2023 LiveLaw (SC) 293

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
KRISHNA MURARI; J., V. RAMASUBRAMANIAN; J.
10 April, 2023
CRIMINAL APPEAL NO. 1051 OF 2023 (Arising out of Special Leave Petition (Crl.) No. 10798 of 2022
PRAMOD SINGLA *versus* **UNION OF INDIA & ORS.**

Preventive Detention - Preventive detention laws in India are a colonial legacy, and as such, are extremely powerful laws that have the ability to confer arbitrary power to the state. In such a circumstance, where there is a possibility of an unfettered discretion of power by the Government, this Court must analyze cases arising from such laws with extreme caution and excruciating detail, to ensure that there are checks and balances on the power of the Government. *(Para 44)*

Preventive Detention - Every procedural rigidity, must be followed in entirety by the Government in cases of preventive detention, and every lapse in procedure must give rise to a benefit to the case of the detenue. The Courts, in circumstances of preventive detention, are conferred with the duty that has been given the utmost importance by the Constitution, which is the protection of individual and civil liberties. *(Para 44)*

Constitution of India, 1950; Article 22 (5) - illegible documents given to the detenue in preventive detention can cause prejudice in submitting a representation. This violates the principles under Article 22(5) of the Constitution of India, where the detaining authority must explain the grounds of detention in a language understood by the detenue. *(Para 39)*

(Arising out of impugned final judgment and order dated 03-11-2022 in WPCRL No. 1205/2022 passed by the High Court of Delhi at New Delhi)

For Petitioner(s) Mr. Vikram Chaudhri, Sr. Adv. Mr. Nikhil Jain, AOR Mr. Rishi Sehgal, Adv. Mr. Keshavam Chaudhri, Adv. Ms. Hargun Sandhu, Adv. Ms. Arveen Sekhon, Adv. Ms. Prabhneer Swani, Adv. Ms. Divya Jain, Adv. Mr. Sagar Juneja, Adv. Mr. Parvez Chaudhary, Adv.

For Respondent(s) Mr. K.M. Nataraj, Ld. ASG Mr. Mukesh Kumar Maroria, AOR Mr. Gurmeet Singh Makker, AOR

J U D G M E N T

KRISHNA MURARI, J.

Leave Granted.

2. The present Appeal is directed against the impugned judgment and final order dated 03.11.2022 passed by the High Court of Delhi at New Delhi, (hereinafter referred to as "**High Court**") in Writ Petition (Crl.) No. 1205 of 2022 whereby the appellant's plea to quash the detention order against him on grounds of delay in considering his representation was denied.

FACTS

3. Briefly, the facts relevant to the present appeal are that an Intelligence was received by the Respondent that a syndicate comprising of certain Chinese, Taiwanese, and South Korean nationals in association with some Indian Nationals

were in the practice of smuggling gold into India through Air Cargo by concealing gold in transformers of electroplating/ reworking machines etc..

4. One such cargo was being imported to India in the name of one M/s Healthy Future Leaders Pvt. Ltd. and was likely to arrive at Delhi Cargo Complex in the New Delhi Airport.

5. On 18.11.2021 and 19.11.2021, acting on the said intelligence, the purported consignment was examined by the officers of Respondent No.4 and 80.126 kgs of 24 carat foreign origin gold was recovered from the said consignment in the form of 'E' and 'I' shaped plates with a market value of Rs.39,31,38,219/-.

6. The appellant being a suspect, his shop was checked by DRI officials and 7 pieces of gold weighing 5.409 KGs with a market value of Rs.2,64,44,680/-was recovered from his premises.

7. The Respondent authority also conducted searches at four different places of the abovementioned syndicate and arrested 4 foreign nationals on grounds of finding incriminating evidence against them.

8. On 20.11.2021, the appellant along with other members of the syndicate was arrested by the officers of respondent no.4 authority, whereupon they were produced before the Ld. CMM, Patiala House Courts, New Delhi and were subsequently remanded to judicial custody.

9. The appellant then sought for bail before the learned CMM, and vide order dated 13.12.2021 he was granted bail.

10. Vide four separate order dated 21.12.2021, all four foreign nationals accused in the said crime were also granted bail by the Ld. CMM, and further, vide order dated 21.12.2021, the CMM also granted bail to the co-accused Neeraj Varshney of Indian Origin.

11. Subsequent to the appellant's release on bail, DRI filed an application in the High Court for incorporating an additional condition in the bail order directing the appellant to appear in the office of DRI every Monday at 11:00 am, and the same was granted.

