Supreme Court of India
Kamleshkumar Ishwardas Patel ... vs Union Of India And Ors. Etc. Etc on 17 April, 1995
Bench: Ahmadi A.M. (Cj), Agrawal, S.C. (J), Bharucha S.P. (J), Paripoornan, K.S.(J), Manohar Sujata (J)

CASE NO.:
Appeal (crl.) 764-65 of 1994

PETITIONER:
KAMLESHKUMAR ISHWARDAS PATEL ETC. ETC.

RESPONDENT:
UNION OF INDIA AND ORS. ETC. ETC.

DATE OF JUDGMENT: 17/04/1995

BENCH:
A.M. AHMADI CJ & S.C. AGRAWAL & S.P. BHARUCHA & K.S. PARIPOORNAN & SUJATA V. MANOHAR

JUDGMENT:

JUDGMENT 1995 (3) SCR 279 The Judgment of the Court was delivered by S.C. AGRAWAL, J. Leave granted in SLP (Crl.) No. 282/94.

When an order for preventive detention is passed by an officer especially 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?

This is the common question that arises for consideration in these appeals in the context of orders for preventive detention passed by officers especially empowered by the Central Government under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 [for short 'COFEPOSA Act'] and the Prevention of Illicit Traffic in Narcotic Drugs & Psychotropic Substances Act, 1988 [for short 'PIT NDPS Act']. There is divergence in the decisions of this Court on this question. In Amir Shad Khan v. L. Hmingliana and Ors., [1991] 4 SCC 39, (decided by a bench of three Judges), it has been held that where an officer of the State Government or the Central Government has passed any detention order and on receipt of a representation he is convinced that the detention needs to be revoked he can do so. In State of Maharashtra v. Smt Sushila Mafatlal Shah & Ors., [1988] 4 SCC 490, (decided by a bench two Judges), a different view has been expressed. It has been held that if an order of detention is made by an officer specially empowered by the Central Government or a State Government the representation of the detenu is required to be considered only by the Central Government or the State Government and it is not required to be considered by the officer who had made the order.

The question posed has to be considered in the light of the provisions relating to preventive detention contained in Article 22 of the Constitution as well as the provisions contained in the relevant statutes.

The Constitution, while permitting Parliament and the State Legisla-tures to enact a law providing for preventive detention, prescribes certain safeguards in Article 22 for the protection of the persons so detained. One such protection is contained in sub- clause (a) of Clause (4) of Article 22 which required that no law providing for preventive detention shall authorise the detention of a person for a period longer than three months unless 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 detention. The other safeguard is contained in clause (5) of Article 22 which provides as under:

"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".

This provision has the same force and sanctity as any other provision relating to fundamental rights. [See : State of Bombay v.Atma Ram Sridhar Vaidya, [1951] SCR 167, at p. 186). Article 22(5) imposes a dual obligation on the authority making the order of preventive detention: (i) to communi- cate to the person detained as soon as may be the grounds on which the order of detention has been made; and (ii) to afford the person detained the earliest opportunity of making a representation against the order of detention. Article 22(5) thus proceeds on the basis that the person detained has a right to make a representation against the order of detention and the aforementioned two obligations are imposed on the authority making the order of detention with a view to ensure that right of the person detained to make a representation is a real right and he is able to take steps for redress of a wrong which he thinks has been committed. Article 22(5) does not, however, indicate the authority to whom the representation is to be made. Since the object and purpose of the representation that is to be made by the person detained is to enable him to obtain relief at the earliest opportunity, the said representation has to be made to the authority which can grant such relief, i.e., the authority which can revoke the order of detention and set him at liberty. The authority that has made the order of detention can also revoke it. This right is inherent in the power to make the order. It is recognised by Section 21 of the General Clauses Act, 1897 though it does not flow from it. It can, therefore, be said that Article 22(5) postulates that the person detained has a right to make a representation against the order of detention to the authority making the order. In addition, such a representation can be made to any other authority who is empowered by law to revoke the order of detention.

