State of Punjab

Vs

Sukhpal Singh

Criminal Appeal No. 624 of 1989

(K. N. Saikia, M. M. Dutt, JJ)

06.10.1989

JUDGMENT

SAIKIA, J. -

1. Special leave granted. Heard learned counsel for the parties.

2. This States appeal is from the judgment of the High Court of Punjab and Haryana dated 31, 1989 passed in Criminal Writ Petition No. 2365 of 1988 quashing the detention order of Sukhjinder Singh, father of the respondent, under the National Security Act.

3. Sri Sukhjinder Singh has been under detention pursuant to the Government of Punjab, Department of Home Affairs and Justice's order dated May 28, 1988, passed in exercise of the powers conferred by sub-section (2) of Section 3 of the National Security Act, 1980 (65 of 1980), hereinafter referred to as 'the Act'; read with Section 14-A as inserted by National Security (Amendment) Act, 1987, with a view to preventing him from indulging in activities prejudicial to the security of the State and maintenance of public order and interference with effort of government in coping with the terrorist and disruptive activities. He was furnished with the grounds of detention contained in 9 paragraphs thereof and saying that on account of the said activities, the President of India was satisfied that he should be detained. As no arguments have been based on the grounds themselves, we have not extracted them. The detenu was also informed that he had a right to make representation in writing against the dentention order and if he wished to make any such representation, he should address it to the State Government through the Superintendent of Jail, and that as soon as possible, his case would be submitted to the Advisory Board within the stipulated period from the date of his detention and if he wished to make a representation to the Central Government, he should address it to the Secretary, Government of India. Ministry of Home Affairs (Department of Internal Security) North Block, New Delhi through the Superintendent of Jail where he was detained. It further stated that he had also a right to appear before the Advisory Board for representing his case, and if he wished to do so. He should inform the State Government through the Superintendent of Jail in which he was detained.

4. It appears that the detenu's son Sukhpal Singh filed Criminal Writ Petition No. 1393 of 1988 in the High Court of Punjab and Haryana praying, inter alia, for a writ of habeas corpus; quashing of the detention order; for production of the detenu in court on the date of hearing; for directing the respondents to arrange the presence of the detenu at Chandigarh before the Advisory Board; and for directing the respondents to make arrangements and pay for the expenses required to be lacquered for arranging the presence of detenu's witnesses to be produced before the Board at Agartala and also of the relatives and the counsel of the detenu so as to effectively assist him in regard to

presenting his case before the Advisory Board.

5. The High Court by order dated September 27, 1988 dismissed the criminal writ petition, but ordered that "the petitioner would approach the Advisory Board stationed at Chandigarh with the request for allowing the detenu to produce evidence before it at Agartala and in case his prayer was granted by the Board, the expenses for taking those witnesses to Agartala would be borne by the respondent/ State."

6. Sukhpal Singh later moved Criminal Writ Petition No. 2365 of 1988 in the High Court of Punjab and Haryana for quashing the detention order contending, inter alia, that the order of detention was passed on May 28, 1988 in a cursory and routine manner without application of mind, much less with subjective satisfaction inasmuch as no case at all was registered against the detenu for his alleged public utterances and stated in the grounds of detention and, therefore, the detention order was liable to be quashed; that consideration of the detenu's representation filed with the State Government on September 1, 1988 was inordinately delayed for two months till October 31, 1988 and even thereafter the State took 8 long days to convey its rejection and the representation addressed to the detaining authority had neither been considered nor disposed of; and that detention was confirmed without affording the detenu any chance of appearing and producing witnesses before the Advisory Board in terms of the High Court's order dated September 27, 1988 in Criminal Writ Petition No. 1393 of 1988.

7. The High Court upheld the above contentions of the petitioner, namely, lack of subjective satisfaction, delay in considering representation and the denial of opportunity to appear before the Advisory Board; and accordingly quashed the order of detention and ordered the detenu to be set at liberty forthwith unless required in connection with any other case.

8. The learned Attorney General of India for the appellant assailing the findings of the High Court submits that the High Court's finding that there was no subjective satisfaction of the detaining authority simply because no criminal case was registered against the detenu for his public speeches is erroneous both in law and facts. The allegations were that during the period from November 19, 1987 to May 11, 1988 the detenu made 9 provocative speeches as stated in the grounds of detention inciting communal hatred and violence between Hindus and Sikhs, inciting Sikhs to armed violence against the government established by law both in the State and in the Centre and making the offer of monetary and other assistance to the terrorists. When the detention order was passed the detenu was already detained in Bihar Jail and the detention order itself said that he was already in custody and was taking steps to get him self released and there was every likelihood of his being released from custody; and that in the event of his release he was likely to resume such prejudicial activities in further and there was thus compelling necessity to pass the order. He submits that the subjective satisfaction of the detaining authority was based on pertinent materials and it had in mind the question whether the prosecution of the detenu would be possible and sufficient. Mr. Kapil Sibal, learned counsel for the respondents supporting the finding of the High Court reiterates that the fact that not criminal case was registered during the period of giving the alleged speech clearly showed that there was non-application of mind preceding the detention order. We find force in the submission of the learned Attorney General. The detention order itself said that the detenu was already custody and was likely to be released wherefore it was necessary to order for his preventive detention. It is not denied that the above relevant materials were placed before the detaining authority. The Act nowhere provides that the detaining authority cannot resort to preventive detention without first criminal prosecuting the detenu. A clear distinctions has to be drawn between preventive detention in which anticipatory and precautionary action is taken to prevent the

