

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 16213 of 2023****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE A.Y. KOGJE****Sd/-****and****HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN****Sd/-**

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

SURESH S/O SANTOSHBHAI PAWAR THROUGH SANTOSH SAMBHAJI PAWAR
Versus
COMMISSIONER OF POLICE, SURAT CITY

Appearance:

MR MOHDDANISH M BAREJIA(10612) for the Petitioner(s) No. 1

MR YUVRAJ BRAHMBHATT, AGP for the Respondent(s) No. 2

GOVERNMENT PLEADER for the Respondent(s) No. 3

SERVED BY RPAD (R) for the Respondent(s) No. 1,2

CORAM: HONOURABLE MR. JUSTICE A.Y. KOGJE**and****HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN****Date : 03/01/2024****ORAL JUDGMENT****(PER : HONOURABLE MR. JUSTICE A.Y. KOGJE)**

1. This petition under Article 226 of the Constitution of India is filed for following relief:-

“(A) This Honourable Court may be pleased to issue a writ of Habeas Corpus or writ of certiorari or any

other appropriate writ, order and/or directions quashing and setting aside the detention order dated 26/08/2023 passed by the Respondent No.1 (Ann.:A to this petition) in PCB/DTN/PASA/725/2023 and further be pleased to direct the respondents to release the petitioner detenu from the detention forthwith;"

1.1 Thus, essentially, the challenge is to the order of detention dated 26.08.2023 passed by the Police Commissioner, Surat, respondent No.1 herein, by which the petitioner has been detained as a "bootlegger" based on solitary offence registered against him, the details of which are as under:-

Sr. No.	Name of Police Station	CR No. and date	Sections	Date of bail order
1	DCB Police Station, Surat	C-11210015230087 of 2023 dated 15.06.2023	65(A)(E), 81, 83, 98(2) and 99 of the Prohibition Act	24.08.2023

2. Learned advocate for the detenu submits that the order of detention impugned in this petition deserves to be quashed and set aside on the ground of registration of the solitary offence under the Prohibition Act cannot bring the case of the detenu within the purview of definition under section 2(b) of the Act. Further, learned Advocate for the detenu submits 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. Further, except statement of witnesses, registration of above FIR/s and Panchnama drawn in pursuance of

the investigation, no other relevant and cogent material is on record connecting alleged anti-social activity of the detenue with breach of public order.

3. Learned advocate for the petitioner further submits 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 solitary criminal case had affected even tempo of the society causing threat to the very existence of normal and routine life of people at large.

3.2 Learned advocate for the petitioner has relied upon the decision of the Apex Court in case of ***Pesala Nookaraju Vs. Government of Andhra Pradesh & Ors.***, reported in **(2023), 14 SCC, 641**.

4. Learned AGP for the respondent State supported the detention order passed by the authority and submitted that sufficient material and evidence was 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(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.

4.1 Learned AGP submitted that the impugned order of detention passed is in consonance with the guidelines framed

pursuant to the various directions issued by this Court and as per Clause-27, the order of detention does contain the individual role of the detainee and therefore also, the order of detention being in consonance with the guidelines framed under the direction of this Court, the detention is required to be upheld.

5. Having heard learned advocates for the parties and considering the facts and circumstances of the case, it appears that the State could have resorted to ordinary law by filing cancellation of bail application and that would have been sufficient to prevent the petitioner from indulging in further offence, particularly when the petitioner has been granted bail in connection with the offence on which the detaining authority has relied upon to arrive at a subjective satisfaction.

6. 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 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 as have been levelled against the detainee cannot be said to be germane for the purpose of bringing the detainee within the 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 and menace to the Society so as to disturb the

whole tempo of the society and that all social apparatus is in peril disturbing public order at the instance of such person, the act alleged cannot be sufficient to attract detention law. Except general statements, there is no material on record which shows that the detinue is acting in such a manner, which is dangerous to the public order. The order of the detaining authority does not reflect application of mind to the aspect that cancellation of bail can be an effective alternate to detention.

7. The State has chosen not to file counter affidavit/reply so as to disturb the action invoking provisions of the PASA Act. No need to say when a citizen is deprived of his personal liberty by keeping him behind the bar under the provisions of the PASA law without trial by the competent court, the detaining authority is required under the law to justify its action and in absence of reply/counter affidavit, the averments made in the petition remain unchallenged

8. In the decision of the Hon'ble Supreme Court in the case of ***Shaik Nazeen Vs. State of Telanga and Ors.*** rendered in Criminal Appeal No.908 of 2022 (@ SLP (Crl.) No.4260 of 2022 dated 22.06.2022, the Hon'ble Supreme Court has made following observations in para 17:-

“17. In any case, the State is not without a remedy, as in case the detinue 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.”