The learned Additional Solicitor General has urged that the repre-sentation envisaged by Article 22(5) has to be made to the Advisory Board referred to in Article 22(4) since the only right that has been conferred on the person detained is to have the matter of his detention considered by the Advisory Board. The learned Additional Solicitor General drew sup-port from the words "making a representation against the order" in Article 22(5) for this submission and contended that the use of the word "a" in singular indicates that only one representation is to be made and that representation has to be made to the Advisory Board because that is the only authority contemplated under the Constitution which is required to consider such representation. We are unable to give such a restricted meaning to the words "making a representation against the order" in Article 22(5) which

is in the nature of a fundamental right affording protection to the person detained. As stated earlier, the object underlying the right to make a representation that is envisaged by Article 22(5) is to enable the person detained to obtain immediate relief. If the construction placed by the learned Additional Solicitor General is accepted relief may not be available to the detenu till the matter is considered by the Advisory Board and that would depend upon the time taken by the appropriate Govern-ment in referring the matter to the Advisory Board. Moreover reference is required to be made to the Advisory Board only in cases where the period of detention is going to be longer than three months and it is not obligatory to make a reference to the Advisory Board if the period of detention is less than three months. In such a case the right to make a representation under clause (5) of Article 22 would be rendered nugatory. A construction which leads to such a result must be eschewed.

We may, in this context, briefly refer to some of the decisions of this Court relating to consideration of the representation of the person detained under Article 22(5).

In Abdul Karim and Ors. v. State of West Bengal, [1969]3 SCR 479, it was urged on behalf of the State Government that since the Advisory Board had been constituted to consider the case of the detenues and to report to the State Government whether there was sufficient cause for the detention there was no obligation on the part of the State Government to consider the representation. Rejecting the said contention, it was said :

"The right of representation under Article 22 is a valuable con-stitutional right and is not a mere formality. It is, therefore, not possible to accept the argument of the respondent that the State Government is not under a legal obligation to consider the repre-sentation of the detenu or that the representation must be kept in cold storage in the archives of the Secretariat till the time or occasion for sending it to the Advisory Board is reached. If the viewpoint contended for by the respondent is correct,the constitu-tional right under Article 22(5) would be rendered illusory. Take for instance a case of detention of a person on account of mistaken identity. If the order of detention has been made against A and a different person B is arrested and detained by the police authorities because of similarity of names or some such cause, it cannot be reasonably said that the State Government should wait for the report of the Advisory Board before releasing the wrong person from detention." [p.487] The decision in Abdul Karim (supra) was reaffirmed by the Constitu-tion Bench of this Court in Pankaj Kumar Chakrabarty and Ors. v. State of West Bengal, [1970] 1 SCR 543, wherein it was observed :

"It is true that cl.(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 expression "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 repre-sentation are provided for to enable the detenu to show that this detention is unwarranted and since no other authority who should consider such representation is mentioned it can only be the detain-ing authority to whom it is to be made which has to consider it. Though cl. 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 enable it to detain

him." [p.548] [Emphasis supplied] Again in Jayanarayan Sukul v. State of West Bengal, [1970]3 SCR 225, decided by the Constitution Bench, this Court has held :

"Broadly stated, four principles are to be followed in regard to representation of detenus. First, the appropriate authority is bound to give an opportunity to the detenu to make a representation and to consider the representation of the detenu as early as possible. Secondly, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the repre-sentation of the detenu by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in the governance of the citizens. A citizen's right raises a correlative duty of the State. Fourthly, the appropriate Government is to exercise its opinion and judgment on the representation before the sending the case along with the detenu's representation to the Advisory Board. If the appropriate Government will release the detenu the Government will not send the matter to the Advisory Board. If however the Government will not release the detenu the Govern-ment will send the case along with the detenu's representation to the Advisory Board." [p.232] (Emphasis supplied).

All these cases related to orders of detention made by the District Magistrate under the Preventive Detention Act, 1950 which specifically provided [in Section 7(1)] that the authority making the order of detention shall afford to the person detained the earliest opportunity of making a representation against the order "to the appropriate Government" and for that reason there are observations by the court that the representation should be considered by the "State Government" though the orders of detention were made by the District Magistrate under Section 3(2) of the Preventive Detention Act. Although in these cases the focus was only on the question whether the representation should be considered by the State Government or the Advisory Board, and the court was not required to consider whether the detaining authority should also consider the repre- sentation, yet we find that in Pankaj Kumar Chakrabarty (supra) the court has said that the "detaining authority" must consider the representation when so made. Similarly, in Jayanarayan Sukul (supra) the court has used the expression "appropriate authority" in the first three principles as dis-tinct from the expression "appropriate Government" used in the fourth principle. The expression "detaining authority" would mean the authority which has made the order of detention and the authority which has made an order for continuance of such detention.