12. On 19.01.2022, the DRI sent a proposal to respondent No.2 to issue an order of detention under the COFEPOSA Act against the appellant, and subsequently respondent No.2 detaining authority passed the impugned detention order as against the appellant on 01.02.2022. The appellant was then arrested on 04.02.2022 by the DRI.

13. On 24.02.2022 a reference was made to the Central Advisory Board, Delhi High Court, and subsequently, a representation was sent by the appellant to the Respondent No.2 detaining authority on 02.03.2022 which came to be rejected on 15.03.2022.

14. In the meanwhile, on 10.03.2022, the appellant sent a representation letter to the Central Government, and subsequently on 04.04.2022, he made another representation to the Advisory Board.

15. The hearing before the Advisory board was concluded on 18.04.2022, and on 09.05.2022, the Central Government, on advice from the advisory board after a delay of 60 days rejected the representation.

16. The appellant then filed a writ in the High Court seeking to quash the detention order against him, which came to be dismissed vide impugned order dated 03.11.2022.

17. This Court subsequently, vide order dated 05.01.2023, released the appellant from custody as interim relief due to the demise of his father, and later, due to the expiry of the impugned detention order against the appellant, he was released from detention.

ARGUMENTS ADVANCED BY THE APPELLANT

18. The Learned Counsel for the appellant contended that:

I. As per Article 22(5) of the Constitution of India, a representation made by the detenue in cases of preventive detention must be considered at the earliest, and an inordinate delay in considering the representation is grounds enough for the detention order to be set aside.

II. While relying on a catena of judgments rendered by this Court, it was argued that the Central Government is not under any compulsion to wait for the recommendation of the Advisory Board and must act independently and without delay in deciding the representation of the detenue.

III. Further, the Ld. Counsel for the appellant contends that the decisions of this Court in the case of ***K.M. Abdulla Kunhi & B.L. Abdul Khader v. Union Of India & Ors***. [1] and ***Ankit Ashok Jalan vs Union Of India & Ors.***[2] Judgment, both of which are Constitution Bench judgments, which state that the central Government must wait for the decision of the Advisory Board, are in direct contravention with Constitution Bench judgments of this Court in ***Pankaj Kumar Chakraborty And Ors. v. State of West Bengal***[3] and the ***Jayanarayan Sukul v State Of West Bengal***[4], and due to the apparent conflict, the issue needs to be referred to a Larger Bench.

IV. It was also contended that the documents supplied to the appellant herein as grounds for his preventive detention were illegible and in Chinese language, and hence on this ground also the impugned detention order as against the appellant must be quashed.

ARGUMENTS ADVANCED BY THE RESPONDENTS

19. Learned ASG, Mr. K.M Natraj appearing on behalf of the respondents contends that:

I. There is no incongruity between the ***Pankaj case (supra)*** and the ***Ashok Jalan case (supra)*** as contended by the appellant. The decisions relied upon by the appellant are in context of the Preventive Detention Act, whereas, the ***Ashok Jalan case (supra)*** and ***Adullah Kuni case (supra)*** are in context of the COFEPOSA Act, and if the ***Pankaj case (supra)*** is seen in the context of COFEPOSA Act, due to their being a distinction between the detaining authority and the central Government in the COFEPOSA Act, there exists no friction between the two Constitutional Bench judgments.

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[1] (1991) 1 SCC 476
[2] (2020) 16 SCC 127
[3] (1969) 3 SCC 400
[4] (1970) 1 SCC 219

II. As per the ***Ashok Jalan Case (supra)***, due to the detaining authority and the central Government being independent of each other under COFEPOSA Act, the mandate to wait for the decision of the Advisory Board exists on the central Government, and hence the delay of 60 days is not grounds enough for the detention order to be quashed.

ISSUES

20. In light of the abovementioned arguments raised by the Learned Counsels for the parties, following three issues arise for our consideration.

I. Whether there exists an incongruity between the ***Pankaj Kumar case (supra)*** and the ***Abdullah Kunhi Case (supra)*** , and if such a friction exists should the point of law be referred to a Larger Bench?

II. If there exists no friction between the two Constitutional judgments of this Court, can the impugned detention order be quashed on grounds of the 60-day delay in consideration of the representation made by the appellant?

III. Whether the illegible documents written in Chinese submitted to the appellant herein are grounds enough for quashing the impugned detention order?

