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Judgment reserved on 13.08.2010
Judgment delivered on 26.11.2010

Habeas Corpus Writ Petition No.35555 of 2002
Km. Indu Mishra Vs. Union of India & Ors.

Habeas Corpus Writ Petition No.38506 of 2002
Jagdamba Prasad Pandey Vs. Union of India & Ors.

Habeas Corpus Writ Petition No.38508 of 2002
Ashok Mishra Vs. Union of India & Ors.

Habeas Corpus Writ Petition No.38509 of 2002
Ram Niranjana Mishra Vs. Union of India & Ors.

Habeas Corpus Writ Petition No.44741 of 2002
Meherban Vs. State of U.P. & Ors.

Hon. Sunil Ambwani, J.

Hon. Imtiaz Murtaza, J.

Hon. Kashi Nath Pandey, J.

1. A Division Bench of this Court noticed a conflict of opinion in the judgments of the Court delivered in **Ram Lal vs. State of U.P., 2000 (41) ACC, 1715** and in **Idrish vs. Secretary, Ministry of Home Affairs, Government of India, New Delhi and others, 2002 (44) ACC 1117** and has referred the following questions to be considered by a Larger Bench:-

"(1) Whether the District Magistrate/Detaining Authority acting under Section 3 (2) of the National Security Act is required to communicate to the person detained, regarding right of making representation to him in view of Apex Court's decision in Kamlesh Kumar's case (supra)? If so, non communication would infringe fundamental right guaranteed under Article 22 (5) of the Constitution?

(2) If the answer of question no.1 is in the affirmative, whether there is obligation on the District Magistrate (Detaining Authority) to communicate the detenu's right within which the detenu is required to make representation to him i.e. before approval of the detention order by the State Government or before 12 days ? If so non

communication of above period will render the detention order invalid?

(3) Whether the District Magistrate/Detaining Authority has power to revoke or modify the detention order passed by him after its approval by the State Government?

(4) Whether there is obligation on the District Magistrate/Detaining Authority to consider and decide the representation of the detenu even after approval of the detention order by the State Government ?

2. The maximum period of detention of the petitioners has long expired and thus the questions raised before us so far as the petitioners are concerned have become academic in nature. We are, however, deciding them as these questions may arise, in the habeas corpus petitions to be decided in future.

3. The relevant facts giving rise to the questions posed before us, as narrated by the Division Bench in referring the order dated 22.4.2003 are as follows:-

"The grounds of detention served upon each of the petitioner separately along with order of detention common in all the writ petitions, stated that on the night of 22/23-1-2002 at about 10.10 p.m. Dr. Deepak Agrawal, Child Specialist was going to his residence from his clinic situate at Mohalla Unchamandi, P.S. Muthiganj, Allahabad, along with his security guard Kamlesh Narain Mishra, in his Maruti Zen Car. The petitioner Ashok Mishra along with his associates Ashok Singh, Dinesh Tewari @ Pappu Shooter, Sandeep Singh, Amit @ Brijesh Singh and others in order to carry out their criminal conspiracy, kidnapped him (Dr. Deepak Agarwal) along with his Maruti Car at about 10.30 p.m. for ransom. The petitioner Ashok Mishra and his associates kept kidnappees Dr. Agrawal and his Security Guard Kamlesh Narain Mishra, at the official residence of petitioner Km. Indu Mishra (Constable) at Police Lines Sultanpur. Her associates demanded Rs. 50 lacs as ransom

from the family members of Dr. Agrawal and his relatives on telephone. On the report of Smt. Savita Agrawal, wife of Dr. Deepak Agarwal a case at crime no.18 of 2002 was registered under Section 364 IPC at 3.10 a.m. on 23.1.2002 at P.S. Muthiganj, Allahabad. The matter was negotiated at Rs.30,00,000/-, on payment of Rs.15,10,000/- and promise to pay remaining Rs.14,90,000/- later on. Dr. Agarwal and his Security Guard were released on the night of 26/27-10-2002 at 11.00 p.m. on Sultanpur - Pratapgarh road. Shocks, belt and buckle of Security Guard Kamlesh Narain Mishra were recovered from official residence of petitioner Km. Indu Mishra. On 3.2.2002 on the pointing out of petitioner Indu Mishra, a sum of Rs. One lac, share of ransom money, was recovered by the Investigating Officer. A sum of Rs.8,800/-, share of ransom money, was recovered from petitioner Jagdamba Prasad Pande and he told that he had spent Rs. 1200/-.

