A SRI ANAND HANUMATHSA KATARE

v.

ADDITIONAL DISTRICT MAGISTRATE AND ORS

OCTOBER 19, 2006

B [ARIJIT PASAYAT AND C.K. THAKKER, JJ.]

Karnataka Prevention of Dangerous Activities of Boot-Leggers, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1985:

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ss. 3(2), 3(3) and 13—Revocation of detention order—Order of detention Approved by State Government—Thereafter, representation to detaining authority—Held, order of detention can be revoked only on the basis of a representation made to the appropriate authority—Detaining authority D *becomes functus officio the moment approval is accorded by State Government—In grounds of detention furnished to detenu on the date of detention itself it was specifically indicated that if he wanted to represent to the State Government, he was to submit the representation directly to the Government through the Superintendent of Jail.*

E **A detention order under sub-section (2) of s. 3 of the Karnataka Prevention of Dangerous Activities of Boot-Leggers, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1985 was passed on 7.10.2005. The detenu was taken into custody the same day and he was furnished with grounds of detention. The detaining authority** F **submitted a report to the Government which, on 11.10.2005, passed an order under s. 3(3) of the Act approving the detention. The order of detention was challenged in a *habeas corpus* petition before the High Court. Meanwhile the Government referred the matter to the Advisory Board which approved the order of detention. Accepting the said report, the Government passed an order under s. 13 of the Act. The High Court dismissed the petition.**

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In the present appeal it was contended the that the representation given by the detenu to the detaining authority ought to have been referred for consideration of the State Government and the detaining authority should not have dealt with the same as it had become *functus officio* the moment the State Government accorded approval to the order of detention.

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Dismissing the appeal, the Court A

HELD: 1. Under Section 3(3) of the Karnataka Prevention of Dangerous Activities of Boot-Leggors, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1985, the approval of the State Government is mandatory. A reading of sub-section (3) of Section 3 of the Act make it clear that the order of detention under s. 3(2) becomes operative the moment it is passed. But it ceases to be operative unless it is approved within 12 days. Therefore, the Detaining Authority becomes functus officio the moment the approval is accorded by the State Government. It is to be noted that the order of detention can be revoked only on the basis of a representation to the appropriate authority. This fact is relevant. [628-E-G; 630-D] B C

Veeramani **v.** *State of Tamil Nadu,* **[1994] 2 SCC 337, held inapplicable.**

Kamleshkumar Ishwardas Patel **v.** *Union of India and Ors.,* **JT (1995) 3 639, distinguished.**

State of Maharashtra and Ors. **v.** *Santosh Shankar Acharya,* **[2000] 7 SCC 463, referred to.** D

2. It is undisputed that in the grounds of detention it was specifically indicated to the detenu that if he wanted to represent to the Government of Karnataka he was to submit the same directly to the Government through the Superintendent of the Cetral Jail in which he was detained. [634-C] E

R. Keshava **v.** *M.B. Prakash and Ors.,* **[2001] 2 SCC 145;** *Union of India* **v.** *Paul Manickam and Anr.,* **[2003] 8 SCC 342;** *Union of India and Anr.* **v.** *Chaya Ghoshal (Smt.) and Anr.,* **[2005] 10 SCC 97 and** *R. Keshava* **v.** *M.B. Prakash and Ors.,* **[2001] 2 SCC 145, relied on.** F

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1080 of 2006.

From the final Judgment and Order dated 5.4.2006. of the High Court of Karnataka at Bangalore in Writ Petition (HC) No. 124 of 2005. G

K.K. Mani for the Appellant.

Udya Halla, A.A.G., Sanjay R. Hegde and Anil K. Mishra for the Respondents.

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A The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Leave granted.