recurrence of apprehensive events, and punitive detention under which the action is taken after the event has already happened. It is true that the ordinary criminal proceed of trial is not to be circumvented and short-circuited by apparently hand and cashier resort to preventive detention. But the possibility of launching a criminal prosecution cannot be said to be an absolute bar to an order of preventive detention. Nor would it be correct to say that if such possibility is not present in the mind of the detaining authority the order of detention would necessarily be bad. The failure of the detaining authority to consider the desirability of launching a criminal prosecution before ordering preventive detention may in the circumstances of a case lead to the conclusion that the detaining authority had not applied its mind to the important question as to whether it was necessary to make an order of preventive detention but such is not the case here. In this regard one has to bear in mind the relevant facts and circumstances of a case including the time and place concerned. In this view we find support from he decision in Fazal Ghosi v. State of U.P. ((1987) 3 SCC 502 : 1987 SCC (Cri) 596 : AIR 1987 SC 1877 : (1987) 3 SCR 471), wherein it was pointed out that the Act provided for preventive detention which was intended where it was apprehended that the persons might act prejudicial to one of more considerations specified in the statute, and that preventive detention was not intended as a punitive measure for curtailment of liberty by way of punishment for the offence already committed. Section 3 read with Section 14-A of the Act clearly indicated that the power of detention thereunder could be exercised only with a view to preventing a person from acting in manner which might prejudice any of the situations set forth in the section. To apply what was said in Rex v. Halliday, ex parie Zadig (1917 AC 260), one of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to commit what is enumerated in Section 3 of the Act. No crime is charged. The question is whether a particular person is disposed to commit the prejudicial acts. The duty of deciding this question is thrown upon the State. The justification is suspicion or reasonable probability and not criminal charge which can only be warranted by legal evidence. It is true that in a case in which the liberty of such person is concerned we cannot go beyond natural construction of the statue. It is the duty of this Court to see that a law depriving the person of his liberty without the safeguards available even to a person charged with crime is strictly complied with. We have, however, to remember that individual liberty is allowed to be curtailed by an anticipatory action only in interest of what is enumerated in the statute.

9. In actual practice the grounds supplied operate as an objective lest for determining the question whether a nexus reasonably exists between grounds of question whether a nexus reasonably exists between grounds of detention and the detention order or whether some infirmities had crept in. A conjoined reading of the detention order and the grounds of detention is therefore necessary. It is, as was held in Ujagar Singh v. State of Punjab (AIR 1952 SC 350 : 1952 SCR 756 : 1953 Cri LJ 146), largely from prior events showing tendencies or inclination of a man that inference can be drawn whether he is likely in future to act in a prejudicial manner. But such conduct should be reasonable proximate and should have a rational connection with the conclusion that the detention of person is necessary. The question of relation of the activities to the detention order must be carefully considered. Though the possibility of prosecution being launched is not an irrelevant consideration, failure to consider such possibility would not vitiate the detention order. In Haradhan Saha v. State of West Bengal ((1975) 3 SCC 198 : 1974 SCC (Cri) 816) the court did not lay down that possibility of a prosecution being launched was an irrelevant consideration, not to be borne in mind by detaining authority but it laid down that the mere circumstance that a detenu was liable to be prosecuted would not by itself be a bar to the making of an order of preventive detention. It did not follow therefore that failure to consider the possibility of criminal prosecution being launched could

ever lead to the conclusion that a detaining authority never applied its mind and the order of detention was therefore bad. Is it correct to say that if such possibility was not present in the mind of the detaining authority, the order of the detention is necessarily bad ? Unless it clearly appears that preventive detention is being resorted to as the line of least resistance where criminal prosecution would be the usual course, no fault can be found with it. What is to be seen is whether it was necessary to make preventive detention. In the instant case there is evidence of application of mind. The proximity between the date of commission of an offence and of detention order cannot also be said to be absent in this case. As we have already seen the power of preventive detention is precautionary power exercised reasonably in anticipation and may or may not relate to an offence. It cannot be considered to be a parallel proceeding. The anticipated behavior of a person based on his past conduct in the light of surrounding circumstances may provide sufficient ground for detention. It cannot be said that the satisfaction of the detaining authority on the basis of the past activities that if the detenus were to be left at large he would indulge in similar activities in future and thus act in a manner prejudicial to the maintenance of public order etc., shall not be based on adequate materials. Public Safety ordinarily means security of the public or their freedom from danger. Public order also implies public peace and tranquillity. There is no escape from the conclusion that the terrorists and disruptive activities disrupt public peace and tranquillity and affect the freedom of the public from danger to life and property. Disruption means the act of bursting and tearing as under. Disruptive means producing or resulting from or attending disruption. Terrorism means the act of terrorising; unlawful acts of violence committed in an organised attempt to overthrow a government or like purposes. Terrorist meant one who adopts or supports the policy of terrorism. The terrorist and disruption activities are naturally disruptive of public peace, tranquillity and development. In Hemlata Kantilal Shah v. State of Maharashtra ((1981) 4 SCC 647 : 1982 SCC (Cri) 16 : AIR 1982 SC 8 : (1982) 1 SCR 1028) it was held that the prosecution or the absence of is not an absolute bar to an order of preventive detention but the authority is to satisfy the court the in had in mind the question of possibility of criminal prosecution while forming the subjective satisfaction by the detaining authority. It may be based on inference from the past conduct and antecedent history of the detenu. The High Court under Article 226 and Supreme Court under Article 32 or 136 do not sit in appeal from the order of preventive detention. But the court is only to see whether the formality as enjoined by Article 22(5) had been complied with by the detaining authority, and if so done, the court cannot examine the materials before it and find that the detaining authority should not have been satisfied on the materials before it and detain the detenu. In other words, the court cannot question the sufficiency of the grounds of detention for the subjective satisfaction of the authority as pointed out in Ashok Kumar v. Delhi Administration ((1982) 2 SCC 437 : 1982 SCC (Cri) 466 : AIR 1982 SC 1143; (1982) 3 SCR 707). Those who are responsible for the national security or for the maintenance of public order must be the judges of what the national security or public order requires. Preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it and to prevent him from so doing. The justification for such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. Thus, any preventive measures even if they Involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State. There is no reason why executive can not take recourse to its powers of preventive detention in those cases where the executive is genuinely satisfied that no prosecution can possibility succeed against the detenu because he had influence over witnesses and against him no one is prepared to depose. However, pusillanimity on the part of the executives has to be deprecated and pusillanimous orders avoided.