In Amir Shad Khan (supra) it has been held:

"The right to make a representation against the detention order thus flows from the constitutional guarantee enshrined in Article 22(5) which casts an obligation on the authority to ensure that the detenu is afforded an earliest opportunity to exercise that right, if he so desires. The necessity of casting a dual obligation on the authority making the detention order is obviously to acquaint the detenu of what had weighed with the Detaining Authority for exercising the extraordinary powers of detention without trial con-ferred by Section 3(1) of the act and to give the detenu an opportunity to point out any error in the exercise of that power so that the said authority gets an opportunity to undo the harm done by it, if at all, by correcting the error at the earliest point of time. Once it is

realised that Article 22(5) confers a right of repre-sentation, the next question is to whom must the representation be made. The grounds of detention clearly inform the detenu that he can make a representation to the State Government, the Central Government as well as the Advisory Board. There can be no doubt that the representation must be made to the authority which has the power to rescind or revoke the decision, if need be." [p.46] Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made 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, who is competent to give imme-diate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a repre-sentation 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 against the order of detention to the authorities who are required to consider such a representation.

Having thus defined the nature of the right to make a representation recognised by Article 22(5) we may now proceed to examine the relevant provisions in the COFEPOSA Act and PIT NDPS Act.

Section 3 of the COFEPOSA Act confers the power to make orders detaining certain persons and provides as under:

"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 Joint Secretary to that Government, specially empowered for the pur-poses of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Govern-ment, 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, make an order directing that such person be detained.

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 Narcotics 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 a State Government or by an officer empowered by a State Government, the State Govern-ment shall, within ten days, forward to the Central Government a report in respect of the order.

(3) For the purpose of clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a deten-tion 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."

Section 11 of the COFEPOSA Act, providing for revocation of detention orders, is in the following terms :

"Section 11. Revocation of detention orders.- (1) Without prejudice to the provisions of Section 21 of the General Clauses Act, 1897 (10 of 1897), a detention order may, at any time, be revoked or modified-

(a) notwithstanding that the order has been made by an officer of a State Government, by that State Government or by the Central Government;

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

(2) The revocation of a detention order shall not bar the making of another detention order under Section 2 against the same person."

Section 3 of the PIT NDPS Act is on the same lines as Section 3 of COFEPOSA Act. There is slight difference in sub-section (l)but sub-sec-tions (2) and (3) are identical. Section 12 of the PIT NDPS Act makes provision for revocation of detention orders and is in the same terms as Section 11 of the COFEPOSA Act.

The provisions in COFEPOSA Act and PIT NDPS Act differ from those contained in the National Security Act, 1980 as well as earlier preventive detention laws, namely, the Preventive Detention Act, 1950, 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. COFEPOSA Act and the PIT NDPS Act do not provide for approval by the appropriate Government of the orders passed by ths 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 PIT NDPS 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.

In view of Section 21 of the General Clauses Act the authority which has made the order of detention would be competent to revoke the said order. Section 11 of the COFEPOSA Act and Section 12 of the PIT NDPS Act provide for revocation of such an order by authorities other than the authority which has made the order, under clause (a) of sub-section (1) of both these sections an order made by an officer specially empowered by the State Government can be revoked by the State Government as well as by the Central Government and under clause (b) of sub-section (1) an order made by an officer specially empowered by the Central Government or an order made by the State Government can be revoked by the Central Government. This means that the Central Government has the power to revoke orders made by -

(i) the State Government;

(ii) an officer specially empowered by the State Government; and

(iii) an officer specially empowered by the Central Government.

Similarly, the State Government has the power to revoke an order made by an officer specially empowered by the State Government. In other words an order made by the officer specially empowered by the State Government can be revoked by the State Government as well as by the Central Government, an order made by the State Government can be revoked by the Central Government and an order made by the officer specially empowered by the Central Government can be revoked by the Central Government. The conferment of this power on the Central Govern-ment

and the State Government does not, however, detract from the power that is available to the authority that has made the order of detention to revoke it. The power of revocation that is conferred on the Central Govern-ment and the State Government under clauses

(a) and (b) of sub-section (1) of Section 11 of the COFEPOSA Act and Section 12 of the PIT NDPS Act is in addition to the power of revocation that is available to the authority that has made the order of detention. This is ensured by the words "without prejudice to the provisions of Section 21 of the General Clauses Act, 1897 (10 of 97)" in sub-section (1) of both the provisions.

If the power of revocation is to be treated as the criterion for ascertaining the authority to whom representation can be made, then the representation against an order of detention made by an officer specially empowered by the State Government can be made to the officer who has made the order as well as to the State Government and the Central Government who are competent to revoke the order. Similarly, the repre-sentation against an order made by the State Government can be made to the State Government as well as to the Central Government and the representation against an order made by an officer specially empowered by the Central Government can be made to the officer who has made the order as well as to the Central Government.