Appellant calls in question legality of the judgment rendered by a Division Bench of the Karnataka High Court holding that the order of detention B passed by the Additional District Magistrate and Police Commissioner, Hubli, Dharwad city, directing detention of one Shri Ramesh Madhusa Bhandage (hereinafter referred to as the 'detenu') under the Karnataka Prevention of Dangerous Activities of Boot-Leggers, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1985 (in short the 'Act'). The habeas corpus petition filed by the appellant who is brother-in-law of the C detenu was dismissed by the High Court.

The order of detention was passed on 7.10.2005 under sub-section (2) of Section 3 of the Act and the detenu was taken into custody that very day. Subsequently, the detenu was furnished with the grounds of detention dated D 7.10.2005 which were also supplied to him that very day. The Detaining Authority submitted a report to the Government as required under law within 12 days from the date of order of detention, which passed an order approving the detention under Section 3(3) of the Act. The order of approval is dated 11.10.2005. The aforesaid order of detention was challenged before the High Court. During the pendency of the proceedings before the High Court the E Advisory Board to whom the Government had referred the matter also approved the order of detention. The Government accepted the said report and passed an order in terms of Section 13 of the Act. The said order of the Government was not called in question by the detenu. Several points were urged in support of the habeas corpus petition. Primarily following points were urged F in support of the habeas corpus petition. Firstly, even assuming that the detenu is a boot-legger within the meaning of Section 2(b) of the Act, his activities cannot be considered as likely to affect adversely the maintenance of public order. Secondly, the detenu had submitted his reply to the Detaining Authority who rejected the same. Once the order passed under Section 3(2) has been approved by the State Government under Section 3(3), the Detaining G Authority became functus officio and any representation given to the Detaining Authority ought to have been transmitted to be considered by the State Government. Thirdly, the proposals made by the Sponsoring Authority were verbatim reproduced in the grounds of detention. Fourthly, the orders of acquittal passed by the Criminal Court in respect of two cases were not H supplied to him. Therefore, subjective satisfaction was affected. Fifthly, there

was no report of the Forensic Department that the liquor sold or manufactured by the detenu was unfit for human consumption. Non-supply of order referred to above, rendered the order of detention vitiated. If it is held that the documents are not supplied then the Detaining Authority's decision is based on irrelevant consideration. The Detaining Authority and the State Government countered each of the contentions.

The High Court did not find any substance in the different grounds pressed into service and held that the detention was in order. The High Court referred to *Kamleshkumar Ishwardas Patel* v. *Union of India and Ors.*, JT (1995) 3 639 which is relied upon by the appellant, and held that the said case was rendered under the COFEPOSA Act and the provisions are not in pari materia. There is no provision in the Act to show that the role of the Detaining Authority comes to an end after making an order. Under the relevant provision, that is Section 3(3), the State Government which has empowered the Detaining Authority assumes the role of the Detaining Authority. The Detaining Authority made the detenu aware of his right to make representation to the State Government and, therefore, there was no infraction.

In support of the appeal, learned counsel for the appellant urged one point i.e. Detaining Authority became functus officio the moment the State Government accords approval. Therefore, the Detaining Authority should not have dealt with the representation and should have referred the matter to the State Government.

In response, learned counsel for the State submitted that the High Court's view about the Detaining Authority not becoming functus officio is correct and in any event the detenu was intimated of his right to make a representation which was made and has been appropriately dealt with and in any event the detenu did not avail opportunity granted to him to make representation to the State Government. The High Court's judgment is in order.

It was pointed out that the judgment of this Court in *State of Maharashtra and Ors.* v. *Santosh Shankar Acharya,* [2000] 7 SCC 463 runs counter to *Veeramani* v. *State of Tamil Nadu,* [1994] 2 SCC 337 which is a decision rendered by a Constitution Bench.

