State of Maharashtra and Another

Vs

Smt. Sushila Mafatlal Shah and Others

Criminal Appeal No. 480 of 1988

(A. P. Sen, S. Natarajan JJ)

07.09.1988

JUDGMENT

NATARAJAN, J. –

1. Leave granted.

2. Being more concerned with the law adumbrated by the High Court of Bombay rather than with the quashing of the order of detention passed against a detenu by name Bhadresh Mafatlal Shah, son of respondent 1 herein, under Section 3 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1972 (hereinafter called 'the COFEPOSA Act') the State of Maharashtra has filed this appeal by special leave against the order of the High Court in Criminal Writ Petition No. 356 of 1987. The High Court has quashed the order of detention on the ground that Shri D. N. Capoor, Officer on Special Duty and Ex-officio Secretary to the Government of Maharashtra, Home Department (hereinafter referred to as 'D. N. Capoor' only) who had passed the order of detention had only communicated to the detenu that "he had a right to make a representation to the State Government as also to the Government of India against the order of detention" and had failed to communicate that "he had also a right to make a representation to the detaining authority himself" the constitutional safeguards and imperatives under Article 22 (5) had been violated inasmuch as the detenu had been deprived of his right to make a representation to the detaining authority himself before availing of his right to make further representation to the State Government and the central Government. The principal challenge in this appeal is to the proposition of law enunciated by the High Court.

3. We may now have a look at the facts. On August 21, 1986 the detenu was caught in the act of transporting ten gold biscuits of foreign origin. On October 23, 1986 the Collector of Central Excise and Customs sent a proposal to the State Government for action being taken against the detenu under the COFEPOSA Act and on November 17, 1986 he furnished, in response to government's query, some additional information about the detenu. On February 2, 1987 an order of detention under Section 3 (1) of the COFEPOSA Act was passed by D. N. Capoor in exercise of the powers specially conferred upon him by the Government of Maharashtra for the purpose of section 3 of the Act. In the grounds of detention the detenu was informed that he had a right to make a representation to the State Government as also to the Government of India against the order of detention. On February 15, 1987 the order of detention as well as the grounds of detention were served on the detenu.

4. On March 14, 1987 the detenu preferred a representation addressed to D. N. Capoor and it was forwarded by the Superintendent, Central Prison, Nasik with a covering letter dated March 17, 1987

to the government. The government after calling for remarks from the Assistant Collector of Customs and Central Excise, Pune rejected the representation of the detenu by order dated April 3, 1987 and the said order was communicated to the detenu on April 4, 1987 through the Superintendent of the Central Prison, Nasik.

5. In the meanwhile on March 12, 1987 the case of the detenu was referred to the advisory Board. On May 8, 1987 the Advisory Board considered the detenu's case and sent a report justifying the detention and thereafter the State Government confirmed the detenu's detention.

6. In the month of March 1987 the first respondent being the detenu's mother, filed a petition under Article 226 of the constitution before the High Court of Bombay for a writ being issued for the order of detention being quashed. Though several grounds were set out in the writ petition, they were all given up and the counsel appearing on behalf of the detenu confined the challenge to the validity of the detention order on one ground alone. The ground of attack was to the following effect :

> [A] As the order of detention had been passed by D. N. Capoor in his capacity as a person specially empowered by the Government of Maharashtra to issue the order of detention under Section 3 (1) of the COFEPOSA Act, the detenu had a right to make a representation to him in the first instance and only thereafter to make representation to the State Government or to the Central Government if need be. In the grounds of detention the detenu had only been informed that he had a right to make a representation to the State Government as also to the Government of India against the order of detention, but he had not been communicated that he had also a right to make a representation to the detaining authority i. e. D. N. Capoor himself. Failure to notify the detenu of his right to make a representation to the detaining authority violated the constitutional provisions of Article 22 (5) inasmuch as the detenu had been deprived of his right to make a second representation to the State Government in the event of the detaining authority D. N. Capoor rejecting his representation.

7. This contention found acceptance with the High Court and the High court made the rule absolute and quashed the order of detention. The challenge in this appeal is not only to the release of the detenu but to the principle of law formulated by the High Court to set aside the order of detention.

8. Before proceeding further we may state for purposes of record, that an attempt was made by the State before the High Court that D. N. Capoor had not passed the order of detention solely in exercise of his powers as a specially empowered officer of the State to make an order under Section 3 (1) but also as an officer authorised to act on behalf of the government under the Standing Rules framed under the Rules of Business of the Government of Maharashtra. The High Court declined to accept this contention as there was no proof that D. N. Capoor had been empowered under the Standing Rules to act on behalf of the government and furthermore the Central Government counsel had also conceded that no such authorisation had been made in favour of D. N. Capoor under the Rules of Business. No attempt was made before us to dispute this finding of the High Court and therefore the settled position is that the detention order had been passed by D. N. Capoor solely in his capacity as an officer specially empowered by the government to exercise powers under Section 3 (1) of the COFEPOSA Act and not as one empowered to act on behalf of the government under the Rules of Business. Therefore what falls for consideration in the appeal is whether by reason of D. N. Capoor having passed the order of detention only in exercise of his special empowerment to act under Section 3 (1) of the Act and not in exercise of any right given to him under the Rules of

Business of the government, he was under a constitutional obligation to communicate to and afford opportunity to the detenu to make a representation to himself in the first instance before the detenu availed of his right to make representations to the State Government and the Central Government.