The learned Additional Solicitor general has, however, submitted that the officer specially empowered under Section 3 of the COFEPOSA Act and PIT NDPS Act cannot be regarded as the detaining authority and that though the order of detention is made by the officer specially em-powered by the Central Government or by the State Government the detaining authority is the appropriate Government which has empowered the officer to make the order and, therefore, it is the appropriate Govern-ment alone which can consider the representation and revoke the same and a representation does not lie to the officer who has made the order of detention. According to the learned Additional Solicitor General the only provision regarding revocation of detention orders is that contained in Section 11 of the COFEPOSA Act and Section 12 of the PIT NDPS Act and under the said provisions the Central Government and the State Government only have been empowered to revoke an order of detention. This contention fails to give effect to the words "without prejudice to the provisions of Section 21 of the General Clauses Act, 1897 (10 of 1897)" in sub-section (1) of Section 11 of COFEPOSA Act and Section 12 of PIT NDPS Act. As pointed out earlier the use of these words preserves the power of the officer making the order under Section 21 of the General Clauses Act to revoke the order made by him. It cannot, therefore, be said that the conferment of the power of revocation on the Central Government and the State Government under Section 11 has the effect of depriving the officer making the order of detention of the power to revoke the order made by him. If that is so the officer who has made the order of detention is competent to consider the representation made by the person detained against the order of detention made by such officer.

We may, at this stage, take note of some of the decisions of this Court which have a bearing on the question under consideration.

In Ibrahim Bachu Bafan v. State of Gujarat & Ors., (supra), this Court, while construing the provisions of Section 11 of the COFEPOSA Act, has held:

"The words "without prejudice to the provisions of Section 21 of the General Clauses Act 1897" used in Section 11(1) of the Act give expression to the legislative intention that without affecting that right which the authority making the order enjoys under Section 21 of the General Clauses Act, an order of detention is also available to be revoked or modified by authorities names in clauses (a) and (b) of Section 11(1) of the Act. Power conferred under clauses (a) and (b) of Section 11(1) of the Act could not be exercised by the named authorities under Section 21 of the General Clauses Act as these authorities on whom such power has been conferred under the Act are different from those who made the orders. Therefore, conferment of such power was necessary as Parliament rightly found that Section 21 of the General Clauses Act was not adequate to meet the situation. Thus, while not affecting in any manner and expressly preserving the power under Section 21 of the General Clauses Act of the original authority making the order, power to revoke or modify has been conferred on the named authorities." (p.28] In Amir Shad Khan (supra) the majority view has been thus ex-pressed :

"Therefore, where an officer of the State Government or the Central Government has passed any detention order and on receipt of a representation he is convinced that the detention order needs to be revoked he can do so by virtue of Section 21 of the General Clauses Act since Section 11 of the Act does not entitle him to do so. If the State Government passes an order of detention and later desires to revoke it, whether upon receipt of a repre-sentation from the detenu or otherwise, it would be entitled to do so under Section 21 of the General Clauses Act but if the Central Government desires to revoke an order passed by the State Government or its officer it can do so only under clause (b) of Section 11(1) of the Act and not under Section 21 of the General Clauses Act. This clarifies why the power under Section 11 is conferred without prejudice to the provisions of Section 21 of the General Clauses Act." [p.49] In Smt. Sushila Mufatlal Shah (supra) the order of detention was passed under Section 3 of the COFEPOSA Act by Shri D.N. Capoor, Officer on Special Duty and Ex-officio Secretary to the Government of Maharashtra, Home Department, as the officer specially empowered by the Government of Maharashtra under Section 3 of the COFEPOSA Act. it was communicated to the detenu that he had a right to make a repre-sentation to the State Government as also to the Government of India against the order of detention but it was not communicated to the detenu that he had a right to make a representation to the detaining authority himself. It was contended that this has resulted in denial of the right to make a representation under Article 22(5). The said contention was nega-tived by this Court [A.P. Sen and S. Natarajan, JJ]. After referring to the decisions of this Court in Abdul Karim (supra), Jayanarayan Sukul (supra), Haradhan Saha v. State of West Bengal, [1975] 3 SCC 198 and John Martin v. State of West Bengal, [1975] 3 SCC 836, it was held that "on the plain language of Article 22(5) the said Article does not provide material for the detenu to contend that in addition to his right to make a representation to the State Government and the Central Government, he has a further right under Article 22(5) to make a representation to D.N. Capoor himself as he had made the order of detention." (p.498) After taking note of the provisions contained in the COFEPOSA Act and after observing that unlike in other Preventive Detention Acts, e.g., National Security Act, Maintenance of Internal Security Act, Preventive Detention Act, the COFEPOSA Act does not provide for approval by the Government of an order of detention passed by one of its duly empowered officers, the learned Judges have expressed the view that "an order passed by an officer acquires 'deemed approval' by the government from the time of its issue and by reason of its the Government becomes the detaining authority and thereby constitutionally obligated to consider the representation made by the detenu with utmost