During investigation of above case evidence was collected that telephone (mobile) No.9838095939 belonged to Dinesh Tewari @ Pappu Shooter and telephone No.9838054138 belonged to petitioner Ashok Mishra who talked on said phones after kidnapping and before release of Dr. Agarwal on telephone (mobile) No.9838067646 purchased from Allahabad, communication was sent to relatives of Dr. Agarwal on mobile phone No.9038057095 and amount of ransom was settled. Petitioner Indu Mishra talked with petitioner Ashok Mishra from telephone No.27348 on mobile phone No.9838054138, time and again.

Dr.Agarwal recognized the petitioner Indu Mishra and her associates Dinesh Tewari @ Pappu Shooter, Sandeep Singh @ Guddu @ Dabboo, Amit @ Brijesh Singh. He also disclosed that threats were extended to him

by the petitioners to kill him in case he gave evidence against them. The dare devil incident of kidnapping of a doctor for ransom was committed during Assembly Election period. On account of said incident a sense of terror and fear prevailed in doctors, traders and respectable citizens of Allahabad. The doctors resorted to the strike due to which public order was adversely affected. The news of kidnapping was published in daily newspapers on various dates which again affected public order.

The petitioners were detained in Central Jail, Naini and attempt was being made by pairokars of the petitioners to get them released on bail. There was real possibility of petitioners being released on bail and on release on bail of indulging them in similar activities prejudicial to the maintenance of public order.

On account of above the detaining authority was satisfied that detention of petitioner under the Act was essential for preventing the petitioners from indulging in activities prejudicial to maintenance of public order.

Each of the petitioner was separately communicated that in case he wanted to make representation against detention order before detaining authority, he may do so, at the earliest through jail authorities where they were detained. In case representation was received after approval of detention order by the State Government then the detaining authority would not consider it.

Each of the petitioner was further informed that in case he wanted to make representation to State Government he could do so addressing to Home Secretary, Government of U.P. through jail authority. They were further informed that detention order would be referred to the Advisory

Board within 3 weeks for approval under Section 10 of the Act and in case petitioners wanted to send representation to the Advisory Board they could do so. Representation received after approval by Advisory Board would not be considered.

It was again informed to each of the petitioner that in case he wanted to make representation to His Excellency President of India or Central Government, he could do so addressing to Secretary, Home and Internal Security Department, Government of India, North Block, New Delhi through jail authorities."

4. We have heard Shri Prem Prakash Yadav, learned counsel appearing for the petitioner. Shri Sudhir Mehrotra, learned Addl. Government Advocate appears for the State.

5. Art.22 (4) to (7) of the Constitution of India provides:-

"(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person

the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

6. Section 3 (2) of the National Security Act, 1980 authorizes the Central or State Government to pass an order of detention:-

"3 (2). The **Central Government** or the **State Government** may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained."

7. Section 3 (3) of the Act authorizes **District Magistrate or Commissioner of Police** to exercise power under Section 3 (2):-

3 (3). If, having regard to the circumstances prevailing or likely to prevail in any area within the local

limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section:

Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time."

8. Section 3 (4) deals with the life of detention order made by District Magistrate:-

"3 (4) when any order is made under this section by an officer mentioned in sub-section (3), 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 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:

Provided that where under Section 8 of the grounds of detention are communicated by the officer making the order after five days but not later than ten days from the date of detention, this sub-section shall apply subject to the modification that, for the words "twelve days" the words "fifteen days" shall be substituted.

9. Section 8 provides for affording of an opportunity to the detenu to make representation:-

"8. Grounds of order of detention to be disclosed to persons affected by the order - (1) 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 be appropriate Government."

10. Section 14 of the Act provides for revocation of detention order as under :-

"14. Revocation of detention orders - Without prejudice to the provisions of Section 21 of the General Clauses Act, 1987 (10 of 1987) a detention order may, at any time, be revoked or modified-

(a) notwithstanding that the order has been made by an officer mentioned in sub-section (3) of Section 3, by the State Government to which that officer is subordinate or by the Central Government:

(b) notwithstanding that the order has been made by a State Government, by the Central Government.

(2) The expiry or revocation of a detention order (hereinafter in this sub-section referred to as the earlier detention order) shall not (whether such earlier detention order has been made before or after the commencement of the National Security (Second Amendment) Act, 1984, bar the making of another detention order (hereafter in this sub-section referred to as the subsequent detention order) under Section 3 against the same person :

Provided that in a case where no fresh facts have arisen after the expiry or revocation of the earlier detention order made against such person, the maximum period for which such person may be detained in pursuance of the subsequent detention order shall, in no case, extend beyond the expiry of a period of twelve months from the date of detention under the earlier detention order.