9. It was urged by Dr. Chitale on behalf of the State, that neither Article 22 (5) of the Constitution nor the provisions of the COFEPOSA Act afford scope for any differentiation being made between an order of detention passed by a specially empowered officer of the State Government or the Central Government, as the case may be, and an order of detention passed by the State Government or the Central Government itself, as the case may be and for holding that if an order of detention falls under the former category, the Constitution obligates a different kind of procedure to be followed in the matter of affording opportunity to the detenu to make his representations against the order of detention. He also stated that the theory that a detenu had a right to have his representation considered by the very same officer who had passed the order of detention has been exploded in Kavita v. State of Maharashtra. (1981) 3 SCC 558 : 1981 SCC (Cri) 743 : (1982) 1 SCR 138] and Smt. Masuma v. State of Maharashtra (1981) 3 SCC 566 : 1981 SCC (Cri) 750 : (1982) 1 SCR 288) and therefore the High court was not right in holding that the detenu had such a right. He also urged that if the view taken by the High court was not corrected it would lead to several anomalies and even to the defeasance of the COFEPOSA Act itself in certain situations.

10. Refuting Dr. Chitale's contentions, Mr. U. R. Lalit, learned counsel appearing for the detenu stated that unlike in other Preventive Detention Acts such as the National Security Act, etc., there is no provision in the COFEPOSA Act for confirmation by the government of an order of detention passed by an officer specially empowered under Section 3(1) of the COFEPOSA Act and as such the officer issuing an order of detention under the Act constitutes the detaining authority of the detenu and hence the detaining authority is under an obligation to afford opportunity to the detenu to make a representation to himself in the first instance before the detenu avails of his right to make representation to the State Government and then to the Central Government. Mr. Lalit relied upon the decisions of this Court in Santosh Anand v. Union of India [(1981) 2 SCC 420 : 1981 SCC (Cri) 456] and Pushpa v. Union of India [1980 Supp SCC 391 : 1979 SCC (Cri) 1015] for sustaining the judgment of the High Court. Yet another argument of Mr. Lalit was that since Article 22 (5) mandates the affording of opportunity at the earliest point of time to the detenu to make his representation, it must be interpretatively construed that the detaining authority is under an obligation to inform the detenu and afford him opportunity to make a representation to the very authority concerned and failure to give such an opportunity would amount to a denial to the detenu of his constitutional rights.

11. We shall now examine the divergent contentions advanced before us in greater detail. The questions that fall for consideration may broadly be enunciated as under :

> (1) Does an order passed by an officer of the State Government or the Central Government, specially empowered for the purposes of section 3(1) by the respective government, make him the detaining authority and not the State Government or the Central Government as the case may be, and obligate him to inform the detenu that he has a threefold opportunity to make his representations i.e. the first to himself and the other two to the State Government and the Central Government.
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> (2) Whether for the purposes of the Act, there is any difference between an order of detention passed by an officer of the State Government or the Central Government, solely in exercise of the powers conferred on him under Section 3 by the respective

> government and an order of detention passed by the State Government or the Central Government as the case may be through an officer who in addition to conferment of powers under Section 3 is also empowered under the Standing Rules framed under the Rules of Business of the government, to act on behalf of the government.
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> (3) Whether by reason of the fact that an order of detention is passed by an officer of the State Government or the Central Government specially empowered to act under Section 3 of the Act, a detenu acquires a constitutional right to have his representation first considered by the very officer issuing the detention order before making a representation to the State Government and the Central Government.

12. The Constitution, while recognising the necessity of laws to provide for preventive detention, has also prescribed the safeguards which should be observed for detaining persons without trial under laws enacted for placing persons under preventive detention. Article 22 sets out the imperatives that should be observed, but for our purpose, it is enough if clause (5) of the article is alone extracted. It is in the following terms :

> 22 (5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

Article 22 (5) has been construed as under in Abdul Karim v. State of W. B. [(1969) 1 SCC 433 : (1969) 3 SCR 479, 486-87] : (SCC pp. 438-39, para 8)

A person detained under a law of preventive detention has a right to obtain information as to the grounds of detention and has also the right to make a representation protesting against an order of preventive detention. Article 22 (5) does not expressly say to whom the representation is to be made and how the detaining authority is to deal with the representation. But it is necessarily implicit in the language of Article 22 (5) that the State Government to whom the representation is made should properly consider the representation as expeditiously as possible. The constitution of an Advisory Board under Section 8 of the Act does not relieve the State Government from the legal obligation to consider the representation of the detenu as soon as it is received by it. On behalf of the respondent it was said that there was no express language in Article 22 (5) requiring the State Government to consider the representation of the detenu. But it is a necessary implication of the language of Article 22 (5) that the State Government should consider the representation made by the detenu as soon as it is made, apply its mind to it and, if necessary, take appropriate action. In our opinion, the constitutional right to make a representation guaranteed by Article 22 (5) must be taken to include by necessary implication the constitutional right to a proper consideration of the representation by the authority to whom it is made.