We shall first deal with the plea taken by learned counsel for the State about *Santosh Shankar Acharya's* case (supra) running countered to *Veeramani's* case (supra). It has been noted that *Veeramani's* case (supra)

A was related to a detention under the COFEPOSA Act. In the said case in para 15 it was noted as follows:-

> "15. Yet another judgment of this Court relied upon in this context in *Amir Shad Khan* v. *L. Hmingliana,* [1991] 4 SCC 39). That was also a case under COFEPOSA Act where the detaining authority as well
> B as the State Government failed to forward the representation of the detenu to the Central Government. In that context this Court after having examined the provisions of Section 11 of COFEPOSA Act observed thus : (SCC pp. 48-49, para 3)
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> "It is obvious from a plain reading of the two clauses of sub-section
> C (1) of Section 11 that where an order is made by an officer of the Government, the State Government as well as the Central Government are empowered to revoke the detention order. Where, however, detention order is passed by an officer of the Central Government or a State Government, the Central Government is empowered to revoke
> D the detention order. Now this provision is clearly without prejudice to Section 21 of the General Clauses Act which lays down that where by any Central Act a power to issue orders is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions, if any, to rescind any order so issued. Plainly the authority which has passed the order under any Central Act is
> E empowered by this provision to rescind the order in like manner. This provision when read in the context of Section 11 of the Act makes it clear that the power to rescind conferred on the authority making the detention order by Section 21 of the General Clauses Act is saved and is not taken away. Under Section 11 an officer of the State Government
> F or that of the Central Government specially empowered under Section 3(1) of the Act to make a detention order is not conferred the power to revoke it; that power for those officers has to be traced to Section 21 of the General Clauses Act. Therefore, where an officer of the State Government or the Central Government has passed any detention order and on receipt of a representation he is convinced that the order
> G needs to be revoked he can do so by virtue of Section 21 General Clauses Act since Section 11 of the Act does not entitle him to do so. If the State Government passes an order of detention and later desires to revoke it, whether upon receipt of a representation from the detenu or otherwise, it would be entitled to do so under Section 21 of the General Clauses Act but if the Central Government desires to
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revoke any order passed by the State Government or its officer it can do so only under clause (b) of Section 11(1) of the Act and not under Section 21 of the General Clauses Act. This clarifies why the power under Section 11 is conferred without prejudice to the provisions of Section 21 of the General Clauses Act. Thus on a conjoint reading of Section 21 of the General Clauses Act and Section 11 of the Act it becomes clear that the power of revocation can be exercised by three authorities, namely, the state Government or the Central Government, the State Government as well as the Central Government. The power of revocation conferred by Section 8(f) on the appropriate Government is clearly independent of this power. It is thus clear that Section 8(f) of the Act satisfies the requirement of Article 22(4) whereas Section 11 of the Act satisfies the requirement of the latter part of Article 22(5) of the Constitution. The statutory provisions, therefore, when read in the context of the relevant clauses of Article 22, make it clear that they are intended to satisfy the constitutional requirements and provide for enforcement of the right conferred on the detenu to represent against his detention order. Viewed in this perspective it cannot be said that the power conferred by Section 11 of the Act has no relation whatsoever with the constitutional obligation cast by Article 22(5)."

Thereafter, referring to the judgment of this Court in *Raziya Umar Bakshi (Smt)* v. *Union of India,* [1980] Supp SCC 195 it was further observed as under: (SCC p. 50, para 4)

> "This observation would show that the power of revocation conferred by Section 11 of the Act has a nexus with the right of representation conferred on the detenu by Article 22(5) and, therefore, the State Government when requested to forward a copy of the representation to the Central Government is under an obligation to do so."

Relying on these observations it is also contended that it must be presumed that the detenu can make representation to the detaining authority also independently and the said authority has to consider the same irrespective of the decision of the State Government or the Central Government on the representation made to them. The above observations made in *Amir Shah* case (supra) also do not go to that extent. In any event *Ibrahim Bachu Bafan* v. *State of Gujarat,* [1985] 2 SCC 24 cases arose under the COFEPOSA Act where there is no specific provision for approval by the State Government. Therefore,