ANALYSIS

21. Before we deal with the issues framed, we find it important to note that preventive detention laws in India are a colonial legacy, and have a great potential to be abused and misused. Laws that have the ability to confer arbitrary powers to the state, must in all circumstances, be very critically examined, and must be used only in the rarest of rare cases. In cases of preventive detention, where the detenue is held in arrest not for a crime he has committed, but for a potential crime he may commit, the Courts must always give every benefit of doubt in favour of the detenue, and even the slightest of errors in procedural compliances must result in favour of the detenue.

ISSUE 1- Whether there exists an incongruity between the Pankaj Kumar case and the Abdullah Kunhi Case and if such a friction exists should the point of law be referred to a Larger Bench?

22. For the purpose of deciding this question, we must first elaborate on the rights accrued to a detenue against his preventive detention in terms of his representation. The detenue, in cases of preventive detention under the COFEPOSA Act, has the right to submit a representation to the detaining authority, the Government, and the Advisory Board. These representations then, as per Article 22(5) of the Constitution of India, must be decided at the earliest opportunity possible. If the representation is accepted either by the Government or the detaining officer, the detenue is released, however, if the representation is rejected, then the detention period is continued.

23. In the case at hand, the appellant herein, who is under preventive detention, submitted a representation to the Central Government, the detaining authority and the Advisory Board. It is the case of the appellant that while the detaining authority considered the representation of the appellant authority in an expeditious manner, however, the Government took 60 days to consider the same. This delay of 60 days, as per the appellant, is fatal to the case of the prosecution, and constitutes sufficient grounds for quashing the impugned detention order.

24. The Government, however, claims that the delay of 60 days is completely fair, as the same was caused because the Central Government was waiting for the advice of the Advisory Board before deciding on the resolution. In light of this conflict, the overarching issue that needs to be answered is whether the central Government is bound to wait for the decision of the Advisory Board before coming to its decision or not. To answer this, we must look at the relevant case laws that define the rights and duties of the Government, the detaining authority and the detenue in such circumstance.

25. In the ***Pankaj Kumar case (Supra)*****,** the petitioners therein filed a writ petition in the Supreme Court seeking for a quashing of a detention order passed against them under the Preventive Detention Act,1950, on grounds that the Government failed to consider the representation made by them and merely passed it on to the Advisory Board. After careful consideration, a Constitution Bench of this Court held that the Government must act Independently from the Advisory Board, and that there exists no mandate on the Government to wait for the decision of the Advisory Board. The relevant paragraphs of the said judgment are being extracted herein:

"It is true that clause (5) does not in positive language provide as to whom the representation is to be made and by whom, when made, it is to be considered. But the expressions "as soon as may be" and "the earliest opportunity" in that clause clearly indicate that the grounds are to be served and the opportunity to make a representation are provided for to enable the detenu to show that his detention is unwarranted and since no other authority who should consider such representation is mentioned it can only be the detaining authority to whom it is to be made which has to consider it. Though clause (5) does not in express terms say so it follows from its provisions that it is the detaining authority which has to give to the detenu the earliest opportunity to make a representation and to consider it when so made whether its order is wrongful or contrary to the law enabling it to detain him. The illustrations given in Abdul Karim case [Abdul Karim v. State of W.B., (1969) 1 SCC 433] show that clause (5) of Article 22 not only contains the obligation of the appropriate Government to furnish the grounds and to give the earliest opportunity to make a representation but also by necessary implication the obligation to consider that representation. Such an obligation is evidently provided for to give an opportunity to the detenu to show and a corresponding opportunity to the appropriate Government to consider any objections against the order which the detenu may raise so that no person is, through error or otherwise, wrongly arrested and detained. If it was intended that such a representation need not be considered by the Government where an Advisory Board is constituted and that representation in such cases is to be considered by the Board and not by the appropriate Government, clause (5) would not have directed the detaining authority to afford the earliest opportunity to the detenu. In that case the words would more appropriately have been that the authority should obtain the opinion of the Board after giving an opportunity to the detenu to make a representation and communicate the same to the Board. But what would happen in cases where the detention is for less than 3 months and there is no necessity of having the opinion of the Board? If counsel's contention were to be right the representation in such cases would not have to be considered either by the appropriate Government or by the Board and the right of representation and the corresponding obligation of the appropriate Government to give the earliest opportunity to make such representation would be rendered nugatory. In imposing the obligation to afford the opportunity to make a representation, clause (5) does not make any distinction between orders of detention for only 3 months or less and those for a longer duration. The obligation applies to both kinds of orders. The clause does not say that the representation is to be considered by the appropriate Government in the former class of cases and by the Board in the latter class of cases. In our view it is clear from clauses (4) and (5) of Article 22 that there is a dual obligation on the appropriate Government and a dual right in favour of the detenu,