13. Vide also John Martin v. State of West Bengal [(1975) 3 SCC 836, 839 : 1975 SCC (Cri) 255], Jayanarayan Sukul v. State of W. B. [(1970) 1 SCC 219 : (1970) 3 SCR 225] and Haradhan Saha v. State of W. B. [(1975) 3 SCC 198 : 1974 SCC (Cri) 816].

14. We can, therefore, conclude without further discussion that on the plain language of Article 22 (5) that Article 22 (5) does not provide material for the detenu to contend that in addition to his right to make a representation to the State Government and the Central Government, he has a

further right under Article 22 (5) to make a representation to D. N. Capoor himself as he had made the order of detention.

15. Turning now to the COFEPOSA Act, the relevant provisions to be noticed are Sections 2, 3, 8 and 11. In Section 2 which is the definition section, the words "appropriate government" and "detention order" have been defined as under :

> 2 (a) "appropriate Government" means, as respects a detention order made by the Central Government or by an officer of the Central Government or a person detained under such order, the Central Government, as as respects a detention order made by a State Government or by an officer of a State Government or a person detained under such order, the State Government;
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> (b) "detention order" means an order made under Section 3.

16. Section 3 is the section which confers powers on the Central Government and the State Government to make an order, either by itself or through one of its officers having the prescribed rank and specially empowered for the purpose of the section by the government to which he belongs for detaining a person under preventive custody without trial. The section reads as follows :

> 3 (1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that government, specially empowered for the purposes of this section by that government, or any officer of a State Government, not below the rank of a Secretary to that government, specially empowered for the purposes of this section by that government, may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from -
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> (i) smuggling goods, or
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> (ii) abetting the smuggling of goods, or
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> (iii) engaging in transporting or concealing or keeping smuggled goods, or
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> (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or
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> (v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,
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> it is necessary so to do, make an order directing that such person be detained.
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> (2) When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order.
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> (3) For the purposes of clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the

> detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention.

17. Section 8, which has been enacted to comply with the constitutional imperative in Article 22 (4) enjoins the Central Government and the State Government to constitute one or more Advisory Board and obligates the concerned government to refer to the Advisory Board the case of every detenu ordered to be detained by the said government within a period of five weeks from the date of detention. For our purposes it would suffice if clause (b) of Section 8 alone is quoted. The clause reads as follows :

> 8 (b) Save as otherwise provided in Section 9, the appropriate Government shall, within five weeks from the date of detention of a person under a detention order, make a reference in respect thereof to the Advisory Board constituted under clause (a) to enable the Advisory Board to make the report under sub-clause (a) of clause (4) of Article 22 of the Constitution.

18. Section 11 which is the last of the sections requiring notice pertains to the powers of revocation of the State Government or the Central Government as the case may be. The relevant clause is in the following terms :

> 11 (1) Without prejudice to the provisions of Section 21 of the General Clause Act, 1897, a detention order may, at any time, be revoked or modified -
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> (a) notwithstanding that the order has been made by an officer of a State Government, by that State Government or by the Central Government;
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> (b) notwithstanding that the order has been made by an officer of the Central Government or by a State Government, by the Central Government.
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> On a reading of the above said provisions, it may be seen that the power to detain a person under the Act has not only been conferred on the Central Government and the State Government but provision has also been made for the Central Government and the State Government to specially empower any of its officers holding the minimum prescribed rank to pass an order of detention under Section 3 (1).

19. We may now examine the scheme of the Act and have a closer look at the provisions set out above to find out whether the Act provides for a differentiation being made between detention orders made by the government and those made by specially empowered officers so as to confer an additional right of representation to detenus subjected to detention under detention orders falling in the later category. At the outset, it needs no saying, that any government, be it Central or State, has to function only through human agencies, viz. its officers and functionaries and that it cannot function by itself as an abstract body. Such being the case, even though Section 3 (1) provides for an order of detention being made either by the Central Government or one of its officers or the State Government or by one of its officers, an order of detention has necessarily to be made in either of the situations only by an officer of the concerned government. It is in acceptance of this position we have to see whether an order of detention, if passed by an officer of the government specially empowered under Section 3 (1) but not further empowered under Rules of Business of the

