1994 (2) GCD 550 (Gul)

S. Chatterji &
A.N. Divecha, JJ.

Lataben Ramchandra Uttekar [Miss]
Versus
Commissioner of Police, Surat & Ors.

Special Criminal Application No. 1712 of 1993†
Decided on 9th August, 1994

Gujarat Prevention of Anti-Social Activities Act, 1985 (PASA in short)—Sec. 9(2)—Constitution of India—Art. 22 (5)—Preventive detention under PASA —Claim of privilege under section 9(2) by the detaining authority—Non consideration of affidavit of 11 witnesses which formed part of bail application—Held, subjective satisfaction of detaining authority is mechanical and vitiated—Impugned detention therefore, quashed.

ગુજરાત અસામાજિક પ્રવૃત્તિ અટકાવવા બાબત અધિનિયમ, ૧૯૮૫ (ટૂકમાં પાસા)—કલમ ૯(૨)—ભારતનું બંધારણ, ૧૯૫૦—આર્ટીકલ ૨૨(૫)—પાસા હેઠળ નિવારક અટકાયત—અટકાયત કરનાર અધિકારીએ કલમ ૯(૨) હેઠળ વિશેષાધિકારની માંગણી કરી—૧૧ સાક્ષીઓની એફીડેવીટની વિચારણા કરી નહિ, જે જામીન અરજીનો ભાગ બનતી હતી—ચુકાદો અટકાયત કરનાર અધિકારીના વિષયાત્મક ખાતરી, યાંત્રિક અને દુષિત છે—તેથી વાંધાવાળી અટકાયત, રદ.

Those affidavits of 11 witnesses were in the nature of exculpatory statements in favour of all the accused including the present petitioners. It was therefore necessary for the detaining authority to have taken into consideration the contents of the affidavits of those 11 witnesses. It is not in dispute that the affidavits of those 11 witnesses were a part of the bail application made by the detenu involved in Special Criminal Application No. 1714 of 1993 in the criminal case arising from Crime Register No. 371 of 1992. It would mean that the said bail application together with its accompaniments was a part of the record of that criminal case. As pointed out hereinabove, that criminal case involved both these petitioners as accused. In that view of the matter, consideration of those affidavits filed by those 11 witnesses would have swayed the subjective satisfaction of the detaining authority one way or the other. Any and every material capable of influencing the subjective satisfaction of the detaining authority would be a vital material to be taken into consideration for arriving at the subjective satisfaction on the part of the detaining authority. We are therefore of the view that the affidavits of those 11 witnesses which were a part of the record of the criminal case arising from Crime Register No. 371 of 1992 ought to have been taken into consideration by the detaining authority in the case of the petitioners of these two petitions. Non-consideration thereof has vitiated his subjective satisfaction and has therefore rendered the detention order in each case to be invalid. The privilege under section 9(2) of the Act was mechanically claimed without application of mind resulting into denial to the detenu of a reasonable opportunity to make effective representation which violated his constitutional right under Article 22(5) of the Constitution of India. [Para 6 & 4]

† with Special Crimi~~~ Application No. 1816 of 1993 Decided on August 1994.

M.C. Kapadia, Advocate with *N.M. Kapadia*, for the Petitioner (in both matters) & *M.R. Rawal*, for the Respondents in both matters.

Petition Allowed

A.N. Divecha, J.—Both these petitions are filed by the same petitioner for challenging the order of detention passed with respect to her two brothers separately. The grounds of detention furnished to the detenu in each case are practically identical. Common questions of law and fact are found arising in both these petitions. We have therefore thought it fit to dispose of both these petitions by this common judgment of ours.

2. The order of detention in each case was passed on 31st July 1993. Its copy is at Annexure-A to each petition. It was approved by the State Government in due course. It appears that the order of detention could not be served immediately to the detenu. It is however not in dispute that it came to be served to the detenu in each case on 7th September 1993. The detenu in each case was supplied the grounds for his detention while serving to him the order of detention at Annexure-A to each petition. A copy of the grounds of detention is at Annexure-B to each petition. The present petitioner has thereafter approached this Court by way of each of these petitions for questioning the validity of the aforesaid detention order in each case and the continued detention of each detenu.

