof, of being a bootlegger is not sufficient to deprive the petitioner of his personal liberty in the

absence of the material to indicate that the acts attributed to the petitioner disturbed the public order. Thirdly, the fundamental right of the petitioner to make and have the representation against the order of detention considered by the Detaining Authority and the State Government under Article 22(5) of the Constitution is blatantly infringed as the respondents did not consider the representation of the petitioner. Inaction on the part of the respondent Nos. 1 and 2 till the Advisory Board opined that there were sufficient grounds for continuation of the detention, resulted in grave and irretrievable prejudice to the petitioner. On these principal, amongst other, grounds the petitioner has prayed for quashing of the impugned order of detention.

5. An affidavit in reply is filed by Mr. Ashish Mohan (Joint Secretary, (Home) of UT of Dadra and Nagar Havel and Daman and Diu. The respondents have contested the claim of the petitioner that there is no material to substantiate the allegation that the petitioner is a bootlegger. The seven cases registered against the petitioner under Bombay Prohibition Act at the instance of Gujarat Police were pressed into service to lend support to the charge that the petitioner is a bootlegger. It was contended that the acts and conduct attributed to the petitioner

caused serious threat to the maintenance of public order. Indisputably, the petitioner was working as a Manager at Hotel Malhar. Sale of huge quantity of 3743 liters of liquor, in the backdrop of the low occupancy at the said hotel, was totally inconceivable. In the circumstances, the Detaining Authority was justified in passing the order of detention as the continued activity of bootlegging was prejudicial to the maintenance of public order. As regards the alleged non-consideration of the representation made by the petitioner, the respondents asserted that the representation was duly forwarded to the Advisory Board, and on the basis of the opinion of the Advisory Board, the detention was continued vide order dated 17th March 2021. Thus, according to the respondents, the non-consideration of the representation is not fatal.

6. In the backdrop of the aforesaid pleadings and material, we have heard Mr. Pasbola, the learned counsel for the petitioner and Mr. Venegavkar, the learned counsel for respondent No.1 and 2 Mr. Shinde, the learned APP. We have also perused the material on record.

7. Mr. Pasbola, the learned counsel for the petitioner would urge that the detention of the petitioner is *ex-facie* unsustainable.

Dealing in IMFL/beer in breach of licence, even if taken at its face value, would not amount to bootlegging. Resultantly, the petitioner could not have been branded as 'bootlegger'. Mr. Pasbola further urged that even if the case of the respondents is taken at par and it is assumed that the petitioner is a bootlegger, the order of preventive detention is wholly unsustainable as there is no assertion much less cogent material to show that the acts and conduct of the petitioner were prejudicial to the maintenance of public order. Inviting the attention of the Court to the provisions contained in section 2(b), which defines a 'bootlegger' and the Explanation to section 3 which incorporates a deeming provision as regards breach of public order, Mr. Pasbola strenuously urged that the material on record, at best, stops at designating the petitioner as 'bootlegger' and nothing beyond that.

8. Elaborating the aforesaid submissions, Mr. Pasbola laid emphasis on the fact that it is not the case of the respondents that the authorities had recorded the statement of any witness to bolster up their case that the petitioner behaved in such manner that it disturbed the even tempo of life of persons in the vicinity. Apart from the cases which were registered against the petitioner under the provisions of the Bombay Prohibition Act, there is no

material to establish the nexus between the acts and conduct of the petitioner and breach of public order, urged Mr. Pasbola. In any event, the said activity on the part of the petitioner could be legitimately dealt under ordinary laws, canvassed Mr. Pasbola.

9. In opposition to this, Mr. Venegavkar made an endeavour to support the impugned order. In the light of the attendant circumstances wherein seven cases were registered against the petitioner under the provisions of Bombay Prohibition Act, the satisfaction arrived at by the Detaining Authority cannot be said to have been vitiated, submitted Mr. Venegavkar.