government to act would have the effect of making the concerned officer the detaining authority and not the concerned government itself. The answer to the question has to be necessarily in the negative for the following reasons. It has been specifically provided in Section 2 (a) that irrespective of whether an order of detention is made by the Central Government or one of its duly authorised officers, the "appropriate government" as regard the detention order and the detenu will be the Central Government only and likewise whether an order of detention is made by a State Government or one of its duly authorised officers the "appropriate government" would be the State Government only as regards the detention order and the detenu concerned. Secondly, irrespective of whether an order of detention is made by the State Government or by one of its officers, the obligation to forward, within ten days a report to the Central Government in respect of the order is cast only upon the State Government in respect of the order is cast only upon the State Government. Thirdly, in the matter of making a reference of the case of detenu to the Advisory Board under Section 8 (b), the duty of making the reference is cast only on the Central Government or the State Government as the case may be, and not on the officer of the Central Government or the State Government if he makes the order of detention in exercise of the powers conferred on him under Section 3 (1). Lastly, Section 11, which deals with the powers of revocation of the State Government and the Central Government provides that notwithstanding that an order of detention had been made by an officer of a State Government, the concerned State Government as well as the Central Government are entitled to revoke or modify the order of detention. Similarly, as per clause (b) notwithstanding that an order of detention has been made by an officer of the Central Government or by a State Government, the Central Government has been empowered to revoke or modify an order of detention. The section does not confer any power of revocation on an officer of the Central or State Government nor does it empower the Central or State Government to delegate the power of revocation to any of its officers. We may further add that even though Section 11 specifies that the powers of revocation conferred on the Central Government/State Government are without prejudice to the provisions of Section 21 of the General Clauses Act, this reservation will not entitle a specially empowered officer to revoke an order of detention passed by him because the order of the specially empowered officer acquires 'deemed approval' of the State or Central Government, as the case may be, automatically and by reason of such deemed approval the powers of revocation, even in terms of Section 21 of the General Clauses Act will fall only within the domain of the State Government and/or Central Government. In Sat Pal v. State of Punjab [(1982) 1 SCC 12, 17, para 8 : 1982 SCC (Cri) 46] the nature of the power of revocation conferred on the State and the Central Government came to be construed and the court held that" (t) he power of revocation conferred on the appropriate government under Section 11 of the Act is independent of the power of confirming or setting aside an order of detention under section 8 (f) ". It was further adumbrated as follows : (SCC p. 17, para 10)

The power under Section 11(1)(b) may either be exercised on information received by the Central Government from its own sources including that supplied by the State Government under Section 3(2), or, from the detenu in the form of a petition or representation. It is for the Central Government to decide whether or not, it should revoke the order of detention in a particular gives the power of revocation an overriding effect on the power of detention under Section 3.

These observations were made by the court when considering the question whether a detenu was entitled to concurrently make representations to the State Government and the Central Government against an order of detention passed by the State Government and whether in such circumstances the State Government could contend that the question of the Central Government considering the representation would arise only after the State Government had considered the representation and rejected it.

20. Consequently, the resultant position emerging from the Act is that even if an order of detention is made by a specially empowered officer of the Central Government or the State Government as the case may be, the said order will give rise to obligations to be fulfilled by the government to the same degree and extent to which it will stand obligated if the detention order had been made by the government itself. If that be so, then it is the concerned government that would constitute the detaining authority under the Act and not the officer concerned who made the order of detention, and it is to that government the detenu should be afforded opportunity to make representation against the detention order at the earlier opportunity, as envisaged under Article 22 (5) and not to the officer making the order of detention in order to provide the detenu an opportunity to make a further representation to the State Government and thereafter to the Central Government if the need arises for doing so. Though by reason of Section 3 (1) a specially empowered officer is entitled to pass an order of detention, his constitutional obligation is only to communicate expeditiously to the detenu the grounds of detention and also afford him opportunity to make representation to the appropriate governments against his detention. The only further duty to be performed thereafter is to place the representation made by the detenu before the concerned officer or the Minister empowered under the Rules of Business of the government to deal with such representation if the detenu addresses his representation to the officer himself.

21. We may point out that unlike in other Preventive Detention Acts such as the National Security Act, Maintenance of Internal Security Act, Preventive Detention Act etc. the COFEPOSA Act does not provide for any approval by the government of an order of detention passed by an officer specially empowered to make a detention order. In all the above said Acts, an order of detention passed by an officer specially empowered under the Acts, an order of detention passed by an officer specially empowered under the Act will cease to have force after the expiry of the number of days prescribed under the relevant Act unless the said order is approved by the government within that period. On the contrary, the COFEPOSA Act does not provide for the State Government or Central Government passing an order approving of a detention order made by one of its officers and therefore the detention order will continue to be operative for the full period of detention unless the order is revoked by the State Government or the Central Government or is quashed by the court for any reason. This is an additional factor to show that an order of detention passed by an officer has the same force and status as an order of detention passed by the government itself, although through the instrumentality of an officer empowered under Section 3.

22. It is also relevant to clarify at this juncture the position as regards an order of detention passed by an officer specially empowered under Section 3(1) vis-a-vis an order of detention passed by another officer who besides being empowered to act under Section 3(1) is also conferred authority under the Rules of Business of the government to act on behalf of the government. This difference in the conferment of powers upon the officers falling under the two categories cannot have any impact on the nature of the detention orders respectively passed by them because the common factor entitling the officers falling in the two classes is their empowerment under Section 3(1) of the Act. Without such empowerment an officer, even if he be empowered to act on behalf of the government under the Rules of Business, cannot pass an order of detention against anyone. If this position is realised, then it follows that there is no scope for contending that a detention order made by an officer empowered to act under the Act but not having additional empowerment under the Rules of Business of the government will not have the effect of making the government the detaining authority and instead would make the officer opportunity to the detenu to make a representation to himself before making his representation to the State Government and the Central Government. It is also relevant to note that the Act confers powers of revocation only upon the State Government and the Central Government and no provision is made for an officer making an order of detention to