10. It is submitted that in the instant case, there were, sufficient materials to show that the detenu

would act in the future to the prejudice of the maintenance of public order, security of the Sate and the governments effort to curb terrorism. From the nature and contents of his speeches stated in the grounds of detention there was sufficient justification for the inference that he would repeat such speeches if not preventively detained. Again when grievous crime against the community was committed it would surely be subject to the penal law and stringent sentences, but at the same time it could be considered unsafe to allow him the opportunities to repeat prejudicial acts during the period the penal process was likely to take. The learned Attorney General refers us to Giani Bakshish Singh v. Government of India ((1973) 2 SCC 688 : 1973 SCC (Cri) 994 : AIR 1973 SC 2667 : (1974) 1 SCR 662), Smt. Hemlata v. State of Maharashtra ((1981) 4 SCC 647 : 1982 SCC (Cri) 16 : AIR 1982 SC 8 : (1982) 1 SCR 1028) and Raj Kumar Singh v. State of Bihar ((1986) 4 SCC 407 : 1986 SCC (Cri) 481 : AIR 1986 SC 2173) submitting that the possibility of criminal prosecution was no bar to order any preventive detention and that the court should not substitute its decision or opinion in place of decision of the authority concerned not he question of necessity of preventive detention : [(1981) 4 SCC p. 656, para 21)

> "A prosecution or the absence of it is not absolute bar to an order of preventive detention; the authority may prosecute the offender for an isolated act or acts of an offence for violation of any criminal law, but if it is satisfied that the offender has a tendency to go on violating such laws, then there will be no bar for the State to detain him under a Preventive Detention Act in order to disable him to repeat such offences. The detaining authority is not the sole judge of what national security or public order requires. But neither is the court the sole judge of the position. When power is given to an authority to act on certain facts and if that authority acts on relevant facts and arrives at a decision which cannot be described as either irrational or unreasonable, in the sense that no person instructed in law could have reasonably taken that view, then the order is not bad and the court cannot substitute its decision or opinion in place of the decision of the authority concerned on the necessity of passing the order."

11. Following Hemlata ((1981) 4 SCC 647 : 1982 SCC (Cri) 16 : AIR 1982 SC 8 : (1982) 1 SCR 1028) it could be said that in this case of prosecution it may not be possible to bring home the offender to book as witnesses may not come forward to depose against him out of fear, or it may not be possible to collect all necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender beyond reasonable doubt.

12. Considering the relevant facts and circumstances including the time and place, the contents of the detention order and the allegations in the grounds of detention in this case, we are of the view that non-registration of any criminal case could not be said to have shown non-application mind or absence of subjective satisfaction on the part of the detaining authority.

13. Assailing the finding as to delay in disposing of the detenu's representation, the learned Attorney General submits that on September 1, 1988 the detenu filed representation against his detention addressed to the President of India through the Home Secretary, Government of Punjab and the Superintendent of District Jail, Agartala (Tripura). The State Government was not aware of pendency of any such representation with it. On September 13, 1988 the Central Government issued a teleprinter message which was duly received on September 14, 1988 in which the Central Government wanted to know the date on which the grounds of detention were supplied to the detenu and also sought parawise comments on the representation of the detenu. However, the Central Government did not send any copy of the representation the State Government. Even so, it directed the police, vide letter dated September 14, 1988, to supply the required information to the Central

Government. It was intimated to the Central Government that parawise comments on the representation could not be offered as copy of the representation was not available with the State of Punjab. The Central Government vide teleprinter message dated October 6, 1988 which was received on October 10, 1988 intimated that the photostat copy of the representation had been sent along with the post copy of the teleprinter message. The representation was duly received on October 19, 1988 by the State of Punjab and it was examined at various levels on October 19, 1988 (October 20, 1988 was a holiday), October 21, 1988 (October 22, 1988 and October 23, 1988 were holidays), October 24, 1988 (October 25, 1988 was again a holiday), October 26, 2988, October 27, 1988 and October 28, 1988. The representation was duly put up before the competent authority who was pleased to reject the representation after due deliberation and consideration on October 28, 1988. Thus, according to the learned Attorney General, the State of Punjab from the time of receiving the representation and till the time of its final disposal did not take more than 9 days, obviously excluding the aforesaid 4 holidays. According to him this was a miraculous job done in disposing of the detenus representation and the intimation of the rejection was conveyed to the Superintendent of Jail, Agartala, vide letter dated October 31, 1988, who informed the detenu on November 8, 1988. Thus the detenu's representation dated September 1, 1988 was disposed of by the State Government on October 28, 1988 and the detenu was informed only on November 8, 1988 i.e. after more than two months. It was pointed out by Mr. R. S. Suri, learned counsel for the appellant, the excepting the Photostat copy received from the Central Government no separate representation was at all received by the State Government of Punjab. The Central Government also rejected the representation before them after due consideration on December 21, 1988 and duly informed the detenu.