3. The learned Advocate for the petitioner in each case has pressed into service several grounds in support of each petition. The learned Additional Public Prosecutor has tried to repel all contentions urged on behalf of the petitioner in support of each petition. A somewhat similar petition bearing Special Criminal Application No. 1714 of 1993 filed by the very same petitioner for challenging the order of detention in the case of her third brother was also taken up for hearing today. In that case, learned Additional Public Prosecutor Shri J.A. Shelat appeared for the respondents. Certain questions of law in all the three petitions were common though certain facts were different in the two sets of cases. We have therefore thought it fit to avail of the assistance of learned Additional Public Prosecutor Shri J.A. Shelat in this case also. We could see that both the sides were well prepared and they have assisted us to the best of their abilities and capacities. Out of the several grounds urged before us in both these petitions, we have thought it fit to dispose of these two petitions on two grounds. The frist ground is non-consideration of the affidavits of 11 witnesses accompanying the application for bail made by one of the accused in the criminal case arising from Crime Register No. 371 of 1992. The second ground is mechanical claim of privilege with respect to statements of the witnesses under section 9(2) of the Gujarat Prevention of Anti-social Activities Act, 1985 (the Act for brief).

4. So far as the second ground is concerned, the facts in both these petitions are similar if not altogether identical with the facts in Special Criminal Application No. 1714 of 1993. Relying on two unreported Division Bench rulings of this Court in Special Criminal Application No. 1251 of 1992 decided on 17th September 1992 and Special Criminal Application No. 1545 of 1993 decided on 27th December 1993, we have come to the conclusion that the privilege under section 9(2) of the Act was mechanically claimed without application of mind resulting into denial to the detenu of a reasonable opportunity to make effective representation which violated his constitutional right under Article 22(5) of the Constitution of India. That conclusion of ours in that case would

fortify our view in these two petitions also. In that view of the matter, the impugned order of detention at Annexure-A to each petition cannot be sustained in law on this ground alone.

5. So far as non-consideration of the affidavits of 11 witnesses accompanying the application for bail filed by one of the accused in the criminal case arising from Crime Register No. 371 of 1992 is concerned, in Special Criminal Application No. 1714 of 1993 decided today, we have held that such non-consideration would vitiate the subjective satisfaction of the detaining authority and would therefore vitiate the detention order. The learned Additional Public Prosecutor has however urged that in that case the detenu himself had made the bail application supported by the affidavits of 11 witnesses and the facts of that case were quite peculiar and non-consideration of such affidavits by the detaining authority was found to have vitiated the subjective satisfaction of the detaining authority in that case. It has been urged that in the present case both the detenus were released on bail at the first instance with respect to the criminal case arising from Crime Register No. 371 of 1992 and our judgment in Special Criminal Application No. 1714 of 1993 decided today is distinguishable on its own facts. Shri Kapadia for the petitioner in each case has however submitted that the record of the criminal case arising from Crime Register No. 371 of 1992 was required to be considered by the detaining authority in its entirety and non-consideration thereof would result in vitiation of his subjective satisfaction rendering the detention order to be bad in law.

