A UNION OF INDIA AND ORS.

v.

MANISH BAHAL @ NISHU

JULY 9, 2001

B [D.P. MOHAPATRA AND RUMA PAL, JJ.]

National Security Act, 1980—S.3(2) and (4) Preventive Detention—Representation by detenu—Advisory Board—Submission of report—Detaining
C *authority on consideration of said report and other materials, confirming the order of detention—On challenge, High Court quashing the detention order holding that there was no independent consideration of representation—Validity of—Held, merely because report of Advisory Board was also placed before the authority along with other materials, it cannot be held that there was no independent consideration of representation by the authority—Thus,*
D *Order of High Court unsustainable.*

Constitution of India, 1950—Article 22(4) and (5)—Preventive Detention —Representation by detenu—Consideration of—Held, there should be prompt and expeditious consideration of representation by authority.

E **Respondent was detained under Section 3(2) of the National Security Act, 1980. Respondent-detenu made a representation to the Advisory Board which submitted its report. Thereafter the detaining authority i.e. the Lt. Governor on consideration of the said report alongwith other materials placed on record confirmed the order of detention and rejected the representation of**
F **respondent. Aggrieved, respondent filed a writ petition before the High Court. High Court quashed the detention order holding that there was no independent consideration of the representation by the Lt. Governor. Hence the present appeal.**

Allowing the appeal, the Court

G **HELD: 1.1. High Court was not justified in quashing the detention order of respondent holding that the order of the Lt. Governor rejecting the representation of the detenu was not based on independent consideration.**

[820-B]

H **1.2. In view of Article 22(4) and (5) of the Constitution,**

State Government should promptly consider and expeditiously dispose of the representation of the detenu. In the instant case, merely because the report of the Advisory Board was placed before the detaining Authority (Lt. Governor) along with other papers for disposal of the representation made by the detenu it cannot be held that there was no independent consideration of the same by the authority. High Court has not recorded any finding that there was delay or callousness or bureaucratic lethargy on the part of the State Government in dealing with the representation of the respondent or that the Lt. Governor had kept the representation submitted before him awaiting the report of the Advisory Board. No finding is also recorded by the High Court that the Lt. Governor solely depended on or relied upon the report of the Advisory Board for passing the order rejecting the representation. It has also not been found that the report of the Advisory Board was the only material placed before the Lt. Governor while submitting the representation for his consideration. [819-E-F-H; 820-A-B]

K.M. Abdulla Kunhi and B.L. Abdul Khader **v.** *Union of India andOrs.*, **[1991] 1 SCC 476;** *Ram Sukrya Mhatre* **v.** *R.D. Tyagi,* **[1992] Supp. 3 SCC 65 and** *Abdul Salam & Thiyyan* **v.** *Union of India* **[1990] 3 SCC 15.** *Moosa Husein Sanghar* **v.** *State of Gujarat and Ors.* **[1993] 1 SCC 511;** *Navalshankar Ishwarlal Dave and anr.* **v.** *State of Gujarat and Ors.* **[1993] Supp. 3 SCC 754 and** *Smt. Gracy* **v.** *State of Kerala,* **[1991] 2 SCC 1, relied on.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 670 of 2001.

From the Judgment and Order dated 14.12.1999 of the Delhi High Court in Crl. W.P. No. 809 of 1999.

Ashok Bhan, S. Wasim, A. Quadri and D.S. Mahra for the Appellants.

Harjinder Singh, Naveen Malhotra and Ms. Vandana Sharma for the Respondent.

The Judgment of the Court was delivered by

D.P. MOHAPATRA, J. Leave granted.

