

Chhagan Bagwan Kahar vs N.L. Kalna & Ors on 16 March, 1989

Equivalent citations: 1989 AIR 1234, 1989 SCR (2) 52, AIR 1989 SUPREME COURT 1234, 1989 (1) JT 572, 1989 (2) SCC 318, 1990 CHANDLR(CIV&CRI) 33, (1989) 1 CRIMES 780, (1990) 1 GUJ LR 286, (1990) 2 GUJ LH 225

Author: S.R. Pandian

Bench: S.R. Pandian, B.C. Ray

PETITIONER:
CHHAGAN BAGWAN KAHAR

Vs.

RESPONDENT:
N.L. KALNA & ORS.

DATE OF JUDGMENT 16/03/1989

BENCH:
PANDIAN, S.R. (J)
BENCH:
PANDIAN, S.R. (J)
RAY, B.C. (J)

CITATION:
1989 AIR 1234 1989 SCR (2) 52
1989 SCC (2) 318 JT 1989 (1) 572
1989 SCALE (1) 653
CITATOR INFO :
R 1989 SC1812 (5)
F 1989 SC1881 (10,11)

ACT:

Gujarat Prevention of Anti-Social Activities Act, 1985:
Sections 3 and 15--Expiry or revocation of an earlier detention order--No bar for making a subsequent detention order--Necessity for fresh facts for passing subsequent detention order.

HEADNOTE:

With a view to preventing the petitioner detained fr

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acting in any manner prejudicial to the maintenance of public order, an order of detention was passed against him by the Commissioner of Police, Surat City, under section 3(2) of the Gujarat Prevention of Anti-social Activities Act, 1985. The grounds of detention referred to the detenu's criminal activities connected with bootlegging on a large scale and in an organised manner, and the several cases registered and pending against him on that account. The detenu's representations were dismissed by the 1st respondent and the State Government.

It was contended on behalf of the petitioner that the Detaining Authority for drawing his requisite subjective satisfaction had taken into consideration the previous grounds of detention which were the subject matter of a Special Criminal Application before the Gujarat High Court, and the High Court had quashed the order of detention impugned in that case. On the other hand, it was contended on behalf of the respondents that the earlier proceeding was considered only to a limited purpose of taking note of the detenu's continued involvement in bootlegging activities. Allowing the writ petition, and quashing the detention order it was

HELD: (1) Even if the order of detention comes to an end either by revocation or by expiry of the period of detention there must be fresh facts for passing a subsequent order.

[58D]

Ghulam Nambi Zaki v. State of Jammu & Kashmir, [1970] SCR 35; Hadibandhu Das v. District Magistrate, Cuttack

JUDGMENT :

Anr., [1969] 1 SCR 227; HarJas Dev Singh v. State of Punjab, [1974] 1 SCR 281 and Chotka Hembram v. State of West Bengal, [1974] 3 SCC 401, referred to.

(2) A fortiori when a detention order is quashed by the Court issuing a high prerogative writ like habeas corpus or certiorari, the grounds of the said order should not be taken into consideration either as a whole or in part even alongwith the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the Court strikes down an earlier order by issuing a rule it nullifies the entire order. [58D-E] Ibrahim Bachu Bafan v. State of Gujarat, [1985] 2 SCC 24, followed.

(3) It is imperative therefore to read down section of the Act which provides for the making of successive orders of detention so as to bring it in conformity with Article 22(4) of the Constitution. [59C] Abdul Latif Abdul Wahab Sheikh v. B.K. Jha & Anr., [1987] 2 SCC 22 followed. (4) In the present case, no doubt, the order of detention-

tion contains fresh facts. In addition, the detaining a u-

thority has taken into consideration the earlier grounds of detention which grounds had been nullified by the High Court by issuing a prerogative writ of habeas corpus. A copy of the earlier grounds of detention was also one of the docu-

ments furnished to the detenu which confirms the fact that the detaining authority has considered the earlier grounds of detention alongwith other documents for drawing his requisite subjective satisfaction for passing the detention order. The order of detention is vitiated on that ground, and is therefore liable to be set aside. [58F. G; 59F-G] & ORIGINAL JURISDICTION: Writ Petition (Criminal) No. of 1989.