expedition." (p.505) Reliance has also been placed on the decisions in Kavita v. State of Maharashtra, [1981] 3 SCC 558 and Smt. Mamma v. State of Maharashtra, [1981] 3 SCC 566.

The learned Additional Solicitor General has pleaded for acceptance of the law laid down in Smt. Sushila Mafatlal Shah (supra). We regret out inability to do so. The decision in Smt. Sushila Mafatlal Shah (supra) proceeds on two premises: (i) Article 22(5) does not confer a right to make a representation to the officer specially empowered to make the order; and

(ii) under the provisions of the COFEPOSA Act when the order of detention is made by the officer specially empowered to do so, the detaining authority is the appropriate Government, namely, the Government which has empowered the officer to make the order, since such order acquires 'deemed approval' by the Government from the time of its issue.

With due respect we find it difficult to agree with both the premises. Construing the provisions cf Article 22(5) we have explained that the right of the person detained to make a representation against the order of detention comprehends the right to make such a representation to the authority which can grant such relief, i.e., the authority which can revoke the order of detention and set him at liberty and since the officer who has made the order of detention is competent to revoke it, the person detained has the right to make a representation to the officer who made the order of detention. The first premises that such right does not flow from Article 22(5) cannot, therefore, be accepted.

The learned judges, while relying upon the observations in Abdul Karim (supra) and the decisions in Jayanarayan Sukui (supra), Haradhan Saha (supra) and John Martin (supra) have failed to notice that in these cases the court was considering the matter in the light of the provisions contained Section 7(1) of the Preventive Detention Act, 1950, whereby it was prescribed that the representation was to be made to the appropriate Government. The observations regarding consideration of the repre-sentation by the State Government in the said decisions have, therefore, to be construed in the light of the said provision in the Preventive Detention Act and on that basis it cannot be said that Article 22(5) does not postulate that the person detained has no right to make a representation to the authority making the order of detention.

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 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.

In the National Security Act there is an express provision [Section 3(4)] in respect of orders made by the District Magistrate or the Commis-sioner 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 mean- time, 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 PIT NDPS Act do not require the approval of an order made by the officer specially empowered by the State Government or by the Central Govern-ment. The order passed by such an officer operates on its own force. All that is required by Section 3(2) of COFEPOSA Act and PIT NDPS 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 Govern-ment 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 PIT NDPS 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 ap-proval 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 given 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 PIT NDPS Act that the officer specially empowered for the purpose of making of an order of detention must forthwith send to the concerned government the grounds and the supporting material on the basis of which the order of detention has been made. Nor is it prescribed in the said enactments that after the order of detention has been made by the officer specially empowered for that purpose the concerned government is required to apply its mind to the grounds and the supporting material on the basis of which the order of detention was made. The only circumstance from which inference about deemed approval is sought to be drawn is that the order is made by the officer specially empowered for that purpose by the concerned govern-ment. Merely because the order of detention has been made by the officer who has been specially empowered for that purpose would not, in our opinion, justify the inference that the said order acquires deemed approval of the government that has so empowered him, from the date of the issue of the order so as to make the said government the detaining authority. By specially empowering a particular officer under Section 3(2) of the COFEPOSA Act and the PIT NDPS 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 PIT NDPS 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 ceases to be the detaining authority and the concerned government which had empowered him assumes the role of the detaining authority. We are unable to construe the provisions of the said enactment as providing for such a limited entrustment of power on the officer who is specially empowered to pass the order. An indication to the contrary is given in Section 11 of the COFEPOSA Act and Section 12 of the PIT NDPS Act which preserve the power of such officer to revoke the order that was made by him. This means that the officer does not go out of the picture after he has passed the order of detention. It must, therefore, be held that the officer specially empowered for that purpose continues to be the detaining authority and is not displaced by the concerned government after he has made the order of detention. Therefore, by virtue of his being the detaining authority he is required to consider the representation of the person detained against the order of detention.

