

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 18956 of 2021**

FOR APPROVAL AND SIGNATURE:

HONOURABLE DR. JUSTICE A. P. THAKER

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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MOHSINKHAN @ MUSO MURAJKHAN PATHAN THROUGH HIS WIFE
ASIANABANU MOHSINKHAN PATHAN
Versus
DIRECTORATE GENERAL OF POLICE

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Appearance:

MR VICKY B MEHTA(5422) for the Petitioner(s) No. 1
MR ADITYA JADEJA, AGP for the Respondent(s) No. 3
RULE SERVED for the Respondent(s) No. 1,2

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CORAM: HONOURABLE DR. JUSTICE A. P. THAKER

Date : 29/03/2022

ORAL JUDGMENT

1. Draft amendment is allowed. To be carried out forthwith.
The present petition is directed against order of detention dated 29.11.2021 passed by the respondent - detaining authority in exercise of powers conferred under section 3 (2) of the Prevention of Illicit Trafficking in Narcotic Drugs and Psychotropic Substances Act, 1988 (for short "NDPS Act") by detaining the petitioner - detenu under the powers conferred

under Section 3(1) of the NDPS Act.

2. Heard learned advocate for the detenu and learned AGP Mr. Aditya Jadeja for the respondent State and perused the materials placed on record.

3. Learned advocate for the detenu has vehemently submitted that the that the entire exercise undertaken by the detaining authority is merit less and since there is no strict compliance with the provisions of the act in question, the detention order itself is illegal ab initio. He has prayed to allow the petition. He has relied upon the order of the Division Bench of this Court dated 31.08.2020 passed in Letters Patent Appeal No.454 of 2020 in Special Civil Application No.8091 of 2020 in case of Vijay alias Ballu Bharatbhai Ramanbhai Patani (Kaptiywala) V.s State of Gujarat. He has relied upon the following decisions:-

(1) In case of **Rajesh Nagoraj Parate Through Wife Lalitaben Rajesh Parate Vs. State of Gujarat** reported in **2020 (0) AIJEL-HC 243036**.

(2) In case of **Banka Sneha Sheela Vs. State of Telangana** reported in **[2021] 0 AIR(SC) 3656**.

4. Per contra, learned **AGP Mr.Aditya Jadeja** has supported the impugned order passed by the authority and submitted that the offence against the detenu is under the NDPS Act and considering the effect of the Narcotic Drugs, the authority has properly passed the impugned order and which deserves to be upheld by this Court.

5. In case of **Banka Sneha Sheela (Supra)** the Apex Court in para 14 has observed as under:-

“14. There can be no doubt that what is alleged in the five FIRs pertain to the realm of ‘law and order’ in that various acts of cheating are ascribed to the Detenu which are punishable under the three sections of the Indian Penal Code set out in the five FIRs. A close reading of the Detention Order would make it clear that the reason for the said Order is not any apprehension of widespread public harm, danger or alarm but is only because the Detenu was successful in obtaining anticipatory bail/bail from the Courts in each of the five FIRs. If a person is granted anticipatory bail/bail wrongly, there are well-known remedies in the ordinary law to take care of the situation. The State can always appeal against the bail order granted and/or apply for cancellation of bail. The mere successful obtaining of anticipatory bail/bail orders being the real ground for detaining the Detenu, there can be no doubt that the harm, danger or alarm or feeling of security among the general public spoken of in Section 2(a) of the Telangana Prevention of Dangerous Activities Act is make believe and totally absent in the facts of the present case.”

6. At this juncture, it is worthwhile to refer to the provisions of Prevention of Illicit Trafficking in NDPS Act, 1988 especially Section 2(e) which reads as under:

“(e) “illicit traffic”, in relation to narcotic drugs and psychotropic substances, means—

(i) cultivating any coca plant or gathering any portion of coca plant;

(ii) cultivating the opium poppy or any cannabis plant;

(iii) engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import inter-State, export inter-State, import into India, export from India or transshipment, of narcotic drugs or psychotropic substances;

(iv) dealing in any activities in narcotic drugs or

psychotropic substances other than those provided in sub-clauses (i) to (iii); or

(v) handling or letting any premises for the carrying on of any of the activities referred to in sub-clauses (i) to (iv), other than those permitted under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), or any rule or order made, or any condition of any licence, term or authorisation issued, thereunder and includes—

(1) financing, directly or indirectly, any of the aforementioned activities;

(2) abetting or conspiring in the furtherance of or in support of doing any of the aforementioned activities; and

(3) harbouring persons engaged in any of the aforementioned activities;”

Under Section 3 of the Illicit Trafficking in NDPS Act, 1988, powers have been vested to the Central Government and State Government or any officer of the State Government not below the rank of a Joint Secretary to that Government and specially empowered for that purposes by the Central Government or not below the rank of Secretary of the State Government. Under Sub-section 2 of Section 3, if any order is passed by the State Government or by its officer then the State Government shall have to, within 10 days, forward the report to the Central Government in this respect. There is also provisions of constitution of any advisory board under Section 9 thereof. However, in the present case, *prima facie* doubtful as to the involvement of the detenu which may fall under the definition of Illicit Trafficking in NDPS Act under Section 2(e).

7. Having heard learned advocates for the parties and considering the facts and circumstances of the case, it appears that 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 detenu cannot be said to be germane for the purpose of bringing the detenu within the meaning of section 3(1) 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, it cannot be said that the detenu is a person within the meaning of section 3(1) of the Act. Except general statements, there is no material on record which shows that the detenu is acting in such a manner, which is dangerous to the public order. In this connection, it will be fruitful to refer to a decision of the Supreme Court in **Pushker Mukherjee v/s. State of West Bengal** [AIR 1970 SC 852], where the distinction between 'law and order' and 'public order' has been clearly laid down. The Court observed as follows :

“Does the expression "public order" take in every kind of infraction of order or only some categories thereof ? It is manifest that every act of assault or injury to specific persons does not lead to public disorder. When two people quarrel and fight and assault each other inside a house or in a street, it may be said that there is disorder but not public disorder. Such cases are dealt with under the powers vested in the executive authorities under the provisions of ordinary criminal law but the culprits cannot be detained on the ground that they were disturbing public order. The contravention of any law always affects order but before it can be said to affect public order, it must affect the community or the public at large. In this connection we must draw a line of demarcation between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily

injure specific individuals and only in a secondary sense public interest. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Preventive Detention Act but a disturbance which will affect public order comes within the scope of the Act.”

8. In the case of **Rekha Versus State of Tamilnadu** reported in **(2011) 5 SCC 244**, the Hon’ble Supreme Court has observed in paragraph No.30 as under:-

“30. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is : Was the ordinary law of the land sufficient to deal with the situation ? If the answer is in the affirmative, the detention order will be illegal. In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Indian Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in question was illegal.”

9. In view of above, I am inclined to allow this petition, because simplicitor registration of FIR 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. In the result, the present petition is hereby allowed and the impugned order of detention dated 29.11.2021 passed by the respondent - detaining authority is hereby quashed and set aside. The detenu is ordered to be set at liberty forthwith if not required in any other case. Direct service is permitted.

Sd/-
(DR. A. P. THAKER, J)

URIL RANA