14. Mr. Kapil Saibal, the learned counsel for the detenu states that two copies, one meant for the Central government and the other meant for the State Government, were sent by the detenu on the same date. The learned Attorney General contends that the delay was caused by the representation having been addressed to the President of India, wherefrom, the copy went to the Central Government. Mr. Sibal, however, asserts that the detention order having said; "whereas the President of India is satisfied", the detenu was required under law to address the representation to the President of India and in view of the fact that it was routed through the Superintendent of the District Jail, Agartala (Tripura) and the Home Secretary, Government of Punjab, there was no reason why it should not have been delivered to the state Government of Punjab. The learned Attorney General points out that the detention order itself having said that if the detenu wished to make such representation, he should address it to the State Government through the Superintendent of Jail as soon as possible and the grounds of detention having also similarly stated that the detenu should address the representation to the State Government through the Superintendent of Jail the delay caused up till the receipt of the Photostat copy from the Central Government must be attributed to the detenu himself and the State Government could not be blamed and the detention order could not be said to have been vitiated by any leaches, negligence or delay in disposing of the representation, under the facts and circumstances stated above.

15. The State of Punjab having been under the Presidents rule at the relevant time and the detention order itself having stated that it was the satisfaction of the President in passing the detention order Mr. Sibal points out that it could not be said to have been fatal mistake in the representation to have been addressed to the President of India, Rashtrapati Bhawan, New Delhi and the same being routed through the Superintendent of the District Jail, Agartala (Tripura), and the Home Secretary of the State of Punjab, there was no reason why the same should not have been received by the State Government of Punjab. However it appears that the representation said to have been meant for the State Government was not received by the state Government at all. The detenu cannot be said to

have deliberately caused the delay. Though we feel that in view of the clear instructions in the grounds of detention that he should address the representation to the State Government through the Superintendent of the Jail where he was detained should have been followed. May be this was due to the fact that Punjab was under President's rule at the relevant time but Rashtrapati Bhawan, New Delhi was not the proper destination of the representation to the State Government.

16. It is a settled law that in cases of preventive detention expeditious action is required on the part of the authorities in disposing of the detenus representation. In Jayanarayan Sukul v. State of West Bengal ((1970) 1 SCC 219 : (1970) 3 SCR 225), it was laid down that the consideration of the representation of the detenu; by the appropriate authority was entirely independent of any action by the Advisory Board including the consideration of the representation by the Advisory Board. There should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but it has to be remembered that the government has to be vigilant in the goverance of the citizens. A citizen's right imposes correlative duty on the State. In Frances Coralie Mullin v. W. C. Khambra ((1980) 2 SCC 275 : 1980 SCC (Cri) 419), it was reiterated that the detaining authority must consider the representation as soon as possible, and this, preferably, must be before the representation is forwarded to the Advisory Board before the Advisory Board makes its report and the consideration by detaining authority of the representation must be entirely independent of the hearing by the Board or its report, expedition being essential at every stage. The time imperative cannot be absolute and the courts observations are not to be so understood, and there has to be leeway depending on the facts and circumstances of the case. However, no allowance can be made for lethargic indifference or needless procrastination but allowance has to be made for necessary consultation where legal intricacies and factual ramifications are involved. The burden of explaining the departure from the time imperative is always on the detaining authority. The emphasis is on the constitutional right of a detenu to have his representation considered as expeditiously as possible and it will depend upon the facts and circumstances of each case whether or not the appropriate government has disposed of the case and expeditiously as possible. In Frances Coralie Mullin case ((1980) 2 SCC 275 : 1980 SCC (Cri) 419) the representation of the detenu made on December 22, 1979 was not communicated to the Advisory Board as it ought to have been, when the Board met on January 4, 1980 and the detaining authority awaited the hearing before the Advisory Board and took a decision thereafter. Under the facts and circumstances of that case where the detenu requested for copies of statements and documents collection of which took time, it was held that if there appeared to by any dealt, it was not deemed due to any want of care but because the representation required a through examination in consultation with investigators of facts and advisers on law and as such though the Administrator considered the representation of the detenu after hearing by the Board, the Administrator was not entirely influenced by the hearing before the Board and the application for habeas corpus was, therefore, dismissed. In State of Orissa v. Manilal Singhania ((1976) 2 SCC 808 : 1976 SCC (Cri) 313 : AIR 1976 SC 456), it was held that the representation made by the detenu may be considered by the State Government as soon as possible i.e., with reasonable despatch and if that is not done, it would have the effect of vitiating the order of detention, but it is neither possible nor desirable to lay down any rigid period of time uniformly applicable in all cases within which the representation of the detenu must be considered by the State Government. The court would have to consider judicially in each case on the available material whether the gap between the receipt of the representation and its consideration by the State Government is so unreasonably long and the explanation for the delay offered by the State Government was unsatisfactory as to render the detention order thereafter illegal.