In Kavita v. State of Maharashtra, (supra) the order of detention was made by the Government of Maharashtra and not by an officer specially empowered by the State Government. Similarly in Smt. Masuma (supra) it was held that the order of detention was not made by P.V. Nayak in his individual capacity as an officer of the State Government but it was made by him as representing the State Government and that it was the State Government which had made the order of detention acting through the instrumentality of P.V. Nayak, Secretary to Government who was authorised to act for and on behalf of and in the name of the State Government under the Rules of Business. The said decisions did not relate to an order made by an officer specially empowered for that purpose is required to be considered by such officer.

It appears that the decision in Ibrahim Bachu Bafan (supra), a decision of a bench of three-Judges, was not brought to the notice of the learned Judges deciding Smt. Sushila Mafatial Shah (supra). For the reasons aforementioned we are of the view that the decision in Smt. Sushila Mafatial Shah (supra). In so far as it holds that where an order of detention made by an officer specially empowered for the purpose representation against the order of detention is not required to be considered by such officer and it is only to be considered by the appropriate Government empowering such officer does not lay down the correct law.

The learned Additional Solicitor General has also placed reliance on the decision in John Martin v. State of West Bengal, (supra) wherein the court was dealing with an order of detention made under the Maintenance of Internal Security Act, 1971 which contained an express provision in Section 8(1), for the representation to be made against the detention order to the appropriate Government. The said decision can, therefore, have no application to a detention under the COFEPOSA Act and the PIT NDPS Act which do not contain such a provision.

Having regard to the provisions of Article 22(5) of the Constitution and the provisions of the COFEPOSA Act and the PIT NDPS 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 repre-sentation against the order of detention. This right of the detenue 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 repre-sentation 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.

The appeals may now be taken up for consideration in the light of the answer given to the question posed for consideration.

Crl.A.Nos. 764-765 of 1994.

Crl. A Nos. 764-765 of 1994 relate to the detention of Ishwardas Bechardas Patel under order dated January 21, 1994 under Section 3 of the COFEPOSA Act made by Shri Mahendra Prasad, Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, as the officer specially empowered by the Central Government. The grounds of detention were served on the detenu on February 5,1994. On February 21, 1994 the detenu made a representation to the officer who had made the order of detention namely, Shri Mahendra Prasad, Joint Secretary to the Government of India, as well as to the Advisory Board. On March 22, 1994.the detenu was informed that the said representation was considered by the Central Government and the same has been rejected. The officer who made the order of detention did not, however, consider the said representation though it was addressed to him and he forwarded the said representation with his recommendation that the representation may be rejected. A writ petition was filed in the Bombay High Court by the appellant who is the son of the detenu. By order dated July 20, 1994 a Division Bench of the High Court referred the following three questions to the Full Bench for consideration :

(1) Has the specially empowered officer under the COFEPOSA Act also an independent power to revoke the order of detention. In view of Section 11 of the COFEPOSA Act read with Section 1 of the General Clauses Act?

(2) Are observations in Amir Shad Khan regarding power of revocation of specially empowered officer under the COFEPOSA Act not binding on this Court?

(3) Does failure to take independent decision on revocation of order of detention by the specially empowered officer under the COFEPOSA Act and merely forwarding the same with recommen-dation to reject, result in non- compliance with constitutional safeguard under Article 22(5) of the Constitution?

By the judgment of the Full Bench dated August 26, 1994 the question No. 1 was answered in the affirmative and it was had that the specially empowered officer under the COFEPOSA Act has an inde-pendent power to revoke in view of Section 11 of COFEPOSA Act read with Section 21 of the General Clauses Act. Question No. 2 was also answered in the affirmative and it was held that the observations in Amir Shad Khan (supra) regarding the power of revocation by such officer under the COFEPOSA Act were binding on the High Court. Question No. 3 was answered in the negative and it was held that the failure on the part of the officer making the order of detention to consider the representation made by the detenu was of no consequence because the representation of the detenu was, in fact, in effect and in substance considered by the Finance Minister who was an appropriate authority for the purpose of consideration of such representation. The matter was thereafter considered by the Division Bench of the High Court and by judgment dated September 16/19, 1994 the writ petition was dismissed. These appeals have been filed against the judgment of the Full Bench dated August 26, 1994 as well as the judgment of the Division Bench dated September 16/19, 1994.