The Union of India through the Secretary, Ministry of Home Affairs, the Lt. Governor of NCT of Delhi, the Commissioner of Police, Delhi and the Superintendent, Central Jail, Tihar, have filed this appeal assailing the judgment of the Delhi High Court dated 14th December, 1999 in Criminal Writ Petition

A No. 809 of 1999 quashing the order of detention in under section 3(2) of the National Security Act, 1980 (hereinafter referred to as 'the Act') and directing immediate release of the respondent unless required in connection with any other case. As appears from the impugned judgment the order of detention has been quashed by the High Court solely on the ground that the Lt. Governor of Delhi rejected the representation of the detenu-respondent taking B into consideration the report submitted by the Advisory Board and therefore, did not consider the representation independently.

The Commissioner of Police, Delhi vide order dated 17.5.1999 ordered the detention of the respondent under section 3(2) of the Act with a view to C prevent him from indulging in activities prejudicially affecting the public order. The said order of detention was approved by the Lt. Governor of NCT Delhi under section 3(4) of the Act vide order dated 20 May, 1999. On 4.6.1999 the respondent addressed a representation to the Advisory Board against the order of his detention. The Advisory Board submitted its report on 10.6.99 stating that there was sufficient cause for the detention of the respondent. D The report was received at the Police Headquarters on 11.6.1999. Thereafter the Lt. Governor on consideration of the report along with other material placed on record confirmed the order of detention and directed that the detenu shall be detained for a period of 12 months from the date of his detention i.e. 18.5.1999. By a separate order passed on the same day (21.6.99) E the Lt. Governor rejected the representation made by the respondent to the Advisory Board. Thereafter the respondent filed the writ petition in the High Court challenging the detention order dated 3rd August, 1999.

The question that arises for consideration is whether the High Court is right in holding that there was no independent consideration of the F representation submitted by the Lt. Governor.

A perusal of the relevant provisions of the Act reveals the scheme which so far as material for the purpose of this case may be stated thus :

In sub-section (3) of section 3 power is vested in the State Government G to pass order that District Magistrate or Commissioner of Police may also, if satisfied as provided in ss(2) exercise the power conferred by the said sub-section within their respective local jurisdiction. In the proviso to the said sub-section maximum period during which such an order shall remain in force has been prescribed. In section 3(2) of the Act it is provided that the Central Government or the State Government may, if satisfied with respect to any H 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 person be detained. Sub-section (4) of the said section mandates that when an order of detention is made by an officer mentioned in ss(3) he shall forthwith report the facts to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter and no such order shall remain in force for more than twelve days after the making thereof unless, in the meantime, it has been approved by the State Government. In sub-section(5) it is provided that when any order is made or approved by the State Government under this Section the State Government shall within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order.

In section 8(1) it is laid down that when a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than ten days from the date of detention communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government.

The constitution of the Advisory Boards is provided in Section 9 of the Act.

In Section 10 it is laid down that save as otherwise expressly provided in the Act, in every case where a detention order has been made under the Act, the appropriate Government shall, within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted by it under section 9, the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer mentioned in sub-section(3) of the Section, also the report by such office under sub-section (4) of that section.

Section 11 which contains provision regarding procedure of Advisory Boards states that the report of the Advisory Board shall, after considering the materials placed before it and, after calling for such further information as

A it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report to the appropriate Government within seven seeks from the date of detention of the person concerned.

B

In Section 12 sub-section(1) it is laid down that in any case where the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such C period as it thinks fit. Sub-section (2) of the section provides that in any case where the Advisory Board has reported that there is, in its opinion, no sufficient cause for the detention of a person, the appropriate Government shall revoke the detention order and cause the person concerned to be released forthwith.

D The High Court, as noted earlier, has quashed the order of detention only on the ground that the Lt. Governor rejected the representation made by the detenu-respondent taking into consideration the report of the Advisory Board. The High Court has placed reliance on the decision of the Constitution Bench of this Court in the case of *K.M. Abdulla Kunhi* and *B.L. Abdul Khader* v. *Union of India and others,* [1991] 1 SCC 476. The High Court has E observed that in view of the settled position of law which has been laid down by this Court such disposal of the representation offends the right of the detenu enshrined in Article 22(5) of the Constitution.