11. The preventive detention means detention of a person without trial, in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof, but may still be sufficient to justify his detention. The object of preventive detention is not to punish a person, but to prevent him from doing something, which comes within Entry 9 (Preventive detention for reasons connected with Defence, Foreign Affairs, or the Security of India; persons subjected to such detention) of List 1, and Entry 3

(Preventive Detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention) of List 3 of the Seventh Schedule of the Constitution of India. The purpose is to prevent the individual not merely for acting in a particular way, but from achieving a particular object. No offence is proved, nor any charge is formulated. The justification is suspicious or reasonable probability and not criminal conviction, which may be warranted only by legal evidence. The order of preventive detention is made as precautionary measure. It is based on reasonable prognosis of the future behaviour of a person based on his past conduct in the light of surrounding circumstances.

12. The Constitution itself provides for certain safeguards relating to preventive detention, to mitigate the harshness and to place restrictions on legislative power conferred on this subject under Art.21 and 22, raising such restrictions to the status of fundamental rights. By reason of Art.21, preventive detention cannot be ordered by the executive without the authority of law, and unless it is in conformity with the procedure laid down therein, vide *State of Rajasthan Vs. Shamsheer Singh*, AIR 1985 SC 1082. The law must be a valid law, within the legislative competence of the legislature enacting it.

13. Art.22 of the Constitution of India, imposes following restrictions upon the power of the legislature itself to enact a law of preventive detention:-

1. The law must constitute an Advisory Board, to recommend confirmation of the detention, where it is sought to continue beyond three months;
2. A State law cannot authorize the detention beyond maximum period prescribed by parliament under the powers given under Clause 7;

3. The parliament also cannot make a law authorizing detention beyond three months without intervention of Advisory Board, unless the law confirms to the conditions laid down in Clause-7;

4. A provision has to be made in the law to enable the parliament to prescribe the procedure;

5. A person detained under law of preventive detention has a right to obtain information, as to the grounds of his detention and also has the right to make a representation against the order of preventive detention. This right is guaranteed independently of the duration of the period of detention.

14. Art.22 (5) gives a right to the detenu to make a representation, but does not give a right to be heard by an independent Tribunal. The representation must be considered by an appropriate government, vide **Haradhon Saha Vs. State of Bengal, (1975) 3 SCC 198**. Failure to give opportunity to make a representation on any of the grounds namely that he was not served with the detention order, will also vitiate the detention. The affording of opportunity of being heard is embedded in Art.22 (5) and is available after passing the detention order and before its confirmation vide **State of Tamil nadu Vs. Senthil Kumar, (1999) 2 SCC 646**.

15. The right to make representation against the order of detention is a fundamental right conferred upon a detenu under Art.22(5), and if there is any infraction of such right, the detenu is liable to be released. This cherished and valuable right is comprehensive one. It comprehends that person detained has a right to make representation not only to the officer, who made the order of detention, but as well as to the State Government and the Central Government, who are competent to revoke the order. In **Union of India Vs. Harish Kumar, (2008) 1 SCC 195** it was held that where the detenu is not informed of his right to make representation to the specified officer, that is the detaining authority authorized to make the detention order, the order of detention gets

vitiated. In para 8 of this report the Supreme Court relied upon **Kamlesh Kumar Ishwar Das Patel Vs. Union of India, (1995) 4 SCC 51.**

16. Art.22 (5) does not state, before whom the representation is to be made. It depends upon the nature of the legislation, whereby and whereunder the order of detention has been passed, but this right has to be construed in the light of the constitutional mandate, vide **A.C. Razia Vs. Government of Kerala, (2004) 2 SCC 621.** This right also includes the duty of the authority to whom the representation is addressed to deal with the same with utmost expedition. The representation has to be considered in its right perspective giving in view the fact that the detention is based on the subjective satisfaction of the authority concerned and infringement of constitutional right under Art.22 (5) invalidates the detention order vide **Union of India Vs. Chaya Ghosal, (2005) 10 SCC 97.** The right cannot be exercised unless the grounds of detention are provided to the detenu. In **Geeta Ram Das Vs. State of West Bengal, (1975) 2 SCC 81** the Supreme Court observed that authority making the order must communicate to the detenu the grounds on which the order has been made, as soon as may be, after the order has been made, and that he should be afforded the earliest opportunity of making the representation against the order.