Shri Ram Jethmalani, the learned senior counsel appearing for the appellant, has assailed the finding recorded by the Full Bench on question No. 3 and has submitted that the failure on the part of the officer who made the order of detention to consider the representation of the detenu results in denial of the right of the detenu to make a representation recognised by Article 22(5) and the said denial renders the detention of the detenu illegal and without the authority of law. In support of his aforesaid submission Shri Jethmalani has placed reliance on the decision in Smt. Santosh Anand v. Union of India, [1981] 2 SCC 420. In that case the order of detention was made by the Chief Secretary, Delhi Administra-tion, acting as the specially empowered officer under Section 3 of the COFEPOSA Act. A representation was made by the detenu to the detain-ing authority, namely, the Chief Secretary, and the Chief Secretary for-warded the same to the Administrator with the endorsement under his signature to the effect "the representation may be rejected" and the said representation was rejected by the Administrator. It was contended that there was non-consideration of the representation and rejection by the detaining authority which resulted in denial of the constitutional safeguard under Article 22(5) of the Constitution. The said contention was accepted by this Court and it was observed :

"It is thus clear to us that the representation could be said to have been considered by the Chief Secretary at the highest but he did not take the decision to reject the same himself and for that purpose the papers were submitted to the Administrator who ultimately rejected the same. There is no affidavit filed by the Chief Secretary before us stating that he had rejected the representation. The representation was, therefore, not rejected by the detaining authority and as such the constitutional safeguard under Article 22(5), as interpreted by this Court, cannot be said to have been strictly observed or complied with." [p.422] The Full Bench of the Bombay High Court has taken note of the decision in Smt. Santosh Anand (supra) but has placed reliance on the later decisions of this Court

in Sat Pal v. State of Punjab, [1982] 1 SCC 12 and Rajkishore Prasad v. State of Bihar, [1982] 3 SCC 10, to hold that the Court must look at the substance of the matter and not act on mere technicality and that even though the constitutionally speaking a duty is cast on the detaining authority to consider the representation yet if in fact and in effect the appropriate Government has finally considered the representation of the detenu it cannot be said that there is contravention of Article 22(5).

In Sat Pal v. State of Punjab, (supra) the order of detention was made by the State Government of Punjab under Section 3 of the COFEPOSA Act and the detenu had made two representations, one was addressed to the Joint Secretary, Government of Punjab and the other was endorsed to the Central Government through the Secretary, Ministry of Finance, Department of Revenue, New Delhi. Both the representations were for-warded by the Superintendent, Central Jail to the Joint Secretary, State Government of Punjab with an endorsement that one of them be forwarded to the Central Government. The State Government rejected the repre-sentations but there was a delay on the part of the State Government in forwarding the representation to the Central Government and ultimately the Central Government also rejected the said representation and these was no delay on the part of the Central Government in considering the representation. This Court held that there was no denial of making a representation to the Central Government and the delay on the part of the State Government in forwarding the representation to the Central Govern-ment, by itself, was not sufficient to invalidate the order of detention. Sat Pal (supra) was. therefore, not a case of non-consideration of the repre-sentation by one of the authorities who was required to consider the said representation.

In Rajkishore Prasad v. State of Bihar, (supra) the order of detention was made by the District Magistrate under Section 3(2) of the National Security Act. The detenu made a representation to the detaining authority (District Magistrate) but in the meantime the case of the detenu was referred to the Advisory Board and the representation was rejected by the State Government after the matter had been considered by the Advisory Board. The Court, while upholding the contention urged on behalf of the detenu that constitutionally speaking a duty is cast on the detaining authority to consider the representation, has referred to Section 8(1) of the National Security Act which provides for making of representation against the order, not to the detaining authority but to the appropriate Govern-ment, and has observed that this was done presumably to provide an effective check by the appropriate Government on the exercise of power by subordinate officers like the District Magistrate or the Commissioner of Police. It was held that if the appropriate Government has considered the representation of the detenu it cannot be said that there is contravention of Article 22(5) or there is failure to consider the representation by the detaining authority. The decision in Santosh Anand (supra) was noticed and it was distinguished on the ground that under the national Security Act there is a specific provision in Section 8 which requires that the detaining authority shall afford the earliest opportunity to make a representation against the order not to the detaining authority but to the appropriate Government.

The decisions in Sat Pal (supra) and Rajkishore Prasad (supra) on which the High Court has placed reliance do not, therefore, detract from the law laid down in Santosh Anand (supra). Having found that the representation of the person detained was not considered by the officer making the order of

detention the High Court was in error in holding that the said failure on the part of the detaining authority to consider and decide the representation is not fatal to the order of detention. We are, therefore, unable to uphold the answer given by the Full Bench to question No. 3 and, in our view, the said question should be answered in the affirmative. On that basis it has to be held that since there was a denial of the constitutional safeguard provided to the detenu under Article 22(5) of the Constitution on account of the failure on the part of the officer who had made the order of detention to independently consider the repre-sentation submitted by the detenu against his detention and to take a decision on the said representation the further detention of the detenue Ishwardas Bechardas Patel is rendered illegal. The appeals, therefore, deserve to be allowed.