namely, (1) to have his representation irrespective of the length of detention considered by the appropriate Government and (2) to have once again that representation in the light of the circumstances of the case considered by the Board before it gives its opinion. If in the light of that representation the Board finds that there is no sufficient cause for detention the Government has to revoke the order of detention and set at liberty the detenu. Thus, whereas the Government considers the representation to ascertain whether the order is in conformity with its power under the relevant law, the Board considers such representation from the point of view of arriving at its opinion whether there is sufficient cause for detention. The obligation of the appropriate Government to afford to the detenu the opportunity to make a representation and to consider that representation is distinct from the Government's obligation to constitute a Board and to communicate the representation amongst other materials to the Board to enable it to form its opinion and to obtain such opinion.

This conclusion is strengthened by the other provisions of the Act. In conformity with clauses (4) and (5) of Article 22, Section 7 of the Act enjoins upon the detaining authority to furnish to the detenu grounds of detention within five days from the date of his detention and to afford to the detenu the earliest opportunity to make his representation to the appropriate Government. Sections 8 and 9 enjoin upon the appropriate Government to constitute an Advisory Board and to place within 30 days from the date of the detention the grounds for detention, the detenu's representation and also the report of the officer where the order of detention is made by an officer and not by the Government. The obligation under Section 7 is quite distinct from that under Sections 8 and 9. If the representation was for the consideration not by the Government but by the Board only as contended, there was no necessity to provide that it should be addressed to the Government and not directly to the Board. The Government could not have been intended to be only a transmitting authority nor could it have been contemplated that it should sit tight on that representation and remit it to the Board after it is constituted. The peremptory language in clause (5) of Article 22 and Section 7 of the Act would not have been necessary if the Board and not the Government had to consider the representation. Section 13 also furnishes an answer to the argument of the counsel for the State. Under that section the State Government and the Central Government are empowered to revoke or modify an order of detention. That power is evidently provided for to enable the Government to take appropriate action where on a representation made to it, it finds that the order in question should be modified or even revoked. Obviously, the intention of Parliament could not have been that the appropriate Government should pass an order under Section 13 without considering the representation which has under Section 7 been addressed to it.

For the reasons aforesaid we are in agreement with the decision in Abdul Karim case [Abdul Karim v. State of W.B., (1969) 1 SCC 433] . Consequently, the petitioners had a Constitutional right and there was on the State Government a corresponding Constitutional obligation to consider their representations irrespective of whether they were made before or after their cases were referred to the Advisory Board and that not having been done the order of detention against them cannot be sustained. In this view it is not necessary for us to examine the other objections raised against these orders. The petition is therefore allowed, the orders of detention against Petitioners 15 and 36 are set aside and we direct that they should be set at liberty forthwith."

26. Further, in the ***Jayanarayan Sukul Case (Supra)***, the same issue was considered by another Constitution Bench of this Court, wherein it went on to reiterate the principles in the ***Pankaj Kumar Case (Supra)***, and held that the central Government must act independently of the Advisory Board, and can decide the representation made by the detenue without hearing from the Advisory Board. For the purpose of convenience, the relevant paragraph of the said judgment is being reproduced herein:

"In the present case, the State of West Bengal is guilty of infraction of the Constitutional provisions not only by inordinate delay of the consideration of the representation but also by putting of the consideration till after the receipt of the opinion of the Advisory Board. As we have already observed there is no explanation for this inordinate delay. The Superintendent who made the enquiry did not affirm an affidavit. The State has given no information as to why this long delay occurred. The inescapable conclusion in the present case is that the appropriate authority failed to discharge its Constitutional obligation by inactivity and lack of independent judgment."

27. In the ***Harardhan Saha Case (Supra),*** yet another Constitution Bench of this Court considered the distinction between the consideration of the representation made by the detenue in cases of preventive detention, and it was stated that if the representation was made before the matter is referred to the Advisory Board, the detaining authority must consider such representation, but if the representation is made after the matter is referred to the Advisory Board, the detaining authority would first consider it and then send it to the Advisory Board. The relevant paragraph from the said judgment is being reproduced hereunder:

"The representation of a detenu is to be considered. There is an obligation on the State to consider the representation. The Advisory Board has adequate power to examine the entire material. The Board can also call for more materials. The Board may call the detenu at his request. The Constitution of the Board shows that it is to consist of Judges or persons qualified to be Judges of the High Court. The Constitution of the Board observes the fundamental of fair play and principles of natural justice. It is not the requirement of principles of natural justice that there must be an oral hearing. Section 8 of the Act which casts an obligation on the State to consider the representation affords the detenu all the rights which are guaranteed by Article 22(5). The Government considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, considers whether in the light of the representation there is sufficient cause for detention.