17. In a Full Bench decision in **Manni Lal v. Superintendent of Central Jail, Naini, Allahabad and others, 1985 AWC 641 (FB)** our Court held, in para 9, that it appears from a plain reading of Section 3 (4) of the Act that the order of detention passed by the District Magistrate under Section 3(2) of the Act shall not remain in force for more than twelve days unless in the meantime it has been approved by the State Government. The approval accorded by the State Government extends the life of the order of detention passed by the District Magistrate beyond twelve days. The State Government does not pass any fresh order of detention under

section 3(4) of the Act, but it merely approves the order of detention passed by the District Magistrate. The order of detention passed by the District Magistrate thus continues even after it is approved by the State Government. It does not exhaust itself or merge in any order of the State Government.

18. It was further held in *Manni Lal (Supra)* that in view of Section 21 of General Clauses Act, 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. It therefore, follows that the District Magistrate is empowered to revoke the detention order passed by him even after it has been approved by the State Government in view of Section 21 of General Clauses Act.

19. In ***Veeramani Vs. State of Tamil Nadu, (1994) SCC (Cri) 482*** the Supreme Court while considering the provisions of Prevention of Dangerous Activities of Bootleggers, Drugg-Offenders, Forest-Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1982, analogous to the provisions of the National Security Act, found it difficult to agree that after the approval of the State Government, the detaining authority can independently revoke the detention by itself.

20. In ***Kamlesh Kumar Ishwardas Patel Vs. Union of India & Ors, (1995) 4 SCC 51***, the Supreme Court considered the question whether after the preventive detention order is passed by the officer specifically empowered to do so by the Central Government or the State Government, is the said officer required to consider the representation submitted by the detenu. The Supreme Court held:-

"Having regard to the provisions of Article 22(5) of the Constitution and the provisions of the COFEPOSA Act and PITNDPS Act, the question posed is thus answered: Where the detention order has been made under Section 3 of the COFEPOSA Act and the PIT NDPS Act by an officer specially empowered for that purpose either by the Central

Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person detained to make a representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an officer specially authorised by a State Government and to the Central Government where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation." (Vide para 38). It was also held in para 19 of the above decision as below :-

"The provisions in the COFEPOSA Act and PITNDPS Act differ from those contained in the National Security Act, 1980 as well as earlier preventive detention laws, namely, the Preventive Detention Act, 1950 and the Maintenance of Internal Security Act, 1971 in some respects. Under sub-section (3) of Section 3 of the National Security Act, power has been conferred on the District Magistrate as well as the Commissioner of Police to make an order of detention, and sub-section (4) of Section 3 prescribes that the officer shall forthwith report the fact of making the order 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 that 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 Section 8 (1) of the National Security Act it is prescribed that the authority making the order shall afford the person detained the earliest opportunity of making a representation against the order to the appropriate Government. Similar provisions were contained in the Preventive Detention Act, 1950 and the Maintenance of Internal Security Act, 1971. The COFEPOSA Act and the PITNDPS Act do not provide for approval by the appropriate Government of the orders passed by the officer specially empowered to pass such an order under Section 3. The said Acts also do not lay down that the authority

making the order shall afford an opportunity to make a representation to the appropriate Government."

Under Section 3 of the COFEPOSA Act and the PITNDPS Act an order of detention can be made by -

- (i) the Central Government; or
- (ii) an officer specially empowered by the Central Government; or
- (iii) the State Government; or
- (iv) an officer specially empowered by the state Government."

21. It was further held by the Supreme Court in para 34 of the judgement as below:-

"In the National Security Act there is an express provision Section 3(4) in respect of orders made by the district Magistrate or the Commissioner of Police under Section 3(3) and the District Magistrate or the Commissioner of Police who has made the order is required to forthwith report the fact to the State Government to which he is subordinate. The said provision further prescribes that 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. **This would show that it is the approval of the State Government which gives further life to the order which would otherwise die its natural death on the expiry of twelve days after its making.** It is also the requirement of Section 3 (4) that the report should be accompanied by the grounds on which the order has been made and such other particulars, as in the opinion of the said officer, have a bearing on the matter which means that the State Government has to take into consideration the grounds and the said material while giving its approval to the order of detention. **The effect of the approval by the State Government is that from the date of such approval the detention is authorised by the order of the State Government approving the order of detention and the State Government is the detaining authority from the date of the order of approval.** That appears to be the reason why Section 8 (1) envisages that the representation against the order of detention is to be made to the State Government. **The COFEPOSA Act and the PITNDPS Act do not require the approval of an order made by the officer specially empowered by the State Government or by the Central Government. The order passed by such an officer operates on its own**