10. In order to properly appreciate the aforesaid submissions, it may be apposite to note that the Detaining Authority, after adverting to the events which transpired in the raid dated 13th January 2021 at Hotel Malhar, the report of the Excise Department, the cases allegedly registered against the petitioner at the instance of Gujarat Police for the offences under Bombay Prohibition Act, recorded that the petitioner has a dubious distinction of carrying out illegal activities, namely bootlegging under the garb of running a hotel and proceeded to pass the impugned order of detention holding, *inter-alia*, as under :

“ AND WHEREAS, on perusal of the records placed before the undersigned, I am of the opinion that Rahul

Sahani is carrying out 'bootlegging' in the guise of liquor business, which is evident from the present case, and other cases registered against him in Gujarat. His continuous activity of bootlegging on large scale in the name of managing a hotel is causing feeling of insecurity among the general public, which is further to cause threat to public order. In the light of above, I am satisfied that there is need to maintain public order by controlling such illegal activities of 'bootlegging' in Dadra and Nagar Haveli and such elements who can cause danger to the public order must be brought under preventive detention."

11. Evidently, the Detaining Authority had considered the seven cases registered against the petitioner at the instance of Gujarat Police. It does not profess to have examined witnesses in-camera and recorded their statements. On the contrary, the Detaining Authority proceeded to arrive at a subjective satisfaction on the strength of the events which transpired in the raid dated 13th January 2021 at Hotel Malhar and the crimes registered against the petitioner. In this view of the matter, the crucial question which crops up for consideration is whether the aforesaid satisfaction to detain the petitioner by invoking the provisions contained in section 3(2) of the Act, 1985 is sustainable?

12. The distinction between the concepts of "public order" and "law and order" is well recognised. Public order is something more than ordinary maintenance of law and order. A proper test to distinguish between "law and order" and "public order" is whether

the complained acts led to disturbance of the ordinary tempo of life of the community so as to amount a disturbance of the public order or it merely affected an individual leaving the tranquility of society undisturbed. It is, therefore, said that the essential distinction between the concepts of “public order” and “law and order” is not in the nature or quality of the act but in the degree, potentiality and extent of its reach upon society. The given act by itself may not be determinant of its own gravity. It is the propensity and potentiality of the act of disturbing the even tempo of life of the community that renders it prejudicial to the maintenance of public order.

13. Mr. Pasbola would urge that under the provisions of the Act, 1985, “Public Order” has definite connotation. It was incumbent upon the Detaining Authority to record a satisfaction that the activities of the proposed detainee is causing or is likely to cause any harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or public health. Mere allegation or proof of the fact that the proposed detainee is a bootlegger is of no avail. To buttress the aforesaid submission, Mr. Pasbola placed a very strong reliance on the judgment of the Supreme Court in the case

of *Piyush Kantilal Mehta Vs. Commissioner of Police, Ahmedabad City & Anr.*¹. In the said case, after adverting to the provisions contained in section 3 of the Act, 1985, the Supreme Court expounded the scope of sub-sections (1) and (4) thereof as under :

“12 Under sub-section (1) of [section 3](#), an order of detention of a person can be passed with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. Sub-section (4) of [section 3](#) contains a deeming provision. Under sub-section (4), a bootlegger or a dangerous person or a drug offender shall be deemed to be acting in a manner prejudicial to the maintenance of public order when the activities of such a person affect adversely or are likely to affect adversely the maintenance of public order. In other words, although sub-section (4) contains a deeming provision, such deeming provision will not be attracted unless the activities of the person concerned affect adversely or are likely to affect adversely the maintenance of public order.”

(emphasis supplied)

14. In the backdrop of the facts of the said case, wherein it was alleged that the petitioner therein was involved in incidents of beating innocent citizens, the Supreme Court observed in clear and explicit terms that the fact that the petitioner is a bootlegger within the meaning of section 2(b) of the Act, 1985 would not be sufficient to preventively detain a person under section 3 of the Act, unless, as laid down in sub-section (4) of section 3 of the said Act, his activities as a bootlegger affect adversely or are likely to affect adversely the maintenance of public order. The observations