Principles of natural justice are an element in considering the reasonableness of a restriction where Article 19 is applicable. At the stage of consideration of representation by the State Government, the obligation of the State Government is such as Article 22(5) implies. Section 8 of the Act is in complete conformity with Article 22(5) because this section follows the provisions of the Constitution. If the representation of the detenu is received before the matter is referred to the Advisory Board, the detaining authority considers the representation. If a representation is made after the matter has been referred to the Advisory Board, the detaining authority will consider it before it will send representation to the Advisory Board."

28. Subsequently, in the case of ***Francis Coralie Mullin v. W.C. Khambra & Ors.[5],*** a Division Bench of this Court considered the principles laid down in the judgment of ***Jayanarayan Sukul (Supra)***, and while it agreed with the principles of the above mentioned case, it however made an observation stating that when it was said that the Government must decide on the representation before forwarding it to the advisory board, the emphasis was not on time, but on the onus of the Government to decide the representation Independently. This essentially meant that the Government must act independently of the Advisory Board, the relevant paragraphs from the said judgment are being extracted herein:

"We have no doubt in our minds about the role of the Court in cases of preventive detention : it has to be one of eternal vigilance. No freedom is higher than personal freedom and no duty higher than to maintain it unimpaired. The Court's writ is the ultimate insurance against

[5] (1980) 2 SCC 275

illegal detention. The Constitution enjoins conformance with the provisions of Article 22 and the Court exacts compliance. Article 22(5) vests in the detenu the right to be provided with an opportunity to make a representation. Here the Law Reports tell a story and teach a lesson. It is that the principal enemy of the detenu and his right to make a representation is neither high-handedness nor mean-mindedness but the casual indifference, the mindless insensibility, the routine and the red tape of the bureaucratic machine. The four principles enunciated by the Court in Jayanarayan Sukul v. State of W.B. [Jayanarayan Sukul v. State of W.B., (1970) 1 SCC 219 : 1970 SCC (Cri) 92] as well as other principles enunciated in other cases, an analysis will show, are aimed at shielding personal freedom against indifference, insensibility, routine and red tape and thus to secure to the detenu the right to make an effective representation. We agree : (1) the detaining authority must provide the detenu a very early opportunity to make a representation, (2) 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, (3) the representation must be forwarded to the Advisory Board before the Board makes its report, and (4) the consideration by the detaining authority of the representation must be entirely independent of the hearing by the Board or its report, expedition being essential at every stage. We, however, hasten to add that the timeimperative can never be absolute or obsessive. The Court's observations are not to be so understood. There has to be lee-way, depending on the necessities (we refrain from using the word "circumstances") of the case. One may well imagine a case where a detenu does not make a representation before the Board makes its report making it impossible for the detaining authority either to consider it or to forward it to the Board in time or a case where a detenu makes a representation to the detaining authority so shortly before the Advisory Board takes up the reference that the detaining authority cannot consider the representation before then but may merely forward it to the Board without himself considering it. Several such situations may arise compelling departure from the time-imperative. But no allowance can be made for lethargic indifference. No allowance can be made for needless procrastination. But, allowance must surely be made for necessary consultation where legal intricacies and factual ramifications are involved. The burden of explaining the necessity for the slightest departure from the time-imperative is on the detaining authority.

We have already expressed our agreement with the four principles enunciated in Jayanarayan Sukul v. State of W.B. [Jayanarayan Sukul v. State of W.B., (1970) 1 SCC 219 : 1970 SCC (Cri) 92] We would make one observation. When it was said there that the Government should come to its decision on the representation before the Government forwarded the representation to the Advisory Board, the emphasis was not on the point of time but on the requirement that the Government should consider the representation independently of the Board."

