PETITIONER:
MEENA JAYENDRA THAKUR

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT: 22/09/1999

BENCH:
G.B.Pattanaik, N.Srinivasan, N.S.Hedge

JUDGMENT:

PATTANAIK, J.

This appeal is directed against the judgment dated 18.1.95 20.1.95 of the Bombay High Court in Criminal Writ Petition No. 701 of 1994. The appellant is the wife of the detenu, Jayendra Vishnu Thakur. The State of Maharashtra issued an order of detention under Section 3(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the COFEPOSA Act) on 5.2.92. The detenu was served with the order of detention on 13.8.93 while he was in custody on being arrested on 23.7.93 in some other criminal case. On 15.9.93, a declaration was made under Section 9 (i) of the COFEPOSA Act thereby extending the period within which the procedural requirements under Section 8 of the said Act could be complied with. The case of the detenu was referred to the Advisory Board on 15.9.93 and the Advisory Board gave its opinion stating that there exists sufficient cause for detention of the person concerned and on the basis of the said opinion, the State Government confirmed the order of detention under Section 8 (f) of the Act by order dated 17.11.93. The appellant filed the writ petition in the Bombay High Court on 15.5.94 assailing the legality of the order of detention as well as the continued detention of the detenu. The High Court, by the impugned judgment, dismissed the writ petition after negativing all the contentions raised and hence the present appeal. At the outset it may be stated that though the period of detention is already over and, therefore, normally this Court would not have gone into the legality of the order of detention, but a proceeding under Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereinafter referred to as the SAFEMA) having been initiated, the appellant pressed his appeal and the Court permitted him to raise the contentions. It may not be out of place to mention here that the Customs authorities received some information that a large scale smuggling of silver is being made in a vessel on 18.9.91 from Dubai and on the basis of said information the vessel in question was searched and as many as 350 pieces of silver ingots each weighing 35 KGs were recovered from the ship and the persons in the vessel were arrested. Admittedly, the detenu was not present in the vessel. But the statements of persons arrested from the vessel under Section 108 of the Customs Act unequivocally indicate that the silver in question was meant for the detenu and was to

be handed over to him. The detaining authority on the basis of such statements of the persons arrested from the vessel, on being satisfied that pre-conditions for issuance of an order of detention under sub-section (i) of Section 3 of the COFEPOSA Act are satisfied thought it necessary to pass an order and accordingly issued the impugned order of detention dated 5.2.92. Mr. V.S. Kotwal, learned senior counsel appearing for the appellant raised the following contentions in assailing the order of detention: 1. While issuing the declaration under Section 9(i) of the Act by order dated 15.9.93, the detenu not having been informed of a right of representation to the authority issuing the declaration, there has been an infringement of his constitutional right under Article 22 and, therefore, the impugned order of detention is vitiated and must be set aside. 2. That the order of detention was issued on 6.2.92 but the same not having been executed till 13.8.93, there has been an inordinate delay in the execution which renders the detention itself vitiated. 3. At the time of executing the order of detention, the detenu having been already arrested and in custody in another criminal case and there being no consideration/ re- consideration regarding the necessity of serving an order of detention by the detaining authority, the detention of the detenu as well as the order of detention itself gets vitiated and should be quashed 4. The statements of the occupants of the vessel recorded under Section 108 of the Customs Act having formed the sole basis for the subjective satisfaction of the detaining authority and those very persons having retracted their statements, non- consideration of those material particulars before issuing the order of detention on 5.2.92 vitiates the same and, therefore, the same should be quashed.

According to Mr. V.S. Kotwal, the High Court committed gross error in rejecting these contentions and in arriving at the conclusions which are unsustainable in law. Mr. N.N. Goswami, learned senior counsel appearing for the Union of India and Mr. I.G. Shah, learned senior counsel appearing for the State of Maharashtra repelled the submissions of Mr. V.S. Kotwal and contended that the High Court was fully justified in rejecting the contentions advanced on behalf of the detenu. Mr. Goswami also further contended that even assuming there has been some infraction of the procedural requirements on account of which there has been an infringement of the constitutional right of the detenu in making a representation then the continued detention becomes invalid and not the order of detention itself. In this view of the matter, Mr. Goswami contends that the period of detention having already expired, question of declaring his continued detention illegal does not arise and further the order of detention that was issued by the detaining authority on 5.2.92 cannot be invalidated. Mr. K.G. Shah, learned senior counsel appearing for the State of Maharashtra contended that non consideration of the retraction made by the persons who were in the vessel, does not vitiate the subjective satisfaction of the detaining authority inasmuch as the detaining authority was not aware of the aforesaid retraction.That apart, the very same persons have made a further statement stating that their earlier statements under Section 108 are correct and not the so called retraction and that material was before the detaining authority when he issued the order of detention, consequently, the satisfaction of the detaining authority cannot be said to be vitiated. In view of the rival submissions of the Bar, we have carefully scrutinised