A the question whether the detaining authority namely the empowered officer of the Government can act independently and revoke the detention order even after the State Government has approved and affirmed the detention as provided under the other Acts did not arise directly. In those two decisions the ratio is that the detaining authority has also the power to revoke the detention order made by it by virtue of the power conferred by Section 21 of the General Clauses Act read with Section 11 of the COFEPOSA Act and in that context it was further observed that the power of revocation conferred by Section 11 of the Act has nexus with the right of representation conferred on the detenu by Article 22(5) and that the State Government when requested to forward a copy of the representation to the Central Government, is under obligation to do so. Therefore the above mentioned observations in the cases arising under the COFEPOSA Act do not squarely apply to cases where factually the detention order made by an empowered officer has been approved by the State Government as provided for under the other enactments. In such cases, in our view, the question of detaining authority revoking the order after such approval does not arise and the power preserved by virtue of the provisions under General Clauses Act is no more exercisable."

The position is different under the Act. Under Section 3(3) of the Act the approval of the State Government is mandatory. There is no such provision in COFEPOSA. A combined reading of Sections 3 and 8 of the COFEPOSA shows that there are three authorities involved. The approval of the State Government under the Act is necessary because of Section 3(2) of the Act. A peculiar situation may arise if representation is made to three authorities. Suppose in a given case two of the authorities reject the representation and one authority accepts it. It is not conceivable that one is bound by the order of the other. Section 8 of the COFEPOSA deals with different situations and provides for a hierarchy. There is no such parallel provision in the Act. A reading of sub-section (3) of Section 3 of the Act makes it clear that the same becomes operative the moment it is passed. But it ceases to be operative unless it is approved within 12 days. In this connection para 6 of *Santosh Shankar Acharya's* case (supra) is relevant. The same reads as follows:-

"The counsel appearing for the State strongly relied upon the decision of this Court in *Veeramani* v. *State of Tamil Nadu,* [1994] 2 SCC 337, wherein an order of detention had been issued under the provision

of Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Forest-Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1982 (hereinafter referred to as "Tamil Nadu Act"). According to the learned counsel for the State the provisions of the said Act are in pari-materia with the Maharashtra Act with which we are concerned in the present appeals and this Court in *Veeramani* (supra) had recorded a conclusion that the question of detaining authority revoking the order after such approval does not arise and the power preserved by virtue of the provisions of General Clauses Act is no more exercisable. In the aforesaid case the Court considered several earlier decisions of the Court under the provisions of COFEPOSA and was of the view that the observations made therein could not apply to cases arising under other Preventive Detention Act including the Tamil Nadu Act. *Veeramani* (supra) also relied upon the judgment of this Court in State of *Maharashtra* v. *Sushila Mafatlal Shah,* [1988] 4 SCC 490, for the ultimate conclusion. In our considered opinion this decision does not assist the respondents in any manner inasmuch as the Court in *Veeramani* (supra) has considered the situation that emerged subsequent to the date of approval of the order of detention by the State Government and not prior thereto. As has been stated earlier, it may be difficult to contend that even after the approval of the order of detention by the State Government the detaining authority would still be competent to entertain and dispose of a representation in exercise of the powers under Section 21 of Bombay General Clauses Act, but this decision cannot be said to be an authority to hold that even before the approval of the order of the detaining authority the detaining authority does not possess the power under Section 21 of the Bombay General Clauses Act. Such a conclusion would make the entire provision of Section 14 of the Maharashtra Act redundant and otiose. Then again the Court had fully relied upon the observations of this Court in *State of Maharashtra* v. *Sushila Mafatlal Shah* (supra) and the judgment of *Sushila Mafatlal Shah* (Supra) has been directly considered and overruled in the Constitution Bench decision in *Kamlesh Kumar's* case (supra). It would also be appropriate to notice that even in *Raj Kishore Prasad* v. *State of Bihar,* [1982] 3 SCC 10, though the Court did not entertain the contention that detaining authority under the provisions of National Security Act has a right to consider the representation on the ground that the order of detention had been