force. All that is required by Section 3 (2) of the COFEPOSA Act and the PITNDPS Act is that the State Government shall within 10 days forward to the Central Government a report in respect of an order that is made by the State Government or an officer specially empowered by the State Government. An order made by the officer specially empowered by the State Government is placed on the same footing as an order made by the State Government because the report has to be forwarded to the Central Government in respect of both such orders. No such report is required to be forwarded to the Central Government in respect of an order made by an officer specially empowered by the Central Government. Requirement regarding forwarding of the report contained in Section 3 (2) of the COFEPOSA Act and the PITNDPS Act cannot, therefore, afford the basis for holding that an order made by an officer specially empowered by the Central Government or the State Government acquires deemed approval of that Government from the date of its issue. Approval, actual or deemed, postulates application of mind to the action being approved by the authority giving approval. Approval of an order of detention would require consideration by the approving authority of the grounds and the supporting material on the basis of which the officer making the order had arrived at the requisite satisfaction for the purpose of making the order of detention. **Unlike Section 3 (4) of the National Security Act there is no requirement in the COFEPOSA Act and the PITNDPS Act that the officer specially empowered for the purpose of making of an order of detention must forthwith send to the Government concerned the grounds and the supporting materials on the basis of which the order of detention has been made.**

. By specially empowering a particular officer under Section 3 (2) of the COFEPOSA Act and the PITNDPS Act the Central Government or the State Government confers an independent power on the said officer to make an order of detention after arriving at his own satisfaction about the activities of the person sought to be detained. **Since the detention of the person detained draws its legal sanction from the order passed by such officer, the officer is the detaining authority in respect of the said person. He continues to be the detaining authority so long as the order of detention remains operative. He ceases to be the detaining authority only when the order of detention ceases to operate.** This would be on the expiry of the period of detention as prescribed by law or on the order being revoked by the officer himself or by the authority mentioned in Section 11 of the COFEPOSA Act and Section 12 of the PITNDPS

Act. **There is nothing in the provisions of these enactments to show that the role of the officer comes to an end after he has made the order of detention and that thereafter he ceased to be detaining authority and the Government concerned which had empowered him assumes the "role of the detaining authority"** (emphasis laid by us).

22. The above passages quoted from the judgement indicates that the Apex Court has made distinction between provisions of Section 3 of National Security Act, 1980 and Section 3 of COFEPOSA Act and PITNDPS Act.

23. In **State of Maharashtra Vs. Santosh Shankar Acharya, JT 2000 (8) SC 374** while considering the provisions of the Maharashtra Act, paramateria with the National Security Act the Supreme Court observed:-

"The only logical and harmonious construction of the provision would be that in a case where an order of detention is issued by an officer under sub Section (2) of Section 3 of the Act, notwithstanding the fact that he is required to forthwith report the factum of detention together with the grounds and materials to the State Government and notwithstanding the fact that the Act itself specifically provides for making a representation to the State Government under Section 8 (1), the said Detaining Authority continues to be Detaining Authority until the order of detention issued by him is approved by the State Government within a period of 12 days from the date of issuance of detention order. **Consequently, until the said detention order is approved by the State Government the Detaining Authority can entertain a representation from a detenu and in exercise of his power under the provisions of Section 21 of Bombay General Clauses Act could amend, vary or rescind the order as is provided under Section 14 of Maharashtra Act. Such a construction of powers would give a full play to the provisions of Section 8 (1) as well as section 14 and also Section 3 of the Maharashtra Act.** This being the position non communication of the fact to the detenu that he could make a representation to the Detaining Authority so long as the order of detention has not been approved by the State Government in a case where an order of detention is issued by an officer other than the State Government under sub Section (2) of Section 3 of the Maharashtra Act would constitute an infraction of a valuable right of the detenu

under Article 22 (5) of the Constitution and the ratio of the Constitution Bench decision of this Court in Kamlesh Kumar's case (supra) would apply notwithstanding the fact that the Court was dealing with an order of detention issued under the provisions of COFEPOSA" (Vide Para 8 of J.T. Report).

"This being the position, it goes without saying that even under the Maharashtra Act a detenu will have a right 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 to the detenu under Article 22 (5) of the Constitution and such failure would make the order of detention invalid" (vide para 98 J.T.report) (emphasis laid by us).