Shri Ashok Bhan, learned counsel for the appellant contended that the F decision of the High Court is based on a misreading and mis-construction of the decision of this Court in *K.M. Abdulla* case (supra). The learned counsel submitted that the High Court is in error in its conclusion that the Lt. Governor did not independently consider the representation of the respondent merely from the fact that the order rejecting the representation was passed after receipt of the report of the Advisory Board.

G

Per contra Shri Harjinder Singh, learned counsel appearing for the respondent, supported the judgment of the High Court. He urged that the view taken by the High Court is in accord with the ratio of the Constitution Bench judgment in *K.M. Abdulla* case (supra).

H Para 11 of the Judgment of *K.M. Abdulla* case (supra) on which reliance

has been placed by the High Court in its impugned judgment reads as follows. A

> "It is now beyond the pale of controversy that the constitutional right to make representation under Clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. Secondly, the obligation of the government to afford to the detenu an opportunity to make representation and to B consider such representation is distinct from the government" obligation to refer the case of detenu along with the representation to the Advisory Board to enable it to from its opinion and send a report to the government. It is implicit in Clauses (4) and (5) of Article 22 that the government while discharging its duty to consider the C representation, cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. The obligation of the government to consider the representation is different from the obligation of the Board to consider the representation at the time of hearing the references. The government considers the representation D to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, considers the representation and the case of the detenu to examine whether there is sufficient case for detention. The consideration by the Board is an additional safeguard and not a substitute for consideration of the E representation by the Government. The right to have the representation considered by the government, is safeguarded by Clause (5) of Article 22 and it is independent of the consideration of the *detenu's* case and his representation by the Advisory Board under Clause (4) of Article 22 read with section 8(c) of the Act."

F

In the said decision the Constitution Bench referring to the several decisions decided earlier held that the right to have the representation considered by the Government is safeguarded by clause (5) of Article 22 and it is independent of the consideration of the detenu's case and his representation by the Advisory Board under clause (4) of Article 22 read with G section 8(c) of the Act (COFEPOSA Act, 1974). *But in that very judgment in paragraphs 19-20 the Bench observed that there is no constitutional mandate under clause (5) of the Article 22 muchless no statutory requirement to consider the representation before confirming the order of detention as long as the Government without delay considers the representation with an unbiased mind there is no basis for concluding that the absence of* H

independent consideration is the obvious result if the representation is not considered before the confirmation of detention. This Court held that indeed there it no justification for imposing this restriction on the determination of the Government. (emphasis supplied)

In para 20 of the judgment, elucidating the point, the Constitution Bench observed :

> "It is necessary to mention that with regard to liberty of citizens the court stands guard over the facts and requirements of law, but court cannot draw presumption against any authority without material. It may be borne in mind that the confirmation of detention does not preclude the government from revoking the order of detention upon considering the representation. Secondly, there may be cases where the government has to consider the representation only after confirmation of detention. Clause (5) of Article 22 suggests that the representation could be received even after confirmation of the order of detention. The words 'shall afford him the earliest opportunity of making a representation against the order' in Clause (5) of Article 22 suggest that the obligation of the government is to offer the detenu an opportunity of making a representation against the order, before it is confirmed according to the procedure laid down under Section 8 of the Act. But if the detenu does not exercise his right to make representation at that stage, but presents it to the government after the government has confirmed the order of detention, the government still has to consider such representation and release the detenu if the detention is not within the power conferred under the statute. The confirmation of the order of detention is not conclusive as against the detenu. It can be revoked *suo motu* under Section 11 or upon a representation of the detenu. It seems to us therefore, that so long as the representation is independently considered by the government and if there is no delay in considering the representation, the fact that it is considered after the confirmation of detention makes little difference on the validity of the detention or confirmation of the detention. The confirmation cannot be invalidated solely on the ground that the representation is considered subsequent to confirmation of the detention. Nor it could be presumed that such consideration is not an independent consideration. With all respect, we are not inclined to subscribe to the views expressed in *V.J. Jain* v. *Shri Pradhan,* [1979] 4 SCC 401 and *Om Prakash Bhal* v. *Union of India* W.P. No. 845 of 1979 decided on October 15, 1979 (Unreported) and Khairul Haque