6. It is not in dispute that the petitioner in each of these two petitions was named as accused in the criminal case arising from Crime Register No. 371 of 1992. It is also not in dispute that the detenu involved in Special Criminal Application No. 1714 of 1993 also figured as an accused in the same criminal case arising from Crime Register No. 371 of 1992. In fact, the petitioners in these two petitions and the petitioner in Special Criminal Application No. 1714 of 1993 are brothers. All the three brothers were made accused along with other persons in the aforesaid criminal case. All the three brothers applied for bail in that criminal case. The application of the two brothers who are the petitioners in these two petitions was accepted and the bail order was passed in their favour. So far as the third brother was concerned, his bail application came to be rejected. As found in that petition, the third brother made yet another application for bail supported by affidavits of 11 persons named as witnesses in the criminal case arising from Crime Register No. 371 of 1992. It was found in that petition that affidavits of those 11 witnesses were not considered by the detaining authority while arriving at the subjective satisfaction for detaining the petitioner, that is, the third brother, in that case. Non-consideration of such affidavits was found to have resulted in vitiating the subjective satisfaction of the detaining authority rendering the detention order to be illegal and invalid. It is not in dispute that those 11 persons whose affidavits accompanied the bail application made by the third brother were named as witnesses in the criminal case arising from Crime Register No. 371 of 1992. As pointed out hereinabove, the petitioners of these two petitions were also named as accused in that criminal case. It would mean that those 11 persons whose affidavits accompanied the application for bail made by the third brother were witnesses in that criminal case even against the present petitioners. Those affidavits of 11 witnesses were in the nature of exculpatory statements in favour of all the accused including the present petitioners. It was therefore necessary for the detaining authority to have taken into consideration the contents of the affidavits of those 11 witnesses. It is not

in dispute that the affidavits of those 11 witnesses were a part of the bail application made by the detenu involved in Special Criminal Application No. 1714 of 1993 in the criminal case arising from Crime Register No. 371 of 1992. It would mean that the said bail application together with its accompaniments was a part of the record of that criminal case. As pointed out hereinabove, that criminal case involved both these petitioners as accused. In that view of the matter, consideration of those affidavits filed by those 11 witnesses would have swayed the subjective satisfaction of the detaining authority one way or the other. Any and every material capable of influencing the subjective satisfaction of the detaining authority would be a vital material to be taken into consideration for arriving at the subjective satisfaction on the part of the detaining authority. We are therefore of the view that the affidavits of those 11 witnesses which were a part of the record of the criminal case arising from Crime Register No. 371 of 1992 ought to have been taken into consideration by the detaining authority in the case of the petitioners of these two petitions. Non-consideration thereof has vitiated his subjective satisfaction and has therefore rendered the detention order in each case to be invalid.

7. In view of aforesaid discussion, the impugned order of detention at Annexure-A to each petition cannot be sustained in law. It has to be branded as illegal and invalid.

8. In the result, each petition is accepted. The detention order at Annexure-A to each petition is held to be illegal and invalid and is quashed and set aside. The detenu in each case is ordered to be set at liberty forthwith if not required in any other case. Rule in each petition is accordingly made absolute.

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1994 (2) GCD 553 (Guj)

S.D. Shah, J.

Saerabibi Usmankhan Pathan
Versus
Superintending Engineer, Gujarat Electricity Board & Ors.

Special Civil Application No. 5334 of 1990
Decided on 8th February, 1994

Service & Employment—Appointment—Compassionate ground—Object was to mitigate the hardship due to death of sole bread-earner in the family—Such appointment should therefore be made immediately, if need be, by creating supernumerary post—In view of the matter that petitioner widow has suffered too much over a period of 11 years with three children necessary direction issued.

સેવા અને રોજગાર—નિમણૂક—દયાનું કારણ—કુટુંબમાં એક માત્ર કમાનાર વ્યક્તિના મૃત્યુને લીધે મુશ્કેલી ઘટાડવાનો—તેથી આવી નિમણૂક સુપન્યુમરી જગા ઊભી કરવાની જરૂર હોયતો ઊભી કરીને તાત્કાલિક કરવા જોઈએ—અરજદારની વિધવાએ, ત્રણ બાળકો સાથે ૧૧ વર્ષની મુદત ઉપરાંત સહન કર્યું છે તે બાબતમાં જરૂરી આદેશો કાઢવા.

The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family. Such appointment should therefore be provided immediately to redeem the family in distress. To keep such a case pending over years in substance would amount to rendering the family of the deceased employee destitute and helpless. The very purpose of