Crl.A.No. 850 and 915 of 1994 In both the appeals the orders of detention were made under Section 3 of the PIT NDPS Act by the officer specially empowered by the Central Government to make such an order. In the grounds of detention the detenu was only informed that he can make a representation to the Central Government or the Advisory Board. The detenu was not informed that he can make a representation to the officer who had made the order of detention. As a result the detenu could not make a representation to the officer who made the order of detention. The Madras High Court, by the judgments under appea dated November 18, 1994 and January 17, 1994, allowed the writ petitions filed by the detenus and has set aside the order of detention on the view that the failure on the part of the detaining authority to inform the detenu that he has a right to make a representation to the detaining authority himself has resulted in denial of the constitution-al right guaranteed under Article 22(5) of the Constitution. In view of our answer to the common question posed the said decisions of the Madras High Court setting aside the order of detention of the detenus must be upheld and these appeals are liable to be dismissed.

Crl.A.No...../95 [Arising out of SLP (Crl.) No. 282194] By order dated July 27, 1993 made under Section 3 of COFEPOSA Act by Shri Mahendra Prasad, Joint Secretary to the Government of India, an officer who had been specially empowered under Section 3(1) of the COFEPOSA Act Jayantilal Somchand Shah, the husband of the appellant, was order to be detained. The writ petition filed by the appellant challeng-ing the said detention was dismissed by the Bombay High Court by judg-ment dated October 27, 1993. One of the contentions that has been urged on behalf of the appellant before this Court was that he had addressed a joint representation dated September 14, 1993 to the detaining authority, the Central Government and the Advisory Board and the same was sub-mitted through the Superintendent, Bombay Central Prison and that the said representation was rejected by the Central Government and it was not [considered and decided independently by the detaining authority himself.

These facts are not disputed on behalf of the respondents. Since the appellant had submitted a representation to the detaining authority, name- ly, the officer who was specially empowered to make an order of detention, and the said officer did not consider the representation there has been a denial of the constitutional safeguard guaranteed under Article 22(5) of the Constitution. As a result the detention of the appellant has to be held to be illegal and the said appeal has to be allowed.

At this stage it becomes necessary to deal with the submission of the learned Additional Solicitor General that some of the detenues have been indulging in illicit smuggling of narcotic drugs and

psychotropic substances on a large scale and are involved in other anti-national activities which are very harmful to the nature of the activities of the detenues the cases do not justify interference with the orders of detention made against them. We are not unmindful of the harmful consequences of the activities in which the detenues are alleged to be involved. But while discharging our constitution-al obligation to enforce the fundamental rights of the people, more espe-cially the right to personal liberty, we cannot allow ourselves to be influenced by these considerations. It has been said that history of liberty is the history of procedural safeguards. The framers of the Constitution, being aware that preventive detention involves a serious encroachment on the right to personal liberty, took care to incorporate, in clauses (4) and (5) of Article 22, certain minimum safeguards for the protection of persons sought to be preventively detained. These safeguards are required to be "jealously watched and enforced by the Court". Their rigour cannot be modulated on the basis of the nature of the activities of a particular person. We would, in this context, reiterate what was said earlier by this court while rejecting a similar submission :

"May be that the detenu is a smuggler whose tribe (and how their numbers increase!) deserves no sympathy since its activities have paralysed the Indian economy. But the laws of Preventive Deten-tion afford only a modicum of safeguards to persons detained under them and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenues."

[See : Rattan Singh v. State of Punjab, [1981] 4 SCC 481 at p.488] We have, therefore, no hesitation in rejecting this contention.

In the result, Crl.A.Nos. 850 and 915 of 1994 are dismissed, Crl. A.) Nos. 764-765 of 1994, Crl.No. 553/95 (arising out of SLP (Crl) No. 282/94) are allowed and the detenues, namely, Ishwardas Bechardas Patel [father of the appellant in Crl.A.Nos. 764-765 of 1994] and Jayantilal Somchand Shah [husband of the appellant in Crl.A.No. 553 of 1995 (arising out of SLP (Crl) No. 282/94) are ordered to be set free unless they are required in connection with any other matter.

A.S. Appeals allowed /dismissed.