W.P. No. 246 of 1969 decided on September 10, 1969, (Unreported) cases. They cannot be considered to be good law and hence stand overruled. A

In *Ram Sukrva Mhatre* v. *R.D. Tyagi*, [1992] Supp. 3 SCC 65, this Court relying on the decision in *K.M. Abdulla Kunhi* (supra) case held that it is settled law that right to representation under Article 22(5) includes right to B expeditious disposal not only by the State Government under the relevant provision of the statute, but also by Central Government. But in each case it is one of fact to be ascertained whether the Central Government or the State Government, as the case may be, has caused delay due to negligence, callous inaction, avoidable red-tapism and undue protraction by the authorities C concerned. This Court observed that expedition is the rule and delay defeats mandate of Article 22(5). Taking note of the decision in *Abdul Salam & Thiyyan* v. *Union of India*, [1990] 3 SCC 15 it was observed that no hard and fast rule as to the measure of reasonable time can be laid down and each case has to be considered from the facts presented therein and that if there is negligence or callous inaction or avoidable red-tapism on the facts in that D case, it does not warrant interference.

In the case of *Moosa Hussein Sanghar* v. *State of Gujarat and Ors.*, [1993] 1 SCC 511, this Court relying on K.M. Abdulla Kunhi case (supra) and other decisions held, *inter alia*, that in a case where the representation has been received before the case is referred to the Advisory Board, the appropriate E Government must consider the same before the matter is referred to the Advisory Board and it would be justified in not considering the same only if there is no reasonable time to consider and dispose of the representation before the case is referred to the Advisory Board and in such case, the representation may be forwarded to the Advisory Board along with the case of the detenu. Referring to the provisions under Articles 21 and 22(5) of the F Constitution the Bench observed :

> "Having regard to the importance of the safeguard of a representation under Article 22(5) for protection of the right to personal liberty guaranteed under Article 21 of the Constitution, this Court has G repeatedly emphasised the need for expeditious consideration of the representation submitted by a detenu and has insisted that the representation must be disposed with a sense of urgency without avoidable delay. The appropriate Government would not be justified in postponing the consideration of the representation while the matter is pending consideration before the Advisory Board because the H

A obligation of the Government to consider the representation is different from that of the Advisory Board".

In *Navalashankar Ishwarlal Deva and Anr.* v. *State of Gujarat and Others,* [1993] Supp. 3 SCC 754, in which the representation was received by the State Government on 20.3.1993, the State Government decided to keep it B pending awaiting the report of the Board and on receipt of the report on March 23, 1993, considered the case and the representation was rejected on the even date, this Court held that keeping the representation pending awaiting the decision of the Board and thereafter its rejection are illegal. In para 9 of the judgment this Court referring to the interpretation of the word 'forthwith' C under Article 22(5) observed that the expression would mean 'as soon as may be' that the action should be performed by the authority with reasonable speed and expedition with a sense of urgency without any unavoidable delay; that no hard and fast rule could be laid nor a particular period is prescribed; that there should not be any indifference or callousness in consideration and disposal of the representation. This Court made it clear that the determination D of the case depends on the facts and circumstances of each case.