(Under Article 32 of the Constitution of India.) V.V. Vaze, M.K. Pandit and P.H. Parekh for the Petitioner. P.S. Poti, M.N. Shroff and Mrs. H. Wahi for the Respondents.

The Judgment of the Court was delivered by S. RATNAVEL PANDIAN, J. This petition under Article of the Constitution of India is filed by the petitioner, the detenu herein, challenging the legality and validity of the order of detention dated 21.10.1988 passed by the detaining authority (the Commissioner of Police, Surat City) clamping upon the detenu the above said order of detention under Sub-section (2) of Section 3 of the Gujarat Prevention of Anti-social Activities Act, 1985 (hereinafter referred to as the 'Act') on the ground that he on consideration of the materials placed before him was satisfied that it was neces-

sary to make the said order with a view to preventing the detenu from acting in any manner prejudicial to the mainte-

nance of public order in the area of Nanpura Machhiwad falling under the jurisdiction of Athwa Lines Police Station-

tion, Surat City and directed the detenu to be detained in Sabarmati Central Prison, Ahmedabad under the conditions specified in the Gujarat Prevention of Anti-Social Activities

Order, 1985. In pursuance of the impugned order the detenu has been detained in the aforesaid prison. The second respondent, the State of Gujarat, approved the impugned order on 26.10.1988 and confirmed the same on 13.12.1988. The detenu submitted his representation dated 15.12.1988 which was received by the 1st respondent on 19.12.1988 on which date itself the same was rejected. The copy of the representation sent to the second respondent was rejected on 21.12.1988. It is stated in the grounds of detention that the detenu was illegally keeping in possession the country liquor and openly selling the same at the corner of Nanpura, Machhiwad, Masjid Wali Gali, Bhandariwad and conducting a den (Adda)

a) and that he had been arrested in 1988 for offences under the Bombay Prohibition Act in respect of which number of cases were registered which cases are still pending trial as disclosed in Annexure I. It is further stated that the detenu had engaged 10 persons whose names are given in paragraph 2 of the grounds of detention, to accelerate his bootlegging activities and those hired persons who were conducting den (Adda) under the instructions and guidance of the detenu had been arrested in 1988 in 19 different cases under the Bombay Prohibition Act from the detenu's adda during police raids of which 8 cases are pending trial and the remaining eleven are under investigation, the details of which are given in Annexure 11 attached to the grounds of detention. On the above materials and the statements of witnesses placed before him, the detaining authority had satisfied himself that the abovementioned bootlegging activities

of the detenu in a large scale in an organised manner were seriously detrimental to the public health and were likely to endanger public health and consequently passed this impugned order of detention. Hence this writ petition. Mr. V.V. Vaze, learned counsel appearing on behalf of the petitioner, detenu raised several contentions assailing the legality and validity of the order of detention one of which being that the detaining authority for drawing his requisite subjective satisfaction to clamp this order of detention upon the petitioner/detenu had taken into consid-

eration the previous grounds of detention which was the subject matter of Special Criminal Application No. 46 of 1987 before the High Court of Gujarat. Since we are inclined to dispose of this Writ Petition on this ground alone we are not traversing on other grounds. Admittedly, the Commissioner of Police, Surat City passed an Order of detention. Under Section 3(2) of the Act on 2.1.1987 in No. PCB/ PASA/I/ on the ground that between 1984 to 1986 there were 19 cases filed against the detenu under the Bombay Prohibition Act of which 16 were pending in Court and three others under inve-

stigation when this previous order was passed. The petitioner filed Special Criminal Application No. 46 of 1987 before the High Court of Gujarat at Ahmedabad challenging the validity of the said order. The High Court by its judgment dated 3.

8. 1987 quashed the earlier impugned order of detention and directed the release of the detenu forthwith. A copy of the High court order is annexed to the Writ Petition as Annexure 'D'. The detaining authority in this case had made a reference-

ence about the previous order in the impugned grounds of detention which reads thus:

"You are associated with bootlegging activity for long time, therefore, under order number dated 2.1.87 you were ordered to be detained under PASA and were kept in Baroda Central Jail. But you filed a petition against this order of detention-

tion in the High Court by Special Criminal Misc. Application No. 46/1987, After this petition was heard on 3.8.87, the Hon'ble High Court quashed the detention order and released you from detention. The proceedings taken against you have had no effect on you and after you were released from the detention, you have continued your activity."