the impugned judgment of the Bombay High Court and the conclusions arrived at in its judgment as well as several authorities placed at the time of hearing and we proceed to examine the contentions seriatim. Coming to the first contention, Mr. Kotwal submits that under Section 8(b) of the COFEPOSA Act, the appropriate Government is required to make a reference to the Advisory Board within five weeks from the date of detention, if no declaration under Section 9 has been made and on the receipt of the opinion of the Advisory Board which the Board is required to submit within eleven weeks from the date of detention, the State Government can confirm the detention order and continue the detention of the person concerned for such period as it thinks fit as required under Section 8(f) of the COFEPOSA Act but where there has been a declaration under Section 9 (i) of the said Act which declaration is required to be made within five weeks from the date of detention, then without obtaining the opinion of the Advisory Board, there can be a valid detention for a period of six months from the date of detention. This being the scheme of the provision, the authority making the declaration under Section 9 (i) of the Act has to indicate to the detenu that he has a right of representation to the declaring authority. In the case in hand, the detenu not having been informed of such right the entire proceedings starting from confirmation of the order of detention gets vitiated which in turn makes the order of detention illegal and void and, therefore, the same has to be quashed by the Court. In order to appreciate this contention, it would be appropriate to extract Sections 8 and 9 of the COFEPOSA Act in extenso:

8. Advisory Boards.- For the purposes of sub-clause(a) of clause (4), and sub-clause(c) of clause (7), of Article 22 of the Constitution,-

(a) the Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards each of which shall consist of a Chairman and two other persons possessing the qualifications specified in sub- clause (a) of clause (4) of Article 22 of the Constitution;

(b) save as otherwise provided in Section 9, the appropriate Government shall, within five weeks from the date of detention of a person under a detention order make a reference in respect thereof to the Advisory Board constituted under clause (a) to enable the Advisory Board to make report under sub-clause (a) of clause (4) of Article 22 of the Constitution;

(c) the Advisory Board to which a reference is made under clause (b) shall after considering the reference and the materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if in any particular case, it considers it essential so to do or if the person concerned desires to be heard in person, after hearing him in person, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned;

(d) when there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board;

(e) a person against whom an order of detention has been made under this Act shall not be entitled to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified shall be confidential;

(f) in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.

9. Cases in which and circumstances under which persons may be detained for periods longer than three months without obtaining the opinion of Advisory Board. (1) Notwithstanding anything contained in this Act, any person (including a foreigner) in respect of whom an order of detention is made under this Act at any time before the 31st day of July, 1999, may be detained without obtaining, in accordance with the provisions of sub-clause (a) of clause (4) of Article 22 of the Constitution, the opinion of an Advisory Board for a period longer than three months but not exceeding six months from the date of his detention, where the order of detention has been made against such person with a view to preventing him from smuggling goods or abetting the smuggling of goods or engaging in transporting or concealing or keeping smuggled goods and the Central Government or any officer of the Central Government, not below the rank of an Additional Secretary to that Government, specially empowered for the purposes of this section by that Government, is satisfied that such person

(a) smuggles or is likely to smuggle goods into, out of or through any area highly vulnerable to smuggling; or

(b) abets or is likely to abet the smuggling of goods into, out of or through any area highly vulnerable to smuggling; or

(c) engages or is likely to engage in transporting or concealing or keeping smuggled goods in any area highly vulnerable to smuggling,

and makes a declaration to that effect within five weeks of the detention of such person.

In support of this contention, Mr. Kotwal, learned senior counsel relies upon the decision of the Full Bench of the Bombay High Court in the case of Sandeep Atmaram Parwal V. The State of Maharashtra in Criminal Writ Petition No. 379 of 1995, disposed of on 31.8.96, since reported in 1996 II LJ 1 as well the decision of Full Bench of the Delhi High Court in the case of Akhilesh Kumar Tyagi V. Union of India