exercise powers of revocation. When such is the case, any insistence e upon the officer making the detention order considering the representation of the detenu himself will be nothing but a futile and meaningless exercise. It will therefore, not be to the advantage of the detenu if it were to be held that in all cases where an order of detention is passed by an officer, the very officer should consider the representation in the first instance and only thereafter the detenu can approach the State Government and the Central Government. Moreover, if for argument's sake it is to be assumed that an officer passing an order of detention is under a duty to afford the detenu an opportunity to make a representation to himself in order to give relief to him, it may lead to the abuse of powers vested in the officer. The possibility of an officer misusing his powers and passing an order of detention against a person and then revoking it in order to seek profit for himself or for other ignoble means (sic ends), however remote it may be, cannot be ruled out. This aspect of the matter has been touched upon in Raj Kishore Prasad v. State of Bihar [(1982) 3 SCC 10 : 1982 SCC (Cri) 530] and the court which was dealing with the case of a detenu detained under the National Security Act has set out the need as to why a representation made by a detenu against an order of detention made by an officer of the government should be considered by the government itself and not by the officer concerned. The relevant passage reads as follows : (SCC pp. 13-14, para 6)

The contention is that constitutionally speaking a duty is cast on the detaining authority to consider the representation. That is of course true. But in view of the scheme of the Act, Parliament has now made it obligatory on the appropriate government to consider the representation. This is done presumably to provide an effective check by the appropriate government on the exercise of power by subordinate officers like the District Magistrate or the Commissioner of Police. Therefore, if the appropriate government has considered the representation of the detenu it cannot be said that there is contravention of Article 22 (5) or there is failure to consider the representation by the detaining authority.

We have already pointed out that unlike in other Preventive Detention Acts, the COFEPOSA Act does not provide for approval by the Central or State Government of an order of detention passed by one of its duly empowered officers and, consequently, an order of detention passed by an officer acquires 'deemed approval' by the government from the time of its issue and by reason of it, the government becomes the detaining authority and thereby constitutionally obligated to consider the representation made by the detenu with utmost expedition.

23. We shall now see whether there is any logic or rationale behind the contention that since D. N. Capoor had made the order of detention, the detenu was entitled, as of right to make a representation to the very same officer and have the same considered by him in the first instance before the detenu availed of his right to make a representation to the State Government and then if need be to the Central Government also. The fallacy and misconception underlying such a contention has been lucidly brought out in Kavita v. State of Maharashtra [(1981) 3 SCC 558 : 1981 SCC (Cri) 743 : (1982) 1 SCR 138] and again in Masuma v. State of Maharashtra [(1981) 3 SCC 566 : 1981 SCC (Cri) 750 : (1982) 1 SCR 288]. The relevant passage in Kavita case [(1981) 3 SCC 558 : 1981 SCC (Cri) 743 : (1982) 1 SCR 138] reads as under : (SCR p. 146 : SCC pp. 563-64, para 5)

It was suggested that it would have been more appropriate if the representation had been considered by the very individual who had exercised his mind at the initial stage of making the order of detention, namely the Secretary to the government, Shri Samant. There is no substance in this suggestion. The order of detention was not made by Shri Samant as an officer of the State Government specially empowered in that behalf but by the State Government itself acting through

the instrumentality of Shri Samant, a Secretary to government authorised to so act for the government under the Rules of Business. Government business can never get through if the same individual has to act for the government at every stage of a proceeding or transaction, however advantageous it may be to do so. Nor can it be said that it would be to the advantage of the detenu to have the matter dealt with by the same individual at all stages. It may perhaps be to the advantage of the detenu if fresh minds are brought to bear upon the question at different stages.

24. In Masuma case [(1981) 3 SCC 566 : 1981 SCC (Cri) 750 : (1982) 1 SCR 288 the same view has been expressed : (SCR p. 293 : SCC pp. 569-70, para 2)

It was the State Government which made the order of detention and not P. V. Nayak in his individual capacity. The representation made by the detenu against the order of detention was also therefore required to be considered by the State Government and either it could be disposed of by P. V. Nayak acting for the State Government under the earlier Standing Order dated July 18, 1980 or the Minister of State for Home could dispose it of under the later Standing Order dated July 18, 1980. Whether P. V. Nayak considered the representation and disposed it of or the Minister of State for Home did so would be immaterial, since both had authority to act for the State Government and whatever be the instrumentality, whether P. V. Nayak or the Minister of State for Home, it would be the State Government which would be considering and dealing with the representation. The only requirement of Article 22 (5) is that the representation of the detenu must be considered by the detaining authority which in the present case is the State Government and this requirement was clearly satisfied because when the Minister of State for home considered the representation and rejected it, he was acting for the State Government and the consideration and rejection of the representation was by the State Government. There is no requirement express or implied in any provision of the COFEPOSA that the same person who acts for the State Government in making the order of detention must also consider the representation of the detenu. In fact, as pointed by Chinnappa Reddy, J. in Smt. Kavita v. State of Maharashtra [(1981) 3 SCC 558 : 1981 SCC (Cri) 743 : (1982) 1 SCR 138]

Government business can never get through if the same individual has to act for the government in every case or proceeding or transaction, however, advantageous it may be to do so.

Moreover it would really be to the advantage of the detenu if his representation is not considered by the same individual but fresh mind is brought to bear upon it. We do not therefore see any constitutional or legal infirmity in the representation having been considered by the Minister of State for Home.