¹ 1989 Supp (1) SCC 322

in paragraph 18 are instructive and thus extracted below :-

“18 In the instant case, the detaining authority, in our opinion, has failed to substantiate that the alleged anti-social activities of the petitioner adversely affect or are likely to affect adversely the maintenance of public order. It is true some incidents of beating by the petitioner had taken place, as alleged by the witnesses. But, such incidents, in our view, do not have any bearing on the maintenance of public order. The petitioner may be punished for the alleged offences committed by him but, surely, the acts constituting the offences cannot be said to have affected the even tempo of the life of the community. It may be that the petitioner is a bootlegger within the meaning of [section 2\(b\)](#) of the Act, but merely because he is a bootlegger he cannot be preventively detained under the provisions of the Act unless, as laid down in sub-section (4) of [section 3](#) of the Act, his activities as a bootlegger affect adversely or are likely to affect adversely the maintenance of public order. We have carefully considered the offences alleged against the petitioner in the order of detention and also the allegations made by the witnesses and, in our opinion, these offences or the allegations cannot be said to have created any feeling of insecurity or panic or terror among the members of the public of the area in question giving rise to the question of maintenance of public order. The order of detention cannot, therefore, be upheld.”

15. The aforesaid pronouncement was followed by the Supreme Court in the case of ***Rashidmiya @ Chhava Ahmedmiya Shaik Vs. Police Commissioner, Ahmedabad and Anr.***². The Supreme Court held that a conjoint reading of section 2(b) and section 3(4) with the Explanation annexed thereto clearly spells out that in order to clamp an order of detention upon a 'bootlegger' under section 3 of the Act, the detaining authority must not only be satisfied that the person is a 'bootlegger' within the meaning of section 2(b) but

² (1989) 3 SCC 321

also that the activities of the said bootlegger affect adversely or likely to affect adversely the maintenance of public order.

16. Reverting to the facts of the case, in the light of the aforesaid enunciation of the legal position, it becomes abundantly clear that in the instant case, the satisfaction allegedly recorded by respondent No.2 is infirm. The Detaining Authority has simply noted that the petitioner indulged in bootlegging and the said act was causing a feeling of insecurity among the general public which further endangered maintenance of public order. Evidently, the text of the provisions authorising the detention is sought to be reiterated sans any credible material and specific instances prejudicial to the maintenance of public order attributed to the petitioner. An inference of threat to public order is sought to be drawn on the basis of the fact that seven cases were registered against the petitioner under the provisions of Bombay Prohibition Act and nothing more.

17. Indisputably, the Detaining Authority had not recorded a satisfaction that for the fear of reprisal, the persons were not coming to lodge complaints or give evidence against the petitioner in public and, therefore, in-camera statements of witnesses were recorded, which, in turn, lent credence to the assessment of the

authorities that the activities of the petitioner were prejudicial to the maintenance of the public order.

18. To sum up, there was not an iota of material to demonstrate that the activity of the petitioner had the propensity to disturb the even tempo of life of the ordinary citizens. Nor was it a case that the alleged activity caused a grave or widespread danger to life, property or public health. The aforesaid pronouncements in the cases of *Piyush Kantilal Mehta* (Supra) and *Rashidmiya @ Chhava Ahmedmiya Shaik* (Supra) are on all four with the facts of the case at hand.

19. As the impugned order deserves to be quashed on this count which dismantles the very substratum of the exercise of power of preventive detention under section 3 of the Act, 1985, it may not be necessary to elaborately consider the other two grounds revolving around non-consideration of the representation of the detainee by the authorities. We are, therefore, inclined to deal with the said challenge briefly.

20. Article 22(5) of the Constitution of India provides as under :

“When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against

the order.

21. Sub-section (1) of section 9 of the Act, 1985 provides as under :

“ When a person is detained in pursuance of a detention order the authority making the order shall, as soon as may be, but not later than seven days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the State Government.”