9. The Court relies upon the observations made by this Court in a reported judgment in the case of **Sohanlal Surjaram Visnoi**, reported in **2004 (2) GLR 1051**, wherein in para-7 the Court has observed as under:-

“7. At the outset, it may be noted that the contention advanced on behalf of the petitioners that no preventive detention order can be recorded in a solitary incident or instance or offence cannot be accepted in toto. The detaining authority can pass the order of detention even on the basis of a solitary incident or instance, provided there is justifiable subjective satisfaction on objective material and consideration that such incident or offence is likely to create disturbance of "public order", and which needs to be controlled and curbed preventively. There must be convincing reasons and justifiable material that the impugned activity or action is likely to cause adverse and prejudicial impact on the maintenance of "public order". Emphasis is laid on "public order" and not "law and order" which belongs to the realm of general law. After having taken into account the statutory definitions of the persons branded as "bootlegger" or "dangerous person" under the PASA Act, and detailed factual matrix of each case, the solitary incident or instance in question in these petitions has not been shown or spelt out from the record as affecting the "public order" or likely to create public disturbance or prejudicial or adverse to the maintenance of "public order", and therefore, the continued detention of the detenu in each case has not been shown to be justifiable, and in this context, in exercise of the powers under Article 226 of the Constitution of India, this Court is left with no alternative in this group of petitions, but to quash and set aside the orders in each matter, with the result that all the petitions are required to be allowed while

quashing and setting aside the detention orders passed against detainee in this group. The view which this Court has taken in this group of petitions is also reinforced by the observations and directions contained in the latest decision of the Honorable Supreme Court in the case of Panda Markup Dharma alias Hairband Markup Dharma Hardened Markup Dharma v. State of Tamil and others, reported in (2003)2 CC 313."

10. In case of ***Raju Manubhai Lal*** ***Vs. State of Gujarat & Ors.*** in **Special Civil Application No.2322 of 2019** vide order dated 03.05.2019, this Court in para-8 has observed that mere selling or possession any Indian made foreign liquor cannot cause or likely to cause any harm, danger, alarm or feeling of insecurity among st general public or any section thereof or a grave or widespread danger to life, property or public health.

11. Separate Bench of this Court, in case of ***Vasava Umeshbhai Laxmanbhai Vs. State of Gujarat & Ors.*** in para-7 has held as under:-

"7. Having heard the learned counsel for the parties ° and having gone through the grounds of detention, ; in my opinion, the detaining authority has failed to substantiate that the alleged antisocial activities of the petitioner-detente adversely affect or are likely to affect adversely the maintenance of public order. Just because a case has been registered against the petitioner: detainee under the Prohibition Act, by itself, . does 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 much less public health. It . may be that the petitioner-detente is a "bootlegger' within the meaning of Section 2(b) of the PASA Act, but

merely because he is a 'bootlegger', he cannot be preventively detained under the provisions of the PASA Act unless, as laid down in sub-section (4) of Section 3 of the PASA Act, his activities as a 'bootlegger' affect adversely or are likely to affect adversely the maintenance of public order."

12. The Court has taken into consideration the submissions made by the learned advocate on the ground that though the subjective satisfaction is based on the findings given by the detaining authority that consumption of liquor is causing harm to the public health and thereby breach of public order. However, there is no material to substantiate such finding. The Apex Court in case of ***Pesala Nookaraju (supra)*** wherein in Para-66, 67 and 71 dealing with very aspect, the Apex Court has held as under:

"66. Just because four cases have been registered against the appellant detenu under the Prohibition Act, by itself, may not have any bearing on the maintenance of public order. The detenu may be punished for the offences which have been registered against him. To put it in other words, if the detention is on the ground that the detenu is indulging in manufacture or transport or sale of liquor then that by itself would not become an activity prejudicial to the maintenance of public order because the same can be effectively dealt with under the provisions of the Prohibition Act but if the liquor sold by the detenu is dangerous to public health then under the Act 1986, it becomes an activity prejudicial to the maintenance of public order, therefore, it becomes necessary for the detaining authority to be satisfied on material available to it that the liquor dealt with by the detenu is liquor which is dangerous to public health to attract the provisions of the 1986 Act and if the detaining authority is satisfied that such material exists either in the form of report of the Chemical Examiner or otherwise, copy of such material should also be given to the detenu to afford

him an opportunity to make an effective representation.

67. It is relevant to note that the Explanation to Section 2(a) of the Act 1986 referred to above in para 11 incorporates a legal fiction as to the adverse effect on public order. In the case of **Harpreet Kaur (supra)**, the connotation of the Explanation was elucidated as under:-

“28. The explanation to Section 2(a) (supra) brings into effect a legal fiction as to the adverse effect on 'public order'. It provides that if any of the activities of a person referred to in clauses (i)-(iii) of Section 2(a) directly or indirectly causes or is calculated to cause any harm, danger or alarm or a feeling of insecurity among the general public or any section thereof or a grave or a widespread danger to life or public health, then public order shall be deemed to have been adversely affected. Thus, it is the fall-out of the activity of the "bootlegger" which determines whether 'public order' has been affected within the meaning of this deeming provision or not. This legislative intent has to be kept in view while dealing with detentions under the Act.”

XXXXXXXX

71. The learned counsel appearing for the appellant has also placed strong reliance on the decision of this Court in **Piyush Kantilal Mehta (supra)**. In that case, the allegations in the grounds of detention were that the detenu was a prohibition boot-legger; that he was indulging in the sale of foreign liquor and that he and his associates indulged in use of force and violence. In that case, the detenu was alleged to have been caught red-handed possessing bottles of English wine with foreign marks and on the second occasion, he was caught while transporting 296 bottles of foreign liquor in an Ambassador car. While dealing with that case, this Court observed as follows:-

“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.”

13. 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(2) of the Act.

14. In the result, the present petition is hereby allowed and the impugned order of detention dated 25.08.2023 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.

15. Rule is made absolute accordingly.

Direct service is permitted.

Sd/-
(A.Y. KOGJE, J)

Sd/-
(RAJENDRA M. SAREEN,J)

SHITOLE