The detenu, presumably based on the above statement, has stated in his writ petition that the present order of detention-

tion is clamped upon him since the earlier order passed on 2.1. 1987 had been quashed and set aside. The detaining authority in attempting to reply to the allegations made in paragraph no. 6 of the Writ Petition, wherein it is averred "The petitioner states that in some of the cases, the petitioner is acquitted and in none of the cases the petitioner is convicted till today", has made the following statement in paragraph 9 of his counter:

"It is submitted that the present detaining authority took into consideration the previous grounds of detention also to establish that the petitioner was engaged in bootlegging activities since long."

Now on this above statement it has been strenuously urged that since the detaining authority for drawing his subjective satisfaction had taken into consideration all the previous grounds of detention, namely, the earlier grounds of detention passed on 2.1. 1987 which had been subsequently quashed by the High Court the present detention order is liable to be set aside. According to learned counsel for the petitioner, once the previous grounds of detention had been quashed on its merit, then the detaining authority has no justification to take into consideration the earlier grounds of detention for passing this present detention order which should have been based only on the fresh grounds that were available subsequent to the quashing of the previous detention-

tion order. In support of this statement several decisions were relied on about which we make reference presently.

Firstly, the attention of the Court was drawn to Ghulam Nambi Zaki v. State of Jammu and Kashmir, [1970] 3 SCR wherein the State contended that the existence of fresh material is not a condition precedent for passing the second order and that in any event, the second order can be made

de when the first order is withdrawn or revoked for technical defect. Hidayatullah, C.J. speaking for the bench repelled that contention holding thus:

"The matter is not *res integra*. In a number of decisions of this Court to which reference will be made presently, this point has been considered and it has been held that once an order of revocation is made, another order detaining the same person can only be passed if some additional or fresh material is in possession of the State Government on which action can be based."

Then referring to the decision of the Constitution Bench in *Hadibandhu Das v. District Magistrate, Cuttack and Another*-

er, [1969] 1 SCR 227, the learned Chief Justice observed:

"In other words, the revocation or expiry of the previous order cannot lead *ipso facto* to a revival of the detention by the passing of a fresh order, because a person who is entitled to his liberty can only be put in a second jeopardy when there are additional or fresh facts against him."

Ultimately, he concluded:

"As pointed out in the *All India Reporter* case (*Hadibandhu Das* case) the inference is very compulsive that fresh facts must be found for new orders otherwise once the old detention-

tion comes to an end either by the expiry of the period of detention or by the cancellation of the order of detention, a fresh detention cannot be ordered."

In *Har Jas Dev Singh v. State of Punjab & Ors.*, [1974] SCR 281, this Court while examining a similar question with regard to validity of second detention order passed under Section 14(2) of the Maintenance of Internal Security Act (Act 26 of 1971) on identical grounds of the earlier order expressed its view:

"In these circumstances after the date on which the order ceases to be in force, unless fresh facts have arisen on the basis of which the Central Government or State Government or an Officer, as the case may be, was satisfied that such an order should be made, the subsequent detention on the very same grounds would be invalid."

The learned counsel also cited for the same principle of law, the decision in *Chotka Hembram v. State of West Bengal & Ors.*, [1974] 3 SCC 401. Those decisions mentioned albeit are cases wherein the first detention order ceased to be either by revocation or by expiry of the period of detention. What would be the legal implications and ultimate effect of quashing an order of detention by the High Court in exercise of its jurisdiction-

tion under Article 226 of the Constitution of India th is Court in Ibrahim Bachu Bafan v. State of Gujarat & Ors ., [1985] 2 SCC 25, made the following rule:

" When the High Court exercises jurisdiction und er Article 226 of the Constitution it does not make an order of revocation. By issuing a high prerogative writ like habeas corpus or certiorari it quashes the order impugned before it and by declaring the order to be void and striking down t he same it nullifies the order. The ultimate effect of cancel-

lation of an order by revocation and quashing of the same in exercise of the high prerogative jurisdiction vested in t he High Court may be the same but the manner in which t he situation is obtained is patently different and while o ne process is covered by Section 11(1) of the Act, the other is not known to the statute and is exercised by an authori ty beyond the purview of sub-section (1) of Section 11 of t he Act. It is, therefore, our clear opinion that in a situati on where the order of detention has been quashed by the Hi gh Court, sub-section (2) of Section 11 is not applicable a nd the detaining authority is not entitled to make ano th er order under Section 3 of the Act on the same grounds."