17. Article 22(5) of the Constitution enjoins that 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 earlier opportunity of making a representation against the order. Since A. K. Gopalan v. State of Madras (AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383), there has been a catena of decisions of this Court taking the view that the representation of the detenu must be considered promptly by the State Government. In John Martin v. State of West Bengal ((1975) 3 SCC 836 : 1975 SCC (Cri) 255) it was observed that Article 22(5) does not say which is the authority to which the representation shall be made or which authority shall consider it. By Section 8(1) of the Act the authority making the order is required to communicate to the detenu his grounds of detention and to afford him the earlier opportunity of making a representation against the order to the appropriate government. In Khudiram Das. v. State of West Bengal ((1975) 2 SCC 81 : 1975 SCC (Cri) 435) it was explained that (SCC p. 87, para 5).

> "(t)he constitutional imperatives enacted in this article [Article 22(5)] are twofold : (1) the detaining authority must, as soon as may be, that is, as soon as practicable after the detention, communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detenu the earlier opportunity of making a representation against the order of detention. These are the barest minimum safeguards which must be observed before an executive authority can be permitted to preventively detain a person and thereby drown his right of personal liberty in the name of public good and social security."

In State of Orissa v. Manilal Singhania ((1976) 2 SCC 808 : 1976 SCC (Cri) 313 : AIR 1976 SC 456) the representation was made on October 21, 1974 and it was received by the District Magistrate on the same day. The representation was processed through the different authorities. The Chief Minister was absent from headquarters between November 7, 1974 and November 12, 1974 and immediately on return to headquarters the Chief Minister disposed of the representation and rejected it on November 12, 1974. It was found that there was no delay at any stage in movement of the representation from one officer to another. Every one having dealt with it promptly and after examining it submitted to the respective higher officer. The Chief Minister was out of the capital and as soon as she returned without any delay at all disposed of the representation. Accordingly this Court did not see any gap between the receipt of the representation and its consideration by the State Government which could be said to be unreasonably long and the period had been satisfactorily explained in the affidavit of the State. Accordingly the order of detention could not be held to be invalid on that ground. On the other hand in Saleh Mohammed v. Union of India ((1980) 4 SCC 428 : 1980 SCC (Cri) 988) a delay of 22 days in considering the representation of the detenu was held to have violated Article 22(5) and vitiated the detention order. The representation in that case was lying unattended in the office of the Superintendent of Jail or the Inspector General of Prison and accordingly it was held to have been a case of gross negligence and chilling indifference and on that short ground alone the detention order was quashed. In Kamla Kanyalal Khushalani v. State of Maharashtra ((1981) 1 SCC 748 : 1981 SCC (Cri) 287) where the disposal of detenu's representation was delayed for 25 days it was held that the continued detention of the detenu was void and that it was of the utmost importance that all the necessary safeguards laid down by the Constitution under Article 21 or Article 22(5) should be complied with fully and strictly and any departure from any of the safeguards would void the order of detention. In Ratan Singh v. State of Punjab ((1981) 4 SCC 481 : 1981 SCC (Cri) 853) the representation to the State Government and the Central Government were made by the detenu simultaneously through the Jail Superintendent who should either have forwarded the representation separately to the governments concerned or else he should have forwarded them to the State Government with a request for the onward transmission of the other

representation to the Central Government. "Someone tripped some where and the representation addressed to the Central Government was apparently never forwarded to it" with the inevitable result that the detenu had been unaccountably deprived of a valuable right to defend and assert his fundamental right to personal liberty. Chandrachud, C.J. speaking for the court observed :

> "But the laws of preventive detention afford only a modicum of safeguards to persons detained under them and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenus. Section 11(1) of COFEPOSA confers upon the Central Government the power to revoke an order of detention even if it is made by the State Government or its officer. That power, in order to be real and effective, must imply the right in a detenu to make a representation to the central government against the order of detention. The failure in this case on the part either of the Jail Superintendent of the State Government to forward the detenus representation to the Central Government has deprived the detenu of the valuable right to have his detention revoked by that government. The continued detention of the detenu must therefore be held illegal and the detenu set free."

18. In Yousuf Abbas v. Union of India ((1982) 2 SCC 380 : 1982 SCC (Cri) 440) the detenu claimed to have made a representation against his detention on October 1, 1981. Government stated that an undated representation was received by it from the District Magistrate on October 23, 1981. The Advisory Board met on October 23, 1981. Thereafter the government rejected the representation of the detenu on October 29, 1981. Admittedly the representation was not forwarded to the Advisory Board. It appears that the representation was forwarded by the Superintendent Central Jail to the District Magistrate on October 20, 1981. Why his representation was detained with the Superintendent, Central jail from October 1, 1981 to October 20, 1981 was not explained. On that ground alone the writ petition was allowed and the detenu was directed to be set at liberty forthwith. In Asha Keshavrao Bhosale v. Union of India ((1985) 4 SCC 361 : 1985 SCC (Cri) 561) it was found that a representation was made by the petitioner on behalf of the detenu which was received in the office of the Chief Minister on November 28, 1984 and orders on that representation were passed on January 23, 1985 and the same orders were received on January 28, 1985. In the representation made by the petitioner himself to the Chief Minister, the order of detention was casually impugned but lot of attention appears to have been bestowed on the necessity of keeping the detenu in a Bombay Jail instead of sending him to Nasik Road Prison as directed in the order of detention. A detailed representation was made by the Secretary of an association which espoused his cause and that representation was received on November 29, 1984 in the Secretariat of the Chief Minister and was forwarded to the Home Department on December 3, 1984 and was finally disposed of on December 12, 1984 and the rejection thereof was communicated on December 13, 1984. This Court held that the petitioner was not entitle to make a tenable submission on the score of delay in disposal of the representation. In Aslam Ahmed Zahire Ahmed Shaik v. Union of India ((1989) 3 SCC 277 : 1989 SCC (Cri) 554) the Superintendent of Central Prison of Bombay to whom the representation was handed over by the detenu on June 16, 1988 for mere onward transmission to the Central Government has callously ignored and kept it unattended for a period of seven days and as a result of that the representation reached the government 11 days after it was handed over to the Jail Superintendent without any explanation despite opportunity given by this Court. Pandian, J. Speaking for the court observed. (SCC p. 282, para 12).