24. This Court has consistently followed the law laid down as above. The Division Benches in **Nawab Dulha Vs. Union of India & Ors., 2001 Cr.L.J. 390** and **Vijai Kumar Mishra Vs. Superintendent District Jail, Gorakhpur, 2002 Cr.L.J. 3652** held that until the order is approved by the State Government, the petitioner has a right to make a representation to the detaining authority also.

25. In **Idrish Vs. Secretary, Ministry of Home Affairs, Government of India, New Delhi & Ors., 2002 (1) U.P.CrR 718** this Court sounded a discordant note and held as follows:-

"It has been alleged in paragraph 3 of the Supplementary Affidavit that the District Magistrate who is the Detaining Authority did not inform the detenu that he could make representation to the Detaining Authority. Learned Counsel for the petitioner has relied on the Supreme Court decision in State of Maharashtra vs. Santosh Kumar Acharya (supra). This decision has been followed by a Division Bench of this Court in Jai Prakash Shastri v. Adhikshak Janpad Karagrar, Muzaffarnagar, 2000 (41) ACC, 883. In the supplementary counter affidavit it has been stated that petitioner had made a representation to the District Magistrate on 28th May, 2001. The District Magistrate (Detaining Authority) held that he could not modify or revoke the detention order dated 20th May, 2001 since the same had been approved by the State Government

on 23rd May, 2001. From this is obvious that the District Magistrate did not apply his mind independently to the merits of the representation, but he rejected it merely on the ground that the State Government had approved the detention order on 23rd May, 2001.”

26. The Division Bench hearing the cases giving rise to the reference found itself in disagreement with the above observations made in *Idrish Vs. Secretary, Ministry of Home Affairs, Government of India, New Delhi & Ors. (Supra)*. The Court found that the Apex Court has clearly observed in *Santosh Shankar Acharya's* case that until detention order is approved by the State Government, the detaining authority can entertain the representation from detenu and that in view of the Division Bench referring the matter, the Apex Court had made it clear that the power of deciding representation by the detaining authority i.e. District Magistrate acting under the delegated powers under Section 3 (3) of the Act is only until the approval of the detention order by the State Government. In ***Mohammad Jaid Vs. District Magistrate, Sitapur & Ors., 2002 (45) ACC 611*** and ***Sushil Singh Vs. D.M. Kheri, 2003 (5) ALR 569*** the Division Benches of this Court held that the power to decide the representation by the District Magistrate is only upto the period of 12 days, or before approval of the detention order by the State Government.

27. Shri Prem Prakash Yadav submits that the Supreme Court has held and affirmed the power of the detaining authority to revoke the order of the detention. This power continues to avail the detaining authority even if the representation is rejected by the State Government. He has relied upon the judgments in *Pankaj Kumar Chakrabarty Vs. State of West Bengal, AIR 1970 SC 97*; *Hardan Saha Vs. State of W.B., AIR 1974 SC 2154*; *Vimal Chand Jawant Raj Jain Vs. Pradhan, AIR 1979 SC 1501*; *Kirit Kumar Kundalia Vs. State of Maharashtra, AIR 1981 SC 1621*; *Smt. Santosh Anand Vs. State, (1981) 2 SCC 420*; *Ibrahim Bacchu Bafan Vs. State of Gujrat, AIR 1985 SC 697*; *Smt. Gracy Vs. State*

of Kerala, AIR 1991 SC 1090; Amir Shad Khan Vs. L. Himingiana, AIR 1991 SC 198; Om Prakash Bahal Vs. Union of India, JT 1991 (5) SC 88; Kamlesh Kumar Ishwar Das Patel Vs. Union of India, (1995) 4 SCC 51; Mrs. Nutan J. Patel Vs. S.V. Prasad, JT 1995 (8) SC 496; Amanulla Khan Kudeatalla Khan Pathan Vs. State of Gujrat, (1999) 5 SCC 613; State of Maharashtra Vs. Santosh Shankar Acharya, (2000) 7 SCC 463; A.C. Razia Vs. Govt. of Kerala, (2004) 2 SCC 621; Harshala Santosh Patil Vs. State of Mah, (2006) 12 SCC 211; Usha Agarwal Vs. Union of India, (2007) 1 SCC 295; Union of India Vs. Harish Kumar, (2008) 1 SCC 195 and Union of India Vs. Sneha Khemka, (2004) 2 SCC 570.