25. Mr. Lalit sought to distinguish these decisions by saying that in both the cases the Secretary to Government issuing the order of detention had the authority to act on behalf of the government under the Rules of Business but D. N. Capoor had no such authority. Since we have pointed out that the detention order passed by an officer having empowerment under the COFEPOSA Act to make an order of detention would also constitute an order of the government by reason of deemed approval, we find no merit in the contention of Mr. Lalit. The ratio in these cases would have equal application to cases of the nature we have on hand.

26. Leaving aside for a moment the absence of any basis in law or rationale for the contention that if an order of detention is made by a specially empowered officer of the government, the detenu acquires a right to have his representation considered in the first instance by the very same officer and if he is not afforded such an opportunity, it will amount to a deprivation of his constitutional

rights, let us view the matter from a practical aspect and on pragmatic considerations. If an order of detention is made by a specially empowered officer and if by the time the representation of the detenu is received by him, the officer is not there to consider the representation either by reason of his proceeding on leave or falling sick or transfer or retirement or being placed under suspension or death, then the inevitable consequence would be that the detenu has to be invariably set at liberty solely on the ground that his representation had not been considered by the very same officer who had passed the order of detention. Can we conceive of such a situation or permit such consequences to follow when it is common knowledge that the services of a government officer in the same post for any length of time can never be guaranteed. As already stated, the officer may fall sick or he may proceed on leave on other grounds or he may retire from service or he may be transferred elsewhere due to exigencies of service etc. If therefore, we are to sustain the view taken by the High Court, it would lead to the position that even if an order of detention is made on very valid and justifiable grounds by a specially empowered officer, the sustainment of the order would depend upon extraneous factors such as the officer not falling sick or going on leave or retiring from service or being transferred etc. etc. Surely, the Act and the Constitution do not envisage such situations. It is because of these factors Dr Chitale contended, and in our opinion very rightly, that if the view of the High Court is to be accepted it would often lead to a defeasance of the COFEPOSA Act itself and the purpose for which it was enacted.

27. We will now consider the decisions relied on by Mr Lalit for contending that the High Court has not blazed a new trail in holding that since D. N. Capoor was the detaining authority he should have communicated to and afforded opportunity to the detenu to make the representation to himself in the first instance while informing him that he had a right to make representations to the State Government and the Central Government. The first two cases Jayanarain v. State of W. B. [(1970) 1 SCC 219 : (1970) 3 SCR 225] and P. K. Chakrabarty v. State of W. B. [(1969) 3 SCC 400 : (1970) 1 SCR 543] were cases pertaining to detention orders passed under the Preventive Detention Act by District Magistrate empowered under the Act to pass the detention orders. In both the cases the detention orders were quashed on the ground that the government had failed to consider the detenu's representation expeditiously and instead had sought umbrage for its action on the ground it had awaited the opinion of the Advisory Board to which it had forwarded the detenu's representation. While upholding the detenu's contentions in each of the two cases it was observed in passing that "though Clause 5 (of Article 22) does not in express terms say so it follows from its provisions that it is the detaining authority which has to give to the detenu the earliest opportunity to make representation and to consider it when so made..... " Abdus Sukkur v. State of W. B. [(1972) 2 SCC 547 : 1972 SCC (Cri) 885 : (1973) 1 SCR 680] was a case relating to a detention order passed under the West Bengal (Prevention of Violent Activities) Act, by the District Magistrate, Burdwan. Since the State Government had failed to consider the representation made by the detenu for a period of 27 days without giving satisfactory explanation for the delay, the detention order was quashed. In so doing the court observed that (SCC p. 548, para 5)

(T) he requirement about the giving of the earliest opportunity to a detenu to make a representation against the detention order would plainly be reduced to a farce and empty formality if the authority concerned after giving such an opportunity pays no prompt attention to the representation which is submitted by the detenu as a result of that opportunity.

28. Vimalchand v. Pradhan [(1979) 4 SCC 401, 404, para 3 : 1980 SCC (Cri) 4 : (1979) 3 SCR 1007] was a case where an order of detention was passed under the COFEPOSA Act by the Secretary, Government of Maharashtra, Home Department in excise of the power conferred on him under Section 3 (1) of the Act. The detention order was quashed by this Court on the ground that the

government had failed to consider the detenu's representation expeditiously and instead had postponed consideration of the representation till the report of the Advisory Board was received. In the course of the judgment it was observed that the detenu must be afforded the earliest opportunity of making a representation would be rendered illusory "unless there is a corresponding obligation of the detaining authority to consider the representation of the detenu as early as possible".

29. In Tara Chand v. State of Rajasthan [(1981) 1 SCC 416 : 1981 SCC (Cri) 165 : AIR 1980 SC 2133] the grievance of the detenu detained under the COFEPOSA Act was that he had sent representations to the detaining authority viz. the State Government and the Central Government on February 23, 1980 but there was a delay of 1 month and 5 days in his representation reaching the State Government and even then the State Government had failed to consider his representation and pass orders. While strikes down the detention order the court observed that (SCC p. 418, para 10)

(I) It is well settled that in case of preventive detention of a citizen, Article 22 (5) of the Constitution enjoins that the obligation of the appropriate government or of the detaining authority (State Government in that case) to afford the earliest opportunity to make a representation and to consider the representation speedily.