> "In our view, the supine indifference, slackness and callous attitude on the part of the Jail Superintendent who had unreasonably delayed in transmitting the representation

> as an intermediary, had ultimately caused undue delay in the disposal of the appellants representation by the government which received the representation eleven days after it was handed over to the Jail Superintendent by the detenu. This avoidable and unexplained delay has resulted in rendering the continued detention of the appellant illegal and constitutionally impermissible."

Similarly in T. A. Abdul Rahman v. State of Kerala ((1989) 4 SCC 741 : JT (1989) 3 SC 444) the representation was submitted originally on January 25, 1988 but was got back and resubmitted on February 2, 1988 and was received by the third respondent only on February 16, 1988 and took time up to March 28, 1988 in receiving the comments of the Collector of Customs. Again there was a delay of seven days in forwarding the representation to the Minister of State for Revenue with the comments of the Joint Secretary, COFEPOSA section. In the opinion of their Lordships, the manner in which the representation had been dealt with revealed a sorry state of affairs in the matter of consideration of the representation made be the detenu. It was not clear why such a long delay from February 16, 1988 to March 28, 1988 had occasioned in getting the comments from the Collector of Customs. Their Lordships extracted what was said in Rama Dhondu Borade v. V. K. Saraf, Commissioner of Police ((1989) 3 SCC 173 : 1989 SCC (Cri) 520 : (1989) 1 Scale 22) : (SCC pp. 179-80, paras 19 and 20)

> "The detenu has an independent constitutional right to make his representation under Article 22(5) of the Constitution of India. Correspondingly, there is a constitutional mandate commanding the concerned authority to whom the detenu forwards his representation questioning the correctness of the detention order clamped upon him and requesting for his release, to consider the said representation within reasonable dispatch and to dispose the same as expeditiously as possible. This constitutional requirement must be satisfied with respect but if this constitutional imperative is observed in breach, it would amount to negation of the constitutional obligation rendering the continued detention constitutionally impermissible and illegal, Since such a breach would defeat the very concept of liberty - the highly cherished right - which is enshrined in Article 21 of the Constitution.

What is reasonable dispatch depends on the facts and circumstances of each case and not hard and fast rule can be laid down in that regard. However, in case the gap between the receipt of the representation and its consideration by the authority is so unreasonably long and the explanation offered by the authority is so unsatisfactory, such delay could vitiate the order of detention.

Their Lordships accordingly held that the representation of the detenu had not been given prompt and expeditious consideration and was allowed to lie without being properly attended to and secondly the unexplained delay in the disposal of the representation was violative of Article 22 5) of the Constitution of India, rendering the order of detention invalid.

19. In the instant case we are satisfied that after receipt of the zerox copy from the Central Government, the State Government took only 13 days including 4 holidays in disposing of the representation. Considering the situation prevailing and the consultation needed in the matter, the State Government could to have been unmindful of urgency in the matter. But the facts remain that it took more than two months from the date of submission of the representation to the date of informing the detenu of the result of his representation. Eight days were taken after disposal of the representation by the State Government. The result is that the detenu's constitutional right to prompt disposal of his representation was denied and the legal consequences must follow.

20. Assailing the finding of the High Court that opportunity was not afforded to the detenu to appear and produce his witnesses before the Advisory Board, the learned Attorney General submits that the finding is not correct in as much as in spite of the best endeavor on the part of the detaining authority to produce the detenu and his witnesses before the Board in terms of the High Court's order dated September 27, 1988, the detenu himself on a lame excuse avoided appearing and producing his witnesses before it and thereby left no other alternative than to tender its opinion to the Stage Government on November 17, 1988 whereupon the State Government confirmed the order of detention vide its order dated November 22, 1988.

21. It appears that it was decided to hold the sitting of the Advisory Board at Indore on November 12, 1988 which was admittedly a week before the mandatory last date for submitting the report. On November 8, 1988 the detenu at Agartala prayed for postponement of the Boards sitting. The State Government informed the Board on the basis of the teleprinter message dated November 8, 1988 received from Agartala that the detenu was unable to undertake the journey from Agartala that the detenu was unable to undertake the journey from Agartala to Indore. Thereafter, the arrangements made to carry the detenu and his witnesses to Indore by plane, were also cancelled by the State Government of Punjab and the detenu was told through the Inspector General of Prisons, Tripura by communication dated November 11, 1988 as follows :

> "In response to this office message dated November 8, 1988, Government of Punjab has informed me that next date of hearing as fixed by the NSA Board, Punjab, will be intimated. This is in connection with his prayer dated November 8, 1988 for postponement of hearing by the NSA Board, Punjab on November 12, 1988 in the District Jail, Indore. This may kindly be noted."