29. However, in the case of ***Abdulla Kunhi (Supra)***, where the preventive detention of the petitioner therein under the COFEPOSA Act was challenged on the same disputed ground, a Constitutional Bench of this Court, while considering both the issues of when the representation is submitted before the matter is referred to the Advisory Board and after the mater has been referred to the advisory board, for both the circumstances, had held that the Government must wait for the decision of the Advisory Board before making its decision on the representation. The relevant paragraph of the abovementioned judgment is being extracted hereunder:

"We agree with the observations in Frances Coralie Mullin case [(1980) 2 SCC 275 : 1980 SCC (Cri) 419] . The time imperative for consideration of representation can never be absolute or obsessive. It depends upon the necessities and the time at which the representation is made. The representation may be received before the case is referred to the Advisory Board, but there may not be time to dispose of the representation before referring the case to the Advisory Board. In that situation the representation must also be forwarded to the Advisory Board along with the case of the detenu. The representation may be received after the case of the detenu is referred to the Board. Even in this

situation the representation should be forwarded to the Advisory Board provided the Board has not concluded the proceedings. In both the situations there is no question of consideration of the representation before the receipt of report of the Advisory Board. Nor it could be said that the Government has delayed consideration of the representation, unnecessarily awaiting the report of the Board. It is proper for the Government in such situations to await the report of the Board. If the Board finds no material for detention on the merits and reports accordingly, the Government is bound to revoke the order of detention. Secondly, even if the Board expresses the view that there is sufficient cause for detention, the Government after considering the representation could revoke the detention. The Board has to submit its report within eleven weeks from the date of detention. The Advisory Board may hear the detenu at his request. The Constitution of the Board shows that it consists of eminent persons who are Judges or persons qualified to be Judges of the High Court. It is therefore, proper that the Government considers the representation in the aforesaid two situations only after the receipt of the report of the Board. If the representation is received by the Government after the Advisory Board has made its report, there could then of course be no question of sending the representation to the Advisory Board. It will have to be dealt with and disposed of by the Government as early as possible."

30. While at a first glance, it may seem like there is friction between the two sets of judgments, however, a deeper inspection would prove otherwise. To understand the two sets of judgments, we must first look at the relevant provisions under which these judgments were passed.

31. The ***Pankaj Kumar Case (Supra)*** judgment was passed in the context of the Preventive Detention Act, 1960, and the ***Abdullah Kunhi Case (Supra)*** was passed in the context of the COFEPOSA Act. Section 3 of the two acts providing for preventive detention, for a ready reference, are being reproduced hereunder in a table chart:

COFEPOSA ACT, 1974	**PREVENTIVE DETENTION ACT, 1950**
Section 3. Power to make orders detaining certain persons. (1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of the State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from— (i) smuggling goods, or (ii) abetting the smuggling of goods, or (iii) engaging in transporting or concealing or keeping smuggled goods, or (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or (v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods, it is necessary so to do,	Section 3. Power to Make Orders Detaining Certain Persons. (1) The Central Government or the State Government may- (a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to- (i) the defence of India, the relations of India with foreign persons, or the security of India, or (ii) the security of the State or the maintenance of public order, or (iii) the maintenance of supplies and services essential to the community; or (b) if satisfied with respect to any person who is a foreigner within the meaning of the Foreigners Act, 1946-(31 of 1946), that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India it is necessary so to do, make an order directing that such person be detained. (2) Any of the following officers, namely : (a) District Magistrates, (b) Additional District Magistrates specially empowered in this behalf by the State Government,

make an order directing that such person be detained: [2][Provided that no order of detention shall be made on any of the grounds specified in this sub-section on which an order of detention may be made under section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 or under section 3 of the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988 (J&K Ordinance 1 of 1988).] (2) When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order. (3) For the purposes of clause (5) of article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention	(c) the Commissioner of Police for Bombay, Calcutta, Madras or Hyderabad, (d) Collectors in the territories which immediately before the 1st November, 1956, were comprised in the State of Hyderabad, may if satisfied as provided in sub-clauses (ii) and (iii) of Cl. (a) of subsection (1), exercise the power conferred by the said subsection. (3) When any order is made under this section by any officer mentioned in sub-section (2) he shall forthwith report the fact 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 made after the commencement of Preventive Detention (Second Amendment) Act, 1952 (61 of 1952), 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. (4) When any order is made or approved by the State Government under this section, the State Government shall, as soon as may be, 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 has a bearing on the necessity for the order.