It emerges from the above authoritative judicial pr o-

nouncements that even if the order of detention comes to an end either by revocation or by expiry of the period of detention there must be fresh facts of passing a subsequen t order. A fortiori when a detention order is quashed by t he Court issuing a high prerogative writ like habeas corpus or certiorari the grounds of the said order should not be tak en into consideration either as a whole or in part even alon g-

with the fresh grounds of detention for drawing the requi-

sitive subjective satisfaction to pass a fresh order becau se once the Court strikes down an earlier order by issuing ru le it nullifies the entire order. In the present case, no doubt, the order of detenti on contains fresh facts. In addition to that the detaini ng authority has referred to the earlier detention order a nd the judgment of the High Court quashing it, presumably f or the purpose of showing that the detenu in spite of earli er detention order was continuing his bootlegging activitie s.

But what the detaining authority says clearly in paragraph of his affidavit in reply is that he took into considerati on the previous grounds of detention also for his conclusi on that the detenu 'was engaged in bootlegging activities sin ce long'. In other words the detaining authority has taken in to consideration the earlier grounds of detention which groun ds had been nullified by the High Court in Special Crimin al Application No. 46 of 1987 by issuing a prerogative writ of habeas corpus.

Under Section 15 of the Act, the expiry or revocation of an earlier detention order is not a bar for making a subs e-

quent detention order under Section 3 against the same person. The provi so annexed to that Section states that in a case where no fre sh facts have arisen after expiry or revocation of an earli er order made against such person the maximum period for whi ch such person may be detained in pursuance of the subseque nt detention order shall in no case extend beyond the period of 12 months from the date of detention under the earli er order. Chinnappa Reddy, J. in Abdul Latif Abdul Wahab Shei kh v. B.K. Jha and Another, [1987] 2 SCC 22 = 1987 2 SCR 2 speaking for the bench of this Court while dealing wi th Section 15 of the Act observed:

"It, therefore, becomes imperative to read down Section of the Gujarat Prevention of Anti-Social Activities Ac t, 1985 which provides for the making of successive orders of detention so as to bring it in conformity with Article 22(

4) of the Constitution. If there is to be a collision betwe en Article 22(4) of the Constitution and Section 15 of the Ac t, Section 15 has to yield. But by reading down the provisio n, the collision may be avoided and Section 15 may be su s-

tained."

Mr. Poti has sought to explain the statement of t he detaining authority made in his counter saying that t he earlier proceeding was considered only to a limited purpo se of taking note of the detenu's continued involvement of bootlegging activities; but the entire grounds of earli er detention as they were, were not considered. We are unab le to accept this explanation because the detaining authorit y, in the counter, in clear terms had expressed that he consi d-

ered the earlier grounds of detention also. Incidentally, it was brought to our notice that a copy of the earlier groun ds of detention was also one of the documents furnished to t he detenu in the present case which confirms the fact that t he detaining authority has considered the earlier grounds of detention along with other documents for drawing his requ i-

site subjective satisfaction for passing this impugn ed order. In other words, the earlier grounds of detenti on dated 2.1. 1987, quashed by the High Court was one of t he material documents considered by the detaining authority in drawing his subjective satisfaction. Therefore, we hold th at this order of detention is vitiated on the ground that t he detaining authority has taken into consideration the groun ds of earlier detention order alongwith other materials f or passing this impugned order. Hence, the order is liable to be set aside. Accordingly, we quash the detention order on this ground and direct that the detenu be set at liber ty forthwith if his detention is not required for any oth er case.

R.S.S. Petition allowed.