22. The fundamental right of the detenue to have his representation against the order of preventive detention considered by the Detaining Authority and Appropriate Government is supplemented by the statutory mandate that the Detaining Authority shall offer an earliest opportunity of making a representation against the detention order to the appropriate government. These constitutional and statutory provisions incorporate a corresponding duty on the authorities to whom the representation is made, to dispose of the representation at the earliest. Lest, the constitutional guaranty and statutory protection would be rendered meaningless and illusory. If the authorities fail to discharge the statutory obligation to provide the earliest opportunity of making a representation and have it considered, the provisions would be robbed of the meaning and content. A

useful reference in this context can be made to the Constitution Bench judgment in the case of **Jaynarayan Sukul Vs. State of West Bengal** ³, wherein the principles were culled out in the following words :

"18 It is established beyond any measure of doubt-that the appropriate authority is bound to consider the representation of the detenu as early as possible. The appropriate Government itself is bound to consider the representation as expeditiously as possible. The reason for immediate consideration of the representation is too obvious to be stressed. The personal liberty of a person is at stake. Any, delay would not only be an irresponsible act on the part of the appropriate authority but also unconstitutional because the Constitution enshrines the fundamental right of a detenu to have his representation considered and it is imperative that when the liberty of a person -is in peril immediate action should be taken by the relevant authorities.

19 No definite time can be laid down within which a representation of a detenu should be dealt with save and except that it is a constitutional right of a detenu to,have his representation considered as expeditiously as possible. It will depend upon the facts and circumstances of each case whether the appropriate Government has disposed of the case as expeditiously as possible for otherwise in words of Shelat, J. who spoke for this Court in the case of Khairul Haque(1) "it is obvious that the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning. Broadly stated, four principles are to be followed in regard to representation of detenues. First, the appropriate authority is bound to give an opportunity to the detenu to make a representation and to consider the representation of the detenu as early as possible. Secondly, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detenu by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in the governance of the citizens. A citizen's right raises a

3 (1970) 1 SCC 219

correlative duty of the State. Fourthly, 'the appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board. If the appropriate Government will release the detenu the Government will not send the matter to the Advisory Board. If however the Government will not release the detenu the Government will send the case along with the detenu's representation to the Advisory Board. If thereafter the Advisory Board will express an opinion in favour of release of the detenu the Government will release the detenu. If the Advisory Board will express any opinion against the release of the detenu the Government may still exercise the power to release the detenu.'

(emphasis supplied)

23. In the case at hand, while meeting the ground of non-consideration of the representation made by the petitioner, the respondents have asserted as under :

"5

(ii) With regard to inaction on the part of the Respondents on his representation is concerned, it is to state that the representation dated 09/02/2021, of the Petitioner was sent to the Advisory Board. The Advisory Board in its report stated that the written submission of the detenue has been perused and thereafter, the Advisory Board had submitted its opinion. As per opinion of the Advisory Board, the detention was continued vide Order dated 17/03/2021, which was communicated to the detenue and received by him on 17/03/2021."

24. The aforesaid response of the respondents makes it explicitly clear that the respondent No.2 did not consider the representation of the petitioner and merely forwarded the same to the Advisory Board and, post the opinion of the Advisory Board, eventually the detention was continued by the order dated 17th March 2021. The respondent Nos.1 and 2 thus infringed the constitutional and

statutory right of the petitioner to have the representation considered at the earliest. This inaction on the part of the respondent Nos.1 and 2 is in teeth of the aforesaid provisions. Resultantly, the impugned order is liable to be quashed on this count as well.

25. The conspectus of the aforesaid consideration is that the impugned order suffers from the vice of non-application of mind qua arriving at the satisfaction that the activity of the petitioner was prejudicial to the maintenance of public order. Secondly, in view of the infraction of the constitutional and statutory provisions by depriving the petitioner of the earliest opportunity of consideration of the representation against the order of detention, the order of detention becomes wholly unsustainable. Resultantly, the petition deserves to be allowed.

26. Hence, the following order :

O R D E R

- (i) The petition stands allowed.
- (ii) The impugned order of detention dated 29th January 2021 passed by respondent No.2-District Magistrate, Dadra and Nagar Haveli, under the provisions of section 3(2) of the Gujarat Prevention of

Anti-social Activities Act, 1985 stands quashed and set aside.

(iii) The petitioner be set at liberty forthwith, if not required to be detained in any other case.

Rule made absolute in the aforesaid terms.

(N. J. JAMADAR, J.)

(S. S. SHINDE, J.)