32. As can be seen from the provisions of the abovementioned Acts, the detention order under both laws can be passed either by the Government, or by the specially empowered officer. However, under Section 3 of the Preventive Detention Act, the specially empowered officer, within 12 days of the detention, has to seek for an approval from the Government for continued detention, and only if the Government approves the same can the detention be continued. This process of seeking an approval from the Government is essentially a transfer of power from the empowered officer to the Government, making the Government the detaining authority after the initial lapse of 12 days. In the COFEPOSA Act however, no such approval is required from the Government, and hence the detaining authority and the Government remain to be two separate bodies independent of each other. This difference between the COFEPOSA Act and the other preventive detention laws has been upheld by this Court in the case of ***Kamlesh Kumar Ishwardas Patel vs Union Of India & Ors.***[6], the relevant extract of the abovesaid judgment is being reproduced hereunder:

"The second premise that the Central Government becomes the detaining authority since there is deemed approval by the Government of the order made by the officer specially empowered in that regard from the time of its issue, runs counter to the scheme of the COFEPOSA Act and the PIT

[6] (1995) 4 SCC 51

NDPS Act which differs from that of other preventive detention laws, namely, the National Security Act, 1980, the Maintenance of Internal Security Act, 1971, and the Preventive Detention Act, 1950."

33. If we read the ***Pankaj Kumar judgment (Supra)*** in light of this distinction between the specially empowered officer and the Government in the COFEPOSA Act, we find that there exists no friction between the ***Pankaj Kumar Judgment (Supra)*** and the ***Abdullah Kunhi Judgement (Supra)***, since the Pankaj Kumar Judgement, while mandating the central Government to not wait for the decision of the Advisory Board, only does so because the central Government is the detaining officer in the Preventive Detention Act. In simpler terms, this would mean that the mandate to not wait for the decision of the Advisory Board is effectively not for the central Government, but only for the detaining officer.

34. In the COFEPOSA Act, since the detaining authority is separate from the Government, both, the ***Pankaj Kumar Judgment (supra)*** and the ***Abdullah Kunhi Judgment (supra)*** would apply, but in different spheres. The ***Pankaj Kumar Judgment (supra)***, since it was rendered in the context of the Government being the detaining authority, would be applicable only to the detaining authority/specially empowered officer under the COFEPOSA Act. The ***Abdullah Kunhi Judgment (supra)*** however, since it was rendered in the context of the COFEPOSA Act, the mandate thereunder would squarely apply only to the Government, and not the detaining authority. In simpler terms, this would mean that the mandate to not wait for the Advisory Board would be applicable only to the detaining authority. The Government, however, as per the ***Abdullah Kunhi Case (supra)***, must wait for the decision of the Advisory Board. Since these two judgments exist symbiotically and apply to two separate authorities within the COFEPOSA Act, there exists no friction between the judgments, and hence there is no necessity for this point of law to be referred to a Larger Bench since the same is already settled. This application of both the judgments in two separate spheres within the same act has been clarified in the ***Ashok Jalan Judgment (supra)***, the relevant extract from the said judgment is being extracted hereunder:

"We are conscious that the view that we are taking, may lead to some incongruity and there could be clear dichotomy when the representations are made simultaneously to such specially empowered officer who had passed the order of detention and to the appropriate Government. If we go by the principle in para 16 in K.M. Abdulla Kunhi [K.M. Abdulla Kunhi v. Union of India, (1991) 1 SCC 476 : 1991 SCC (Cri) 613] it would be proper for the appropriate Government to wait till the report was received from the Advisory Board, while at the same time the specially empowered officer who had acted as the detaining authority would be obliged to consider the representation with utmost expedition. At times a single representation is prepared with copies to the detaining authority, namely, the specially empowered officer and to the appropriate Government as well as to the Advisory Board. In such situations there will be incongruity as stated above, which may be required to be corrected at some stage. However, such difficulty or inconsistency cannot be the basis for holding that a specially empowered officer while acting as a detaining authority would also be governed by the same principles as laid down in para 16 of K.M. Abdulla Kunhi [K.M. Abdulla Kunhi v. Union of India, (1991) 1 SCC 476 : 1991 SCC (Cri) 613] ."

35. In light of the abovementioned discussions, it can be clearly seen that any apparent conflict, as contended by the appellant, stands resolved, and both sets of judgments operate symbiotically and harmoniously within the said Act, without there existing any tension between them. The mandate to wait for the decision of the Advisory Board, as per the ***Pankaj Kumar Judgment(Supra),*** would apply to the central Government, however, the detaining authority, being independent of the Government, can pass its decision without the decision of he Advisory Board. Since

no conflict exists, the need to refer the point of law to a Larger Bench also ceases, and hence we hold issue No.1 in favour of the Respondents.

ISSUE II- If there exists no friction between the two Constitutional judgments of this Court, can the impugned detention order be quashed on grounds of the 60-day delay in consideration of the representation made by the appellant?

