

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 17135 of 2023****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE A.Y. KOGJE****Sd/-****and****HONOURABLE MR. JUSTICE SAMIR J. DAVE****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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RAJUBHAI PREMABHAI PARMAR**Versus****STATE OF GUJARAT & ORS.**

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Appearance:**MR HITESH P PRAJAPATI(12819) for the Petitioner(s) No. 1****MR.KISHAN PRAJAPATI(7074) for the Petitioner(s) No. 1****MR PRANAV DHAGAT, AGP for the Respondent(s) No. 1****GOVERNMENT PLEADER for the Respondent(s) No. 3****RULE SERVED BY DS for the Respondent(s) No. 2****SERVED BY RPAD (R) for the Respondent(s) No. 1**

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CORAM: HONOURABLE MR. JUSTICE A.Y. KOGJE**and****HONOURABLE MR. JUSTICE SAMIR J. DAVE****Date : 15/02/2024****ORAL JUDGMENT****(PER : HONOURABLE MR. JUSTICE A.Y. KOGJE)**

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

"(a) This Hon'ble Court may be pleased to allow this Special Civil Application;

(b) That This Hon'ble Court may be pleased to allow this present Special Civil Application by issuing appropriate writ of habeas corpus or any other appropriate writ, order or direction quashing and setting aside the impugned order of detention dated 15.09.2023 passed by respondent no.2;

(c) Pending admission hearing and final disposal of this petition, this Hon'ble Court may be pleased to grant stay as to the further implementation, execution and operation of the impugned order of detention dated 15.09.2023 passed by the respondent no.2; "

2. The challenge is to the order of detention dated **15.09.2023** passed by the respondent– detaining authority viz. the Commissioner of Police, Vadodara City, in exercise of powers conferred under section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (for short "the Act") by detaining the petitioner – detenu as defined under section 2(c) of the Act.

3. Learned advocate for the petitioner has challenged the

order of detention on the ground that the detention order is passed on the basis of a solitary offence registered against the petitioner and though reference is made to the two previous offences from 2022 to 2023, no relevant material in connection of those offences have been placed on record of the detaining authority on which the subjective satisfaction is arrived at.

4. Learned advocate for the petitioner has submitted that the petitioner has been enlarged on regular bail and immediately on the next day, the petitioner has been detained and therefore, the detaining authority did not have sufficient time to apply its mind and arrived at the subjective satisfaction to detain the petitioner.
5. Learned advocate has lastly submitted that though the detaining authority has concluded that dealing with the prohibited liquor is dangerous to the public health. However, the grounds of detention and the documents annexed with the grounds of detention does not consist of any material, which would establish that consumption of the liquor in question would result in hazard to public health.
6. As against that, learned AGP has objected to grant of the petition by submitting that the petitioner has been arraigned earlier also as an accused in similar offences, where FIRs have been registered against him in various police stations of Vadodara city and that the quantity of prohibited liquor, which was recovered in the offence is of

very huge quantity. It is submitted that ordinarily also the consumption of liquor is hazardous to health and therefore, a judicial notice to be taken to this aspect that liquor, which has been seized during the investigation of the aforesaid offence, where the petitioner is involved would necessarily result in the adversely affecting the public health who are consuming such liquor within the territory of city Vadodara.

7. Having considered the rival submissions of the parties and having perused the documents on record, the petitioner has been detained as 'bootlegger' by the impugned order of detention dated 15.09.2023 passed by the Commissioner of Police, Vadodara City. The grounds of detention would indicate that the detaining authority has relied upon one offence registered with Varasiya Police Station on 26.08.2023 and in connection with this offence, the petitioner was enlarged on regular bail by the Court of competent jurisdiction by order dated 14.09.2023. Immediately on the second day on 15.09.2023, the petitioner has been detained.

It is pertinent to observe that the petitioner who was according to the detaining authority was involved in two previous offences, there is no material placed on record to indicate that the sponsoring authority at any stage had objected to the grant of regular bail when the petitioner was bailed out in the present offence, nor is there any material to indicate that the detaining authority had

applied its mind to a lesser drastic remedy of resorting to cancellation of bail granted to the petitioner on account of his continuous indulgence in the similar offence. In absence of application of mind to the relevant factor, the subjective satisfaction of the detaining authority would stand vitiated.

8. The Court has taken into consideration the fact that the petitioner has been enlarged by the Court of proper jurisdiction where the option of alternative remedy of cancellation of bail was available to the sponsoring authority, which the sponsoring authority has not resorted to and hence, as is held in recent decision of the Hon'ble Supreme Court in the case of **Shaik Nazeen v/s. State of Telanga and Ors** reported in **(2023) 9 SCC 633**, 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 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."

9. The Court has taken into consideration the submissions

made by learned advocate with regard to their being no material on record connecting the consumption of the prohibited liquor, in which the petitioner is involved leading to any hazard to public health. The detaining authority has to have any material on record to arrive at a conclusion that the prohibited liquor, in which the petitioner has been involved, has been consumed in general public leading to any hazard and thereby affecting the public life and consequent public order. In absence of such record the subjective satisfaction of the detaining authority will stand vitiated.

10. The Hon'ble Apex Court in the case of **Pesala Nookaraja Vs. Government of Andhra Pradesh & Ors.**, reported in **(2023) 14 SCC 641**, has held as under in Para No.66, and 67:

"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."

11. The Court has also taken in to consideration the fact that the petitioner was arrested on 26.08.2023 and released on bail on 14.09.2023 and thereafter, the order of detention was passed on 15.09.2023 and therefore, the order of detention is passed on the very next day of the order of bail.
12. The Apex Court in the case of **Kalidas C. Kahar Vs. State of Gujarat and Ors.**, reported in **1989 Supple. II SCC 155**, has held that the detaining authority has to undertake a meaningful exercise and apply the mind to the documents placed along with the sponsoring proposal and then come to the conclusion by subjectively satisfying itself. Looking to objectively to the documents on record and conclude that the detention is the only option available to the petitioner, this exercise is not evident from either from the grounds of detention, the documents accompanying order of detention or any affidavit of the

detaining authority in this regards.

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 **15.09.2023** 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/-
(SAMIR J. DAVE, J)

MEHUL B. TUVAR