A approved by the State Government yet it had been observed that constitutionally speaking a duty is cast on the detaining authority to consider the representation which would obviously mean that if such representation is made prior to the approval of the order of detention by the State Government. This being the position, it goes without saying that even under the Maharashtra Act a detenu will have a right B to make a representation to the detaining authority so long as the order of detention has not been approved by the State Government and consequently non-communication of the fact to the detenu that he has a right to make representation to the detaining authority would constitute an infraction of the valuable constitutional right guaranteed C to the detenu under Article 22(5) of the Constitution and such failure would make the order of detention invalid. We, therefore, see no infirmity with the impugned judgment of the Full Bench of the Bombay High Court to be interfered with by this Court. These appeals accordingly fail and stand dismissed."

D Therefore, the Detaining Authority becomes functus officio the moment the approval is accorded by the State Government. It is to be noted that the order of detention can be revoked only on the basis of a representation to the appropriate authority. This fact is relevant. Further para 17 of *R. Keshava* v. *M.B. Prakash and Ors.*, [2001] 2 SCC 145 is of importance. The same reads E as follows:

"We are satisfied that the detenu in this case was apprised of his right to make representation to the appropriate Government/authorities against his order of detention as mandated in Article 22(5) of the Constitution. Despite knowledge, the detenu did not avail of the F opportunity. Instead of making a representation to the appropriate Government or the confirming authority, the detenu chose to address a representation to the Advisory Board alone even without a request to send its copy to the authorities concerned under the Act. In the absence of representation or the knowledge of the representation having been made by the detenu, the appropriate Government was G justified in confirming the order of detention on perusal of record and documents excluding the representation made by the detenu to the Advisory Board. For this alleged failure of the appropriate Government, the order of detention of the appropriate Government is neither unconstitutional nor illegal."

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At this juncture it would be relevant to take note of paras 17 to 19 of *Union of India* v. *Paul Manickam and Anr.*, [2003] 8 SCC 342. They read as follows:

> "17. Coming to the question whether the representation to the President of India meets with the requirement of law it has to be noted that in *Raghavendra Singh* v. *Superintendent, District Jail, Kanpur and Ors.*, [1986] 1 SCC 650 and *Rumana Begum* v. *State of Andhra Pradesh and Anr.*, [1993] Supp. 2 SCC 341 it was held that a representation to the President of India or the governor, as the case may be, would amount to representation to the Central Government and the State Government respectively. Therefore, the representation made to the President of India or the Governor would amount to representation to the Central Government and the State Government, but this cannot be allowed to create a smokescreen by an unscrupulous detenu to take the authorities by surprise, acting surreptitiously or with ulterior motives. In the present case, the order (grounds) of detention specifically indicated the authority to whom the representation was to be made. Such indication is also part of the move to facilitate an expeditious consideration of the representations actually made.
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> 18. The respondent does not appear to have come with clean hands to the Court. In the writ petition there was no mention that the representation was made to the President; instead it was specifically stated in paragraph 23 that the representation was made by registered post to the first respondent on 11.5.2000 and a similar representation was made to the second respondent. Before the High Court in the writ petition the first and the second respondent were described as follows:
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> "1. State of Tamil Nadu
>
> Rep. By its Secretary,
>
> Government of Tamil Nadu,
>
> Public (SC) Department, Fort St. George,
>
> Chennai, 600 009.
>
> 2. Union of India,
>
> Rep. By its Secretary

A Ministry of Finance,

Department of Revenue, New Delhi."