28. Shri Yadav has also relied upon the Full Bench judgment in Manni Lal Vs. Supdt. Central Jail, 1985 AWC 641; Sheshdhar Mishra Vs. Supdt. Central Jail, 1985 ALJ 1222; and Rai Bahadur yadav Vs. State of U.P., 1997 (35) ACC 33, and the Full Bench judgment of Sunil S. Gatate Vs. State of Maharashtra, 2000 CrLJ 3709, in support of his submissions.

29. Shri Yadav has relied on the definition of the word 'approve' in Black's Law Dictionary, Sixth Edition page 102; P. Ramanatha Aiyar's Concise Law Dictionary, 2010 Edition page 75 as well as the judgment in Arun Shanker Vs. State of U.P., 1984 ALJ 1031; Bidya Deo Barma Vs. Distt. Magistrate Tripura, AIR 1969 SC 323; P.L. Lekhpal Vs. Union of India, AIR 1967 SC 908 and AIR 1931 All 567 (Full Bench). The word 'approval' in these only means to accept "as good or sufficient for the purposes intended". The difference between 'approval' and 'permission' is that, in the first the act holds good until disapproved, while in the other case it does not become effective until permission is obtained. Shri Yadav submits that the approval of the order by the State Government is only to accept it as good or sufficient for the purpose intended, namely for the purpose of preventive detention. The approval of the State Government, therefore, should not be taken as approving the decision on the representation made by the

detenue. In other words, he submits that the approval of the order by the State Government does not taken away power of the detaining authority to consider and decide the representation. The detaining authority does not loses his authority or become functuous officio on the ground of approval of the order by the State Government, and that such approval can be made even before detention vide Hira Bai Vs. State of M.P., 1987 CrLJ 659.

30. Shri Yadav has also relied upon Section 21 of the General Clauses Act in submitting that the power of detention include the power to revoke the detention, and thus the detaining authority even after approval of the order is not divested of his powers to consider and decide the representation. He submits that whereby a Central Act, the power to issue orders is conferred, then that power includes a power exercisable in the like manner, and subject to like sanction and conditions, if any to rescind any order. The District Magistrate continues to have power in pursuance to Section 21 of the General Clauses Act, uses to interpret the legislation, to pass orders for revoking the detention even after it has been approved by the State Government.

31. Shri Sudheer Mehrotra, Addl. Government Advocate submitted in reply that all the questions referred to be decided by the Full Bench are interconnected. The District Magistrate/ Detaining Authority exercises the delegated powers of the State Government under Section 3 (3) of the National Security Act, 1980, and after passing the detention order under Section 3 (2) of the Act he becomes functuous officio. An appropriate government under Section 2 (a), means, as respect a detention order made by the Central Government for a person detained under such order, the Central Government; and as respect a detention order made by a State Government or by an officer subordinate to a State Government, as respects a person detained under such order, the State Government. Upon delegation of power by the State Government, in view of the provisions contained under Section 8

(1); which clearly postulates that the detaining authority is required to inform the detenu by affording him the earliest opportunity of making representation against the order to the appropriate government. The information mentioning the fact that the detenu has a right to make representation to the detaining authority, thus does not vitiate the detention order, or violate the fundamental right as guaranteed under Art.22 (5) of the Constitution, which requires that the person detained under any preventive detention shall be afforded earliest opportunity of making representation against the order.

32. Shri Mehrotra submits that the case of Kamlesh Kumar Ishwardas Patel Vs. Union of India & Ors. has no application to the facts and circumstances of the case, in as much as under COFEPOSA (the Act of 1974) the order passed by an officer duly appointed for the purpose by the Government needs no approval of the government. There is clear distinction between the provisions of COFEPOSA (Act of 1974), PITNDPS Act and the National Security Act, 1980. In State of Maharashtra Vs. Santosh Shankar Acharya it was held that the detaining authority continues to be the detaining authority until the approval of the detention order by the State Government and thus it is clear that until approval or for a period of 12 days only the detaining authority can entertain representation, if made to him, but it is not required under the law or under the National Security Act, 1980 that the detaining authority must inform the detenu that he has right to make representation to the detaining authority, as the officer duly authorised under Section 3 (3) of the Act is required to immediately report the matter to the State Government, to which he is subordinate. The orders 'subordinate' under Section 3 (4) is significant in as much as after passing the detention order he becomes functuous officio.