30. The attempt of Mr. Lalit was to highlight the reference to the "detaining authority" in the general observations in the abovesaid cases by taking them out of their context and build up an argument that in all those decisions it has been laid down that there is a constitutional obligation on every detaining authority to afford opportunity to the detenu to make a representation to the detaining authority himself before making representations to the State Government and the Central Government. In order to point out the misconception in the argument of Mr. Lalit we have set out in brief the facts of each case as well. There was no controversy in any of those cases as to whether the detenu's representation should have been considered by the officer passing the order of detention or by the government. On the other hand the challenge made in all those cases to the detention orders was on the ground there had been delay or failure on the part of the concerned government in considering the representation. The observations in these decisions, therefore, do not have any relevance to the debate in this case.

31. We then come to two other decisions of this Court which apparently lend support to Mr. Lalit's contention. The more decisive one is Santosh Anand v. Union Of India. [(1981) 2 SCC 420 : 1981 SCC (Cri) 456] In that case an order of detention made by the Chief Secretary, Delhi Administration, acting as an officer specially empowered under Section 3 of the COFEPOSA Act was challenged on two ground, viz. (a) that it was obligatory upon detaining authority (Administrator) to consider the representation before sending it to the Advisory Board and (b) that in any event the detenu's representation ought to have been considered and rejected by the detaining authority itself, namely, by the Chief Secretary but the same had been straightway considered and rejected by the Administrator, who under Section 2 (f) of the Act was the State Government for the Union Territory of Delhi, thus depriving the detenu of his remedy to approach the Administrator as a higher authority after the rejection of his representation by the detaining authority.

32. The court came to the view (SCC pp. 421-22 para 3) "that the continued detention of the detenu under the order dated April 3 1979 is liable to be quashed on the second ground about which facts are clear and there is no difficulty in accepting the same. " The court further held as follows : (SCC p. 422, para 3).

Under Article 22 (5), as interpreted by this Court, as also under the provisions of Section 11 of the

COFEPOSA it is clear that a representation should be considered by the detaining authority, who on a consideration thereof can revoke the detention order and if the representation is rejected by the detaining authority it is open to the detenu to approach the State Government for revocation of the order and failing that it is open to him to approach the Central Government to get the detention order revoked.

33. The Court further observed as follows : (SCC p. 422, para 3) It is thus very clear to us that the representation could be said to have been considered by the Chief Secretary at the highest but he did not take the decision to reject the same himself and for that purpose the papers were submitted to the Administrator who ultimately rejected the same. There is no affidavit filed by the Chief Secretary before us stating that he had rejected the representation. The representation was, therefore, not rejected by the detaining authority and as such the constitutional safeguard under Article 22 (5), as interpreted by this Court, cannot be said to have been strictly observed or complied with.

The next decision is Pushpa v. Union of India [1980 Supp SCC 391 : 1979 SCC (Cri) 1015]. The decision was rendered by a Single Judge constituting the Vacation Bench of the Supreme Court. That was also a case of a detenu under the COFEPOSA Act against whom an order of detention had been passed by the Chief Secretary to the Delhi Administration who was specially empowered under Section 3 of the Act. The detention was challenged on the ground that the representation sent by the detenu had been considered by the Chief Secretary himself, thought he was not competent to reject the representation and the representation had not been considered and rejected by the appropriate government viz. the Administrator. The court rejected the contention and held as follow : (SCC p. 396, para 9).

There is nothing in the scheme of Article 22 or the provisions of the COFEPOSA which requires that he representation ought always to be considered by the appropriate government notwithstanding the fact that the order of detention has been made by an officer specially empowered in that behalf. Undoubtedly the power to revoke the detention order under Section 11 is conferred on the State Government and the Central Government whenever an order of detention is made by an officer of the State Government but that does not imply that the initial representation which a detenu has a right to make after the grounds of detention are furnished to him, must of necessity be made and considered by the State Government. In fact, the representation can and ought to be made to the detaining authority because it is he who has to apply his mind to the facts of the case and it is he who has furnished the grounds of detention on which he has acted and it is he who has to be convinced that the action taken by him is unjustified and required reconsideration. After all the purpose of a representation is to convince the authority to reconsider its decision which has resulted in the detention of the detenu. The representation is not in the form of an appeal to the higher authority and, therefore, ipso facto it must go to the State Government. Undoubtedly it would be open to the detenu to make a representation under Section 11 requesting either the State Government or the Central Government, as the case may be, to revoke the order of detention. But the initial representation that a detenu has a right to make on receipt of the grounds of detention would ordinarily be addressed to the detaining authority because it is that authority which has taken a decision adverse to the detenu and which has to be persuaded to reconsider the same. Therefore, if the detenu made the representation to the third respondent who had passed the detention order it was open to him to consider the same and after applying his mind to accept or reject the same. The failure to submit the representation addressed to the detaining authority and considered by him, to the State Government, would not vitiate the detention order.

Though these authorities lend apparent force to the contentions of Mr. Lalit we are of the view that

they cannot be taken as decisive pronouncements on the question of law raised for consideration before us.