In *Smt. Gracy* v. *State of Kerala,* [1991] 2 SCC 1, a Bench of three learned Judges of this Court construing the provisions of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 and E Article 22(4) and (5) of the Constitution held that the nature of duty imposed on the detaining authority under Article 22(5) in the context of the extraordinary power of preventive detention is sufficient to indicate that strict compliance is necessary to justify interference with personal liberty and it is more so since the liberty involved is of a person in detention and not of a free agent. The obligation of the government to consider the representation is different F from, independent of and in addition to the obligation of the Board to consider it at the time of hearing the reference before giving its opinion to the government. In that case during the pendency of the reference before the Advisory Board the detenu made his representation and addressed it to the Advisory Board. The Advisory Board considered the reference relating to the G detenu made by the Central Government and also the detenu's representation submitted to it and gave the opinion that there was sufficient cause to justify his preventive detention. The Central Government then made the order confirming his detention. This Court observed that detenu's representation was not considered by the Central Government independently at any time. In the counter affidavit Central Government's stand was that since the H representation was addressed to the Advisory Board and not to the Central

Government there was no obligation on it to consider the same independently Rejecting this stand of the Central Government and allowing the writ petition filed on behalf of the detenu this Court observed :

> "The contents of Article 22(5) as well as the nature of duty imposed thereby on the detaining authority support the view that so long as there is a representation made by the detenu against the order of detention, the aforesaid dual obligation under Article 22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the Advisory Board or to both. The mode of address is only a matter of form which cannot whittle down the requirement of the constitutional mandate in Article 22(5) enacted as one of the safeguards provided to the detenu in case of preventive detention.
>
> In the present case there had been a breach by the Central Government of its duty under Article 22(5) to consider and decide the representation independently of the Advisory Board's opinion. The order of detention as well as the order of its confirmation passed by the Central Government are, therefore quashed. This shall not, however, affect the detenu "prosecution for the alleged offence and it shall also not be construed as a direction to release him in case he is in custody as a result of refusal of bail."

From the conspectus of the views taken in the decisions discussed above, it is clear to us that what this Court has consistently laid stress upon is, prompt consideration and expeditious disposal of representations of the detenu received by the State Government at any stage of the proceeding. The view has been taken in the light of Article 22(4) and (5) of the Constitution. We do not find any support for the extreme view taken by the High Court in the case that merely because the report of the Advisory Board was placed before the Detaining Authority (Lt. Governor) along with other papers for disposal of the representation made by the detenu there was no independent consideration of the same by the authority. In the scheme of things under the Act, the report of the Advisory Board is not an irrelevant material in the exercise.

The specific question that arises for consideration is whether on the facts and circumstances of the case on hand the order passed by the Lt. Governor rejecting the representation of the detenu-respondent can be held to have been vitiated on the ground that it was not passed on independent consideration. It is relevant to make it clear that the High Court has not

A recorded any finding that there was delay or callousness or bureaucratic lethargy on the part of the State Government in dealing with the representation of the respondent or that the Lt. Governor had kept the representation submitted before him awaiting the report of the Advisory Board. No finding is also recorded by the High Court that the Lt. Governor solely depended on or relied upon the report of the Advisory Board for passing the order rejecting the B representation. It has also not been found that the report of the Advisory Board was the only material placed before the Lt. Governor while submitting the representation for this consideration. In such circumstances, we are of the view that the High Court committed error in holding that the order of the Lt. Governor rejecting the representation of the detenu was not based on his C independent consideration. At the cost of repetition we may state that the High Court drew such an inference solely on the ground that the report of the Advisory Board was also placed before the Lt. Governor while considering the representation of the respondent. It is relevant to note here that the observations made by the Constitution Bench in the case of K.M. Abdulla Kunhi (supra) and other decisions noted earlier were made with a view to D bring home the importance of expeditious consideration and disposal of representation of a detenu under the preventive detention laws in the light of the right vested in the detenu under Article 22(4) and (5) of the Constitution.

On the discussions made and the reasons stated in the foregoing E paragraphs, we are constrained to hold that in the facts and circumstances of the case the judgment of the High Court is unsustainable. Accordingly, the appeal is allowed. The judgment dated 14.12.1999 in Criminal Writ Petition No. 809/99 is set aside. Since about five months have elapsed after the judgment of the High Court was delivered, we leave it open to the detaining authority to decide whether the respondent should be taken in detention to complete F the unexpired period of detention.

S.V.K. Appeal allowed.