22. Admittedly, the detenu was arrested on May 28, 1988. The total period of Advisory Boards report under Section 14-A (2)(d)(i) was five months and three weeks. Reference to Advisory Board was made on August 26, 1988. So the period would expire on or about November 19, 1988. The Board fixed November 12, 1988 for its sitting. The detenu prayed for adjournment as because of frozen joint he was unable to perform ablution and tie his turban. Whether that was a lame excuse or not need not be decided. The fact remained that he was told of another sitting of the Board. Having a week in hand it would perhaps have been possible to hold another sitting of the Board and give the detenu an opportunity which however, did not come. Of course the decision was that of the Advisory Board and not of the State Government. The High Court rightly observed that there was a communication gap. It is true that the Advisory Board is not a judicial body. It is charged with the responsibility of advising the executive government. But when it advises in favour of the detenu, namely, that there was no sufficient cause for detention, it would be binding upon the government under Section 12(2) of the Act to release the detenu forthwith. The detenu in this case did not have that opportunity to show that there was no sufficient cause for his detention. Expressing inability to appear once could not have been treated as the detenus not desiring to be heard under Section 11 (2) of the Act. In fact he desired to be heard and to produce his witnesses. The result was that despite the State Government's communication he was deprived of this opportunity. What then would be the result ?

23. As was observed in Dr. R. K. Bhardwaj v. State of Delhi (1953 SCR 708 : AIR 1953 SC 318 : 1953 Cri LJ 1241) preventive detention is a serious invasion of personal liberty and such a meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court. Following D. S. Roy v. State of West Bengal (1972) 1 SCC 308 : 1972 SCC (Cri) 45 : (1972) 2 SCR 787) it can be said that Article 22(4) provides that no

law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless the Advisory Board has reported within that period that there is in its opinion sufficient cause for such detention. Law therefore mandates a reference to a Board and for it to report on the sufficiency or otherwise of the detention which should be within three months from the detention. In this case it is for this reason that after the Constitution every legislation dealing with preventive detention has made specific provision for confirmation and continuance of detention in view of the constitutional mandate in Article 22(4). In this case, Section 11 of the Act prescribes 5 months 3 weeks. Unless the Board has made a report to the effect that there is a sufficient cause for such detention within that period from the date of detention there can be no detention of a person under any law for a longer period than that. Relying on the observation of M. H. Beg, J., in P. D. Deorah v. District Magistrate, Kamrup ((1974) 1 SCC 103 : 1974 SCC (Cri) 18 : (1974) 2 SCR 12) it can be said that the gravity of the evil to the community resulting from antisocial activities cannot furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The protection of the personal liberty is largely through insistence on observance of the mandatory procedure. In cases of preventive detention observance of procedure has been the bastion against wanton assaults on personal liberty over the years. Social security is no doubt the most important goal of the State but it is not the only goal of a good society. There are other important values in a society. One of the foremost and fundamental right guaranteed in the Constitution is personal liberty and one cannot be deprived of it except by the procedure prescribed by law. Libertus inestimabilis res est. Liberty is an inestimable thing above price. Libertus Omnibus rebus favorabilier est. Liberty is more favoured than all things (anything). It would be ironic, if in the name of social security, we would sanction the subversion of this liberty. When a certain procedure is prescribed by the Constitution or the laws for depriving a citizen of this personal liberty, we think it our duty to see that that procedure is strictly observed. As long back as in N. P. Umrao v. B. B. Gujral ((1979) 2 SCC 637, 642 : 1979 SCC (Cri) 557 : (1979) 2 SCR 315, 321) it was held to be 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 is to afford the detenu the opportunity to make a representation and to consider that representation and there is the government's obligation to constitute a Board and to communicate the representation, amongst other materials, to the Board to enable it to from its opinion and to obtain such opinion. It was also reiterated that when liberty of the subject is involved under a preventive detention law it is the bounden duty of the court to satisfy itself that all the safeguards is the bounden duty of the court to satisfy itself that all the subject is not deprived of his personal liberty otherwise than in accordance with law. Two of these safeguards under Article 22 which relate to the observance of the principle of natural justice and which a fortiori are intended to act as a check on a arbitrary exercise of power, are to found in Article 22(5) of the Constitution. These safeguards might be designated as a regulative postulate of respect, that is respect for the intrinsic dignity of the human person. The detention of individuals without trial for any length of time, howsoever short, is wholly inconsistent with the basic ideas of our government. As was pointed out in V. C. Jawantraj Jain v. Pradhan ((1979) 4 SCC 401 : 1980 SCC (Cri) 4 : (1979) 3 SCR 1007) one of the two safeguards provided to a detenu is that his case must be referred to an Advisory Board for its opinion if it is sought to detain him for a longer period than three months and the other is that he should be afforded the earliest opportunity of making a representation against the order of detention and such representation should be considered by the detaining authority as early as possible before any order is made confirming the detention. Neither safeguard is dependent on the other and both have to be observed by the detaining authority. It is no answer for the detaining authority to say that representation of the detenu was sent by it to the Advisory Board and that the Board has considered the representation and then made a report

expressing itself in favour of detention. Even if the Advisory Board has made a report stating that in its opinion there is sufficient cause for the detention, the State Government is not bound by such opinion and it may still on considering the representation of the detenu or otherwise, decline to confirm the order of detention and release the detenu. It is imperative for the State Government to consider the representation of the detenu before making the order confirming the detention. Fazal Ali., J. emphasised in Bal Chand Choraria v. Union of India ((1978) 1 SCC 161 : 1978 SCC (Cri) 77 : (1978) 2 SCR 401) that in matters where the liberty of the subject is concerned and a highly cherished right is involved, the representation made by the detenu should be construed liberally and not technically so as to frustrate or defeat the concept of liberty which is entrained in Article 21 of the Constitution of India. In Smt. Kavita v. State of Maharashtra ((1981) 3 SCC 558 : 1981 SCC (Cri) 743 : (1981) 2 Cri LJ 1262 : AIR 1981 SC 1641) it was emphasised that the Advisory Board is charged with the task of submitting the report within the prescribed period after hearing the detenu, specifying its opinion as to whether or not there is sufficient cause for the detention of the person concerned.