34. In Santosh Anand case [(1981) 2 SCC 420 : 1981 SCC (Cri) 456] the challenge to the order of detention was on two grounds and this aspect of the matter has been noticed in Raj Kishore Prasad case [(1982) 3 SCC 10 : 1982 SCC (Cri) 530], while differentiating the decision. The Bench, however, did not go further into the matter for not following the ration in Santosh Anand Case [(1981) 2 SCC 420 : 1981 SCC (Cri) 456] because it was dealing with an order of detention passed under the National Security Act and Section 8 of the said Act specifically provided that the detenu must be afforded opportunity at the earliest point of time to make a representation to the appropriate government and to the detaining authority. Apart From this fact we have to point out that we do not find any material to substantiate the view taken by the Bench that Article 22 (5) has been interpreted by the court and furthermore Section 11 of the COFEPOSA Act envisages that a representation should be considered by the detaining authority, who on a consideration thereof can revoke the detention order and if the representation is rejected by the detaining authority it is open to the detenu to approach the State Government for revocation of the order etc. etc. On the contrary, it has been held by a Bench of three Judges in N. P. Umrao v. B. B. Gujral [(1979) 4 SCC 401, 404, para 3 : 1980 SCC (Cri) 4 : (1979) 3 SCR 1007] that (SCC p. 641, para 13)

(I) It is, therefore, well settled that in case of preventive detention of a citizen, the Constitution by Article 22 (5) as interpreted by this Court, enjoins that the obligation of the appropriate government to afford the detenu the opportunity to make a representation and to consider that representation is distinct from the government's obligation to constitute a Board and to communicate the representation, amongst other materials, to the Board to enable it to form its opinion and to obtain such opinion.

It is pertinent to note that in that case the order of detention was made by the Additional Secretary to the Government of India, Ministry of Finance (Department of Revenue) but even so the court held that the government was the appropriate authority to consider the representation made by the detenu and the government had fulfilled its constitutional obligation in that behalf. Besides we have already pointed out that Section 11 confers powers of revocation only on the State Government and the Central Government and the Act does not envisage or contemplate an officer of the State Government or the Central Government passing an order of detention also exercising powers of revocation. We must, therefore, hold that the decision in Santosh Anand case [(1981) 2 SCC 420 : 1981 SCC (Cri) 456] must stand confined to the facts of that case and it cannot be treated as one in which a principle of law of general application in all cases has been enunciated. In fact we may appositely refer in this connection to a decision by a Bench of three Judges of this Court in Devji Vellabhbhai Tandel v. Administrator [(1982) 3 SCC 222 : 1982 SCC (Cri) 403] where it was held that it is only the Administrator in the Union Territory of Delhi who is entitled to consider the representation of a detenu and reject the same or accept the same and revoke the order of detention. The pronouncement in this case, being one made by a Bench of three Judges, carries with it more binding force than the view taken in Santosh Anand case [(1981) 2 SCC 420 : 1981 SCC (Cri) 456].

35. Turning now to Pushpa case [1980 Supp SCC 391 : 1979 SCC (Cri) 1015], apart from being a judgment rendered by a Single Judge constituting the vacation Bench of the court, can be distinguished on facts. The two representations made by the detenu, in that case, one through an advocate and the other by the detenu himself were both addressed to the Chief Secretary himself and secondly no representation was made by the detenu to the appropriate government. These factors had influenced the court to hold that the Chief Secretary had acted within his competence in

considering the representation addressed to him and in rejecting the same and that if the detenu had any grievance he should have moved the State Government under Section 11 to invoke its powers of revocation. In such circumstances this decision cannot also be treated as one having precedential value.

36. In the light of our discussion our answer to the three posers formulated earlier has to be in the negative. It, therefore, follows that we cannot accept or sustain the view taken by the High Court for quashing the order of detention passed against the detenu.

37. Having settled the position of law, it only remains for us to consider whether the order of detention should be restored and the detenu sent back to custody. On this aspect of the matter Mr. Lalit fervently pleaded that this was not a case where the end of justice required the detenu being arrested and placed in custody for the rest of the period of detention. He stated that the detenu was a young boy of 19/20 years and that he had already been in custody for 5 months and 3 weeks. It was further stated by him that no adverse information against the detenu had come to the notice of the authorities after he was set at liberty by the High Court. In such circumstances Mr. Lalit pleaded that the court may allow the appeal by the State only insofar as the settlement of the question of law is concerned and not go to the extent of ordering the re-arrest of the detenu. In support of his submission the learned counsel placed reliance on State of Bombay v. Purushottam Jog Naiak [1952 SCR 674, 676 : AIR 1952 SC 317 : 1952 Cri LJ 1269] where the court, following the precedent in Emperor v. Vimalbhai Deshpande [ILR 1946 Nag 651, 655 : AIR 1946 PC 123 : (1946) 2 MLJ 10] proceeded to decide the appeal after making it clear that the State shall not in any event re-arrest the detenu who had earlier been detained under Section 3 of the Preventive Detention Act of 1950. Dr. Chitale had no serious objection to the court following the same procedure in this case. We, therefore direct that notwithstanding our holding that the High Court was in error in quashing the order of detention made against the detenu, he will not be re-arrested and placed in custody for the rest of the period of detention.

38. In the result the appeal is allowed and the judgment and order of the High Court are set aside but, however, the detenu's release will not be affected.

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