and Others 1996 Crl.L.J.965. He also relies upon the decision of this Court in Shibapada Mukherjee V. The State of West Bengal 1974 (3) SCC 50 and the decision in Kamleshkumar Ishwardas Patel V. Union of India & and the decision of the Constitution Bench of this Court in A.K. Roy V. Union of India and Others 1982 (1) SCC 271. There cannot be any dispute that the right to make a representation of a detenu is the most valuable right conferred upon him under Article 22 of the Constitution and if there has been any infraction of such right then certainly the detenu is entitled to be released. The question, therefore, arises as to whether when a declaration is made under Section 9(i) of the Act which in turn extends the period of detention without being confirmed whether the officer issuing the declaration under Section 9 (i) is also required to inform the detenue that he has a right to make a representation to him. Under the constitutional scheme engrafted in Article 22, no law providing for preventing detention can authorise the detention of a person for a longer period than three months unless the Advisory Board reports before expiration of the said period of three months that there is, in its opinion, sufficient cause for such detention. When an authority issues a declaration under Section 9(i) of the Act, the said authority has the necessary powers to revoke the declaration on a representation being made by the detenu against such declaration. Consequently, if the detenu is not intimated of his right to make a representation to the authority issuing the declaration under Section 9(i) then certainly his valuable constitutional right gets infringed and the two decisions of the Full Bench relied upon by Mr. Kotwal fully support this contention. Mr. N.N. Goswami, learned senior counsel appearing for the Union of India fairly concedes this position. In the case of A.K. Roy V. Union of India 1982(1) SCC 271 where the Court was examining the constitutional validity of issuance of an Ordinance providing for detention and the constitutional validity of the National Security Act, it did rely upon the earlier decision in Khduram Das. V. State of W.B. 1975 (2) SCC 81 and held that it is not open to anyone to contend that a law of preventive detention, which falls within Article 22, does not have to meet the requirement of Articles 14 or 19, and in the same analogy it must be held that Article 21 also would apply in case of a law of preventive detention. The proposition laid down in the aforesaid decision of the Constitution Bench cannot be doubted, but in our view the said question does not arise for consideration in the case in hand. In Kamleshkumar Ishwardas Patel V. Union of India and Ors. JT 1995 (3) SC 639, it has been held in unequivocal terms that the right to make a representation within the meaning of Article 22(5) against the order of detention is not only to the Advisory Board but also to the detaining authority i.e. the authority that has made the order of detention or the order for continuance of such detention, and hence such right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation. In this view of the matter, the conclusion becomes irresistible that the authority issuing a declaration under Section 9 of COFEPOSA Act must intimate the detenu that he has right of opportunity to represent to the declaring authority and non intimation of the same infringes upon the constitutional right of the detenu to make a representation under Article 22(5) and, therefore, the notification issued under Section

9(i) becomes invalid and the continued detention pursuant to such declaration and the opinion of the Advisory Board within the extended period as well as the confirmation by the State Government are vitiated. But the further question that requires to be answered is whether the initial order of detention issued under Section 3(i) of the COFEPOSA Act can be held to be ab initio void on the aforesaid infraction of the right of the detenu. On this question, we are unable to agree with the submission of Mr. Kotwal, inasmuch as Article 22(4) itself provides for a law for preventive detention authorising detention up to a period of three months. The infraction of the constitutional right to make a representation on account of non intimating the detenu about his right to make a representation or the opinion of the Advisory Board and the order of detention not being made within the period prescribed under law does not get into the satisfaction of the detaining authority while making an order of detention under Section 3(i) of the COFEPOSA Act. If the detaining authority on the basis of materials before him did arrive at his satisfaction with regard to the necessity for passing an order of detention and the order is passed thereafter, the same cannot be held to be void because of a subsequent infraction of the detenus right or of non- compliance of the procedure prescribed under law. On such infraction and for non-compliance of the procedure prescribed under law, the further detention becomes illegal. But it does not affect the validity of the order of detention itself issued under Section 3(i) of the Act by the detaining authority. In view of our aforesaid conclusion, the question of setting aside the order of detention issued on 5.2.92 does not arise and further the detenu being no longer under detention, question of issuing any other direction does not arise. Our aforesaid conclusion is supported by the decision of this Court in Shibapada Mukherjee Vs. The State of West Bengal 1974 (3) SCC 50 wherein the Court observed that there being no valid confirmation and continuation, the result is that the petitioners detention after expiry of the period of three months becomes illegal since it was not in compliance with Section 12 (i). It would be appropriate, at this stage, to extract the following few lines from the aforesaid judgment:

.. It is clear from clauses (4) and (7) of Article 22 that the policy of Article 22 is, except where there is a Central Act to the contrary passed under clause (7)(a), to permit detention for a period of three months only, and detention in excess of that period is permissible only in those cases where an Advisory Board, set up under the relevant statute, has reported as to the sufficiency of the cause for such detention. Obviously, the Constitution looks upon preventive detention with disfavour and has permitted it only for a limited period of three months without the intervention of an independent body with persons on it of judicial qualifications of a high order. The facts that the report of such an Advisory Board has to be obtained before the expiry of three months from the date of detention shows that the maximum period within which the detaining authority can on its own satisfaction detain a period is three months.