24. The Advisory Board, as was held in A. K. Roy v. Union of India ((1982) 1 SCC 271 : 1982 SCC (Cri) 152 : (1982) 88 Cri LJ 340), is to consider the question whether there is sufficient cause for the detention of the person concerned and not where the detenu is guilty of any charge. The detenu may therefore present his own evidence in rebutal of the allegations made against him and may offer other oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him. If the detenu desires to examine any witnesses, he shall keep them present at the appointed time and no obligation can be cast on the Advisory Board to summon them. The Advisory Board, like any other Tribunal, is free to regulate its own procedure within the constraints of the Constitution and the statute. If report is submitted by the Advisory Board without hearing the detenu who desired to be heard it will be violative of the safeguards provided under Article 22 of the Constitution and Sections 10 and 11 of the Act. Failure to produce the detenu, unless it is for wilful refusal of the detenu himself to appear, will be equally violative of those provisions. In State of Rajasthan v. Shamsher Singh (1985 Supp SCC 416 : 1985 SCC (Cri) 421 : 1985 Supp 1 SCR 83) the importance of the proceedings before the Advisory Board was highlighted. In fact it is the only opportunity for the detenu of being heard along with the representation for deciding whether there was sufficient cause for his detention.

25. The increasing need for ensuring public safety and security in the State of Punjab and the Union territory of Chandigarh has been reflected in the recent successive amendments of the National Security Act (Act 65 of 1980) with which we are concerned. The Act was amended by the National Security (Amendment) Ordinance, 1984, which was repealed by the National Security (Amendment) Act, 1984, (May 18, 1984) Act 24 of 1984) which was deemed to have come into force on April 15, 1984. Section 2 of this amendment act provided that the National Security Act, 1980 shall, in its application to the State of Punjab and the Union Territory of Chandigarh, have effect subject to the amendments specified in Sections 3 to 5. Section 3 of the Principal Act (detaining officer reporting to the State Government) in the proviso, for the words "10 days" the words "15 days" shall be substituted and for the words "15 days" the words "20 days" shall be substituted. Similarly in sub-section (1) of Section 8 (communicating grounds of detention to the detenu) for the words "10 days" the words "15 days" shall be substituted. A new section namely, Section 14-A was inserted after Section 14. This was followed by the National Security (Amendment) Act, 1984, and the National Security (Amendment) Act of 1985. This was followed by the National Security (Amendment) Ordinance of 1987 which was repealed by the National Security (Amendment) Act, 1987 (Act 27 of 1987) which further amended the Act in its application to the State of Punjab and the Union territory of Chandigarh. The National Security (Amendment)

Act, 1984, Section 4 of the National Security (Second Amendment) Act, 1984, the National Security (Amendment) Act, 1985 and the National Security (Amendment) Ordinance, 1987 were thereby repealed. This was followed by the National Security (Amendment) Ordinance, 1988 which was repealed by the National Security (Amendment) Act, 1988 (Act 43 of 1988).

26. In Section 14-A as inserted by the Amendment Act of 1984, the provision was "where such person had been detained with a view to preventing him from acting in any disturbed area, in manner prejudicial to ....."

27. It was by the National Security (Amendment) Act, 1987 (Act 27 of 1987) that the provision of detention without obtaining the opinion of the Advisory Board for a period longer than 3 months, but not exceeding 6 months, from the date of his detention where such person had been detained with a view to preventing him 'in any disturbed area' - 'from interfering with the efforts of government in coping with the terrorists and disruptive activities", was inserted.

28. We find that while sub-section (2) of Section 3 of the Act before the amendment of 1984 provided that the Central Government and that the State Government may if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such a person be detained, Section 14-A is inserted by the Amendment Act of 1984 provided that notwithstanding anything contained in the foregoing provisions of this Act any person in respect of whom an order of detention has been made at any time before April 3, 1986 may be detained without obtaining the opinion of the Advisory Board for a period longer than three months but not exceeding six months, from the date of his detention where such person had been detained with a view to preventing him from acting, in any disturbed area, in any manner prejudicial to (a) the defence of India; or (b) the security of India; or (c) the security of the State; or the security of the State; (d) the maintenance of public order; or (e) the maintenance of supplies and services essential to the community. The Amendment Act of 1987 added to these the ground "from interfering with the efforts of government in coping with the terrorist and disruptive activities".

29. Thus as a result of these amendments applicable to the State of Punjab and the Union territory of Chandigarh we find on one hand addition to the grounds of detention and on the other, extension of the period during which a person could be detained without obtaining the opinion of the Advisory Board. There is, however, no amendment as to the safeguards provided under Article 22 and Sections 9, 10 and 11 of the Act, Indeed, there could be no such amendment. This reminds us of what was said, of course in a slightly different context. "Amid the clash of arms laws are not silent. They may be changed, but they speak the same language in war and peace." Would laws speak in a different language in internal disturbance ? Lex uno ore omnes alloquitur. Law addresses all with one mouth or voice. Quotiens dubia interpretation libertatis est secundum libertatem respondent erit - Whenever there is a doubt between liberty and bondage, the decision must be in favour of liberty. So says the Digest.

30. The result is that this appeal fails and is dismissed. As ordered by the High Court the detenu is to be set at liberty forthwith, if he is not required to be detained in connection with any other case.

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