33. Shri Mehrotra submits that in a recent decision in **Shri Anand Hanumathsa Katare Vs. Additional District Magistrate**

& Ors., (2006) 10 SCC 725 the Supreme Court considered the conflict between the judgments in *State of Maharashtra Vs. Santosh Shankar Acharya*, (2000) 7 SCC 463, and *Veeramani Vs. State of Tamil Nadu*, (1994) 2 SCC 337, the decision rendered by a Constitution Bench. The Supreme Court held in para 8 that Veeramani's case related to detention under COFEPOSA Act. In Veeramani Case after referring to *Amir Shad Khan Vs. L. Hmingliana*, (1991) 4 SCC 39, and *Raziya Umar Bakshi Vs. Union of India*, 1980 Supp SCC 195, it was held that it must be presumed that the detenu can make representation to the detaining authority also independently, and the State authority has to consider the same irrespective of the decision of the State Government or the Central Government on the representation made to them. These observations in Amir Shad Khan's case and Ibrahim Bachu Bafan's case were made under COFEPOSA Act, where there is no specific provision for approval by the State Government. In these decisions the ratio is that the detaining authority has also powers to revoke the detention order by virtue of power conferred by Section 21 of the General Clauses Act read with Section 11 of the COFEPOSA Act; and in that context it was observed that the power of revocation has nexus with the right of representation under Art.22 (5). The position is, however, different under the Karnataka Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Gamblers, Gundas, Immoral Traffic Offenders and Slum Grabbers Act, 1985. In this Act, which is like maintenance of Internal Security Act, 1980, the approval of the detention order by the State Government is mandatory.

34. The Supreme Court, thereafter, discussed Santosh Shankar Acharya's case, and upheld the Full Bench of the Bombay High Court, on the ground that even under Maharashtra Act a detenu will have a right 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 a representation to the detaining authority would constitute an infraction of the valuable constitutional right guaranteed to the detenu under Art.22 (5) of the Constitution of India.

35. The Supreme Court, thereafter held in para 10 as follows:-

"10. 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 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 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 unconstitutional nor illegal."

36. The Supreme Court in Shri Anand Hanumathsa Katore also relied upon Union of India vs. Chaya Ghoshal, (2005) 10 SCC 97, and R. Keshava Vs. M.B. Prakash, (2003) 8 SCC 342.

37. On the aforesaid discussion, we find it difficult to agree with the argument of Shri Prem Prakash Yadav, that it is obligatory for the District Magistrate/ Detaining Authority under National Security Act, 1980, to communicate the detenu his right for

making representation to him, and that non-communication of the period of 12 days within which he can make representation to him will render the detention order invalid. We also do not agree with his submission that the District Magistrate/ Detaining Authority has power to revoke or modify the detention order passed by him after it is approved by the State Government. The view taken in *Idrish Vs. Secretary, Ministry of Home Affairs, 2002 (44) ACC 1117* is not correct. The Court in *Idrish's* case fell into error in accepting the judgment in *State of Maharashtra Vs. Santosh Kumar Acharya*, rendered in COFEPOSA Act. The judgments following the *State of Maharashtra Vs. Santosh Kumar Acharya*, of this Court in the matters of preventive detention under the National Security Act, 1980, are also incorrectly decided. The judgment of the Supreme Court in *Sri Anand Hanmathsa Katara (Supra)* has explained the scheme of Karnataka Act of 1985, which is much close to, and more appropriate to the preventive detention under the National Security act, 1980 and conforms to Art.22 (5) of the Constitution of India.

38. We, therefore, answer the questions posed before us in the reference, as follows:-

"1. The District Magistrate/ Detaining Authority acting under Section 3 (2) of the National Security Act, 1980 is required to communicate to the person detained, his right of making representation to him, and that non-communication of such right will infringe fundamental right of the detenu under Article 22 (5) of the Constitution of India.

2. The obligation of the District Magistrate/ Detaining Authority is to communicate to the detenu, his right for making representation to him, is upto the date of approval of the detention order by the State Government, or before 12 days. The non-communication of the period will not render the detention order invalid.

3. The District Magistrate/ Detaining Authority does not have power to revoke or modify the detention order passed by him, after it is approved by the State Government.

4. The District Magistrate/ Detaining Authority is not obliged to consider and decide the representation, after approval of the detention order by the State Government."

39. The reference is answered as above. The maximum specified period for detention has long expired. The petitioners were released on bail. Unless they are required in any other offence or have been detained subsequently under any law of preventive detention, their bail bonds shall stand discharged. The writ petitions accordingly stand **disposed of**.

Dt.26.11.2010

SP/