

(1989) 02 DEL CK 0049

In the Delhi High Court

Case No : Criminal Writ Petition No's. 491 and 625 of 1988

Gurbax Bhiryani

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 07-02-1989

Acts Referred:

Constitution of India, 1950 — Article 22(4)

Citation : (1989) ILR Delhi 297 : (1989) 1 RCR(Criminal) 465

Hon'ble Judges : M. Sharief-ud-din, J;Charanjit Talwar, J

Bench : Division Bench

Advocate : Ram Jethmalani, R.L. Mehta, Sunil Mehta, G. Ramaswamy and Rajender Dutt, for the Appellant;

Judgement

Charanjit Talwar, J.

(1) By this petition (Criminal Writ Petition No. 491/88) the petitioner, Gurbax Bhiryani, is challenging the legality of the order passed u/s 3(1) of the prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (hereinafter referred to as "the Act"). The order was passed on 14th September, 1988 by Shri K. L. Verma, a Joint Secretary to the Government of India, specially empowered under the Act, with a view to preventing the petitioner from abetting the export from India, of narcotic drugs. The declaration u/s 10(1) of the Act issued on 30th September, 1988 has been challenged by him in a separate writ petition (Criminal Writ Petition No. 625 of 1988).

(2) This judgment disposes of both the writ petitions .

(3) At the outset, we may notice that the impugned order is the second order of detention passed against the petitioner. The first order was passed on 24th May, 1988 by the said Shri K. L. Verma under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "the COFEPOSA"). That order was revoked by the Central Government u/s 11(1) of the Cofeposa on. 14th September, 1988 and a fresh order under the Act,

which is impugned herein, was passed and served on the detenu on 14th September, 1988 itself while he was under detention, It is necessary to notice some of the facts preceding the issuance of impugned order.

(4) The petitioner was detained on 28th May, 1988 under order of the 24th May, 1988 passed u/s 3(1) of the COFEPOSA. That order (the first order) was passed with a view to preventing him from abetting the smuggling of goods. The grounds of detention also dated the 24th May, 1988 were served on the petitioner "after his detention on 28th May, 1988. Aggrieved by the said order of detention, the petitioner preferred a habeas corpus petition in the High Court at, Bombay. During the pendency of that writ petition, a declaration u/s 9(1) of the Cofeposa dated the 9th June, 1988 was issued by Shri B. V. Kumar, Additional Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi. The petitioner after obtaining the permission of that High Court amended the petition and sought quashing of the said declaration.

(5) One of the grounds taken in the writ petition was that copies of the documents relied upon by the detaining authority, had not been supplied to him. Along with the grounds of detention thereby preventing him from making an effective representation. The respondents herein, however, filed affidavits justifying the detention. It appears that at the time of final hearing on 10th August, 1988, a preliminary objection to the territorial jurisdiction of that High Court to entertain the petition was raised by the respondents herein. Allowing the objection the petition was forwarded to this Court for disposal. The Registry of this Court numbered it as Criminal Writ Petition No. 407 of 1988 and placed it before a Division Bench of this Court on 23rd August, 1988 for preliminary hearing. After issuance of rule nisi, it was listed before a learned Single Judge for final hearing on 8th September, 1988. The petitioner's counsel completed his arguments on 8th September, 1988 but on consent of the parties the case was adjourned as part heard to 13th September, 1988 for arguments in reply by the learned Additional Solicitor General who was appearing for the respondents. It seems that on 13th September, 1988 a request was made on behalf of the respondents for a day's adjournment as Mr. Ramaswamy, the Additional Solicitor General was not available. On 14th September, 1988, a copy of the order passed by the Central Government u/s 11(1) of the Cofeposa revoking the detention order, was produced before the Court and thus the said writ petition (Criminal Writ Petition No. 407 of 1988) was disposed of as having become infructuous.

(6) The relevant portion of that order of revocation dated the 14th September, 1988 (Annexure "G" to the petition) reads:

"Where as the supporting documents relied upon were not served contemporaneously along with the grounds of detention on Shri Gurbax Biryani; Whereas, the Central Government considered this technical error in the aforesaid matter;

Now, Therefore, in exercise of the powers conferred by Section 11(1) of the aforesaid Act, the Central Government hereby revokes the above said detention order."

(7) It is thus obvious that it was only during the pendency of the said writ petition in this Court that the Central Government came to the conclusion that an error, which is being described as technical