In Shri Jagprit Singh V. Union of India & Ors. JT 1990(3) SC 293 where there had been a delay of one month and 13 days before the detenu was made aware of his right to make an effective representation against declaration, this Court held that it is contrary to the provision of Article 22(5) of the Constitution and, therefore, the detention of

the detenu after the original period of one year, in the circumstances, was unjustified. The Court further set aside the detention of the detenu beyond September, 1989 and not the original order of detention that had been issued on 2.9.88. This case was directly on the applicability of Section 9 of the COFEPOSA Act and direct authority in support of our conclusion. It is not necessary to multiply authorities on this question. We, therefore, while agreeing with Mr. Kotwal that there has been an infraction of the right of detenu under Article 22 as the declaring authority had not informed that he had right of representation against the order of declaration, we are of the view that it will not by itself vitiate the initial order of detention. So far as the second and third contentions are concerned, the question would essentially depend upon the facts of each case. In the case in hand, no doubt the order of detention was passed by the detaining authority on 5.2.92 but the same could be served on 3.8.93 after the detaining authority came to know that the detenu had been arrested on 23.7.93 in some other case. Mr. Kotwal, in this connection, heavily relies upon a recent decision of this Court in Smf. Sultan Abdul Kader Vs. Jt. Secy. To Govt. of India and Others 1998(8) SCC 343. In the aforesaid case, the Court has indicated that the unreasonable delay in executing the order creates a doubt regarding the genuineness of the detaining authority as regards the immediate necessity of detaining the petitioner in order to prevent him from carrying on the prejudicial activity referred to in the grounds of detention and as such the order of detention had not been passed in lawful exercise of the power vested in him. But the question has to be examined in the light of the facts and circumstances of each case and further it has to be considered whether the alleged delay is on account of the reasons beyond the control of the detaining authority. From the affidavit filed in the present case, it transpires that the detenu had been evading execution and with best of efforts, the order of detention could not be served upon him. After the detenu was arrested in some other case, when it was brought to the notice of the detaining authority, the detaining authority then considered the desirability of the execution of the order of detention issued earlier and directed the concerned officer to execute the same. Thus, there has been sufficient explanation for the delay in execution of the order of detention and further just before the execution, the detaining authority was made aware of the fact that the detenu has been arrested and still the detaining authority thought it necessary to execute the order of detention. We, therefore, find no force in the second contention raised by Mr. Kotwal in assailing the order of detention. In support of the third contention, Mr. Kotwal relies upon the decision of this Court in Binod Singh V. District Magistrate, Dhanbad, Bihar and Others 1986 (4) SCC 416. In the aforesaid case, this Court has observed: If a man is in custody and there is no imminent possibility of his being released, the power of preventing detention should not be exercised. In the instant case when the actual order of detention was served upon the detenu, the detaining was in jail. There is no indication that this factor or the question that the said detenu might be released or that there was such a possibility of his release, was taken into consideration by the detaining properly and seriously before the service of the order.

It is this observation on which Mr. Kotwal heavily relies upon. But as has been stated earlier in the

affidavit filed, it has been indicated that not only the fact that the detenu is in custody on being arrested in some other case was brought to the notice of the detaining authority, but also the detaining authority on consideration of all relevant material including the fact that there may be a possibility of detenu being released on bail, thought it fit to get the order of detention served on the detenu. In the premises, the ratio in the aforesaid case will have no application. This is not a case where the detaining authority has not applied his mind to the relevant material, but a case where the detaining authority considered all the relevant material and decided and directed to get the order executed. Consequently, we do not find any merit in the aforesaid two contentions of Mr. Kotwal. The only other contention that survives for consideration is whether the statements of the occupants of the vessel recorded under Section 108 of the Customs Act having formed the sole basis for the subjective satisfaction of the detaining authority for the order of detention and those very persons having retracted, non consideration of the retraction, vitiates the order of detention itself. The High Court in the case in hand did not accept the aforesaid contention on the ground that there was no material before the detaining authority that there has been retraction of the statements made by those persons who had earlier been examined under Section 108 of the Customs Act. We need not go into this question in the case in hand, inasmuch as by the date of issuance of the order of detention, those persons have made a further statement indicating that the original statements made by them under Section 108 of the Customs Act were correct and not the retracted statements they had made and this fact was before the detaining authority when he issued the order of detention under Section 3(i) of the COFEPOSA Act. This being the position, it is difficult for us to accept the contention of Mr. Kotwal that the satisfaction of the detaining authority gets vitiated for non consideration of the relevant material. In our opinion, the aforesaid submission, in the facts and circumstances of the present case, is devoid of any force and we accordingly reject the same.

All the contentions having failed, this appeal fails and is dismissed accordingly.