36. In the present case at hand, the appellant-detenue, availing his rights sent a representation to both, the specially empowered officer and the Government. The detaining authority in the present case decided on the representation expeditiously and without waiting for the decision of the Advisory Board, and hence, did not violate the ***Pankaj Kumar Judgment (supra)***.

37. The Government in the present case at hand, did decide to wait for the decision of the Advisory Board. This was also done in accordance with the decision of the ***Abdullah Kunhi case (supra)***, since the Government, being a separate authority, is bound to wait for the decision of the Advisory Board.

38. In light of the abovementioned discussions, it can be seen that both, the detaining authority, and the Government, have worked precisely within the procedure established by law, and hence the impugned detention order is not liable to be struck down on this ground. We therefore hold Issue II in favour of the respondent.

ISSUE III- Whether the illegible documents written in Chinese submitted to the appellant herein are grounds enough for quashing the impugned detention order?

39. In cases where illegible documents have been supplied to the detenue, a grave prejudice is caused to the detenue in availing his right to send a representation to the relevant authorities, because the detenue, while submitting his representation, does not have clarity on the grounds of his or her detention. In such a circumstance, the relief under Article 22(5) of the Constitution of India and the relevant statutory provisions allowing for submitting a representation are vitiated, since no man can defend himself against an unknown threat.

40. In the case of ***Harikisan v. The State Of Maharashtra & Ors.***[7]**,** this Court held that in cases of preventive detention, as per the principles enshrined under Article 22(5) of the Constitution Of India, the detaining authority must explain the grounds of detention to the detenue, and must provide the material in support of the same and in the language understood by the detenue. The relevant Paragraph of the said judgment is being reproduced herein:

"…The grounds in support of the order served on the appellant ran into fourteen typed pages and referred to his activities over a period of thirteen years, beside referring to a large number of Court proceedings concerning him and other persons who were alleged to be his associates. Mere oral explanation of a complicated order of the nature made against the appellant without supplying him the translation in script and language which he understood would, in our judgment, amount to denial of the right of being communicated the grounds and of being afforded the opportunity of making a representation against the order…"

41. It has been brought to our notice that a co-detenue, one Mr. Neeraj Varshney has already been granted relief, and his detention order has been quashed by the High Court on grounds of illegible Chinese documents supplied to him as his grounds

[7] (1962) Supp. 2 SCR 918

for detention. It is important to note that the circumstances of the appellant herein, as far as the present detention is concerned, is identical to the case of the co-detenue who's detention order was quashed.

42. At the sake of repetition, we find it important to state that in cases of preventive detention, every procedural irregularity, keeping in mind the principles of Article 21 and Article 22(5) of the Constitution of India, must be accrued in favour of the detenue. In the present case at hand, the appellant detenue herein has been supplied with illegible documents in a foreign language. It is also important to note that these are the very same documents that the authorities have relied upon to detain the appellant herein.

43. Further, the principle of parity is squarely applicable in this case, since another co-detenue with identical circumstances, has already been granted the relief of quashing the detention order against him. In the case of ***Gian Chand v. Union Of India & Anr.***[8], this Court while deciding on a quashing of a detention order, categorically held that in cases where a similarly placed co-detenue has already been granted the relief of a quashing of the detention order, the principle of parity must apply, and the same relief should be extended to other similarly placed detenues. In light of the abovementioned discussion, we hold Issue III in favour of the appellant.

CONCLUSION

44. As has been mentioned above, preventive detention laws in India are a colonial legacy, and as such, are extremely powerful laws that have the ability to confer arbitrary power to the state. In such a circumstance, where there is a possibility of an unfettered discretion of power by the Government, this Court must analyze cases arising from such laws with extreme caution and excruciating detail, to ensure that there are checks and balances on the power of the Government. Every procedural rigidity, must be followed in entirety by the Government in cases of preventive detention, and every lapse in procedure must give rise to a benefit to the case of the detenue. The Courts, in circumstances of preventive detention, are conferred with the duty that has been given the utmost importance by the Constitution, which is the protection of individual and civil liberties. This act of protecting civil liberties, is not just the saving of rights of individuals in person and the society at large, but is also an act of preserving our Constitutional ethos, which is a product of a series of struggles against the arbitrary power of the British state.

45. In light of the abovementioned discussion, while the appellant has already been released on grounds of expiry of the detention period, for the sake of clarity on the point of law, we hold that the impugned detention order is liable to be set aside, and the present appeal is accordingly allowed.

[8] (Crl.) 39 of 2011