19. As noted supra, for the first time in the review application it was disclosed that the representation was made to the President of India and no representation was made to the State of Tamil Nadu or the Union of India who were arrayed in the writ petition as parties. This appears to be a deliberate attempt to create confusion and reap an undeserved benefit by adopting such dubious device. The High Court also transgressed its jurisdiction in entertaining the review petition with an entirely a new substratum of issues. Considering the limited scope for review the High Court ought not to have taken into account factual aspects which were not disclosed or were concealed in the writ petition. While dealing with a habeas corpus application undue importance is not to be attached to technicalities, but at the same time where the court is satisfied that an attempt has been made to deflect the course of justice by letting loose red herrings the Court has to take serious note of unclean approach. Whenever a representation is made to the President and the Governor instead of the indicated authorities, it is but natural that the representation should indicate as to why the representation was made to the President or the Governor and not the indicated authorities. It should also be clearly indicated as to whom the representation has been made specifically, and not in the manner done in the case at hand. The President as well as the Governor, no doubt are constitutional Heads of the respective Governments but day to day administration at respective levels are carried on by the Heads of the Department-Ministries concerned and designated officers who alone are ultimately responsible and accountable for the action taken or to be taken in a given case. If really the citizen concerned genuinely and honestly felt or interested in getting an expeditious consideration or disposal of his grievance, he would and should honestly approach the really concerned authorities and would not adopt any dubious devices with the sole aim of deliberately creating a situation for delay in consideration and cry for relief on his own manipulated ground, by directing his representation to an authority which is not directly immediately concerned with such consideration."

Paras 17 to 19 of *Union of India and Anr.* v. *Chaya Ghoshal (Smt.) and Anr.*, [2005] 10 SCC 97 are also relevant. They read as follows:

"17. While dealing with a habeas corpus application undue importance is not to be attached to technicalities, but at the same time where the court is satisfied that an attempt has been made to deflect the course of justice by letting loose red herrings the Court has to take serious note of unclean approach. Whenever a representation is made to the President or the Governor instead of the indicated authorities, it is but natural that the representation should indicate as to why the representation was made to the President or the Governor and not the indicated authorities. It should also be clearly indicated as to whom the representation has been made specifically. The President as well as the Governor, no doubt are constitutional Heads of the respective Governments but day to day administration at respective levels are carried on by the Heads of the Department-Ministries concerned and designated officers who alone are ultimately responsible and accountable for the action taken or to be taken in a given case. If really the citizen concerned genuinely and honestly felt or is interested in getting an expeditious consideration or disposal of his grievance, he would and should honestly approach the really concerned authorities and would not adopt any dubious devices with the sole aim of deliberately creating a situation for delay in consideration and cry for relief on his own manipulated ground, by directing his representation to an authority which is not directly/immediately concerned with such consideration.

18. Where, however, a person alleging infraction of personal liberty tries to act in a manner which is more aimed at deflecting the course of justice than for protection of his personal right, the Court has to make a deliberate balancing of the fact situation to ensure that the mere factum of some delay alone is made use of to grant relief. If a fraud has been practiced or perpetrated that may in a given case nullify the cherished goal of protecting personal liberty, which obligated this Court to device guidelines to ensure such protection by balancing individual rights and the interests of the nation, as well.

19. In *R. Keshava* v. *M.B. Prakash and Ors.*, [2001] 2 SCC 145 it was observed by this Court as follows:

"We are satisfied that the detenu in this case was apprised of his right to make representation to the appropriate Government/ authorities against his order of detention as mandated in Article 22 (5) of the Constitution. Despite knowledge, the detenu did not

A avail of the opportunity. Instead of making a representation to the appropriate Government or the confirming authority, the detenu chose to address a representation to the Advisory Board alone even without a request to send its copy to the authorities concerned under the Act. In the absence of representation or the knowledge of the representation having been made by the detenu, the appropriate Government was justified in confirming the order of detention on perusal of record and documents excluding the representation made by the detenu to the Advisory Board. For this alleged failure of the appropriate Government, the order of detention of the appropriate Government is neither rendered unconstitutional nor illegal".

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It is undisputed that in the grounds of detention it was specifically indicated to the appellant that if he wanted to represent to the Government of Karnataka he was to submit the same directly to the Government through the Superintendent of the Central Jail in which he is detained.

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Above being the factual position, the judgment of the High Court is irreversible. The appeal is sans merit and is dismissed.

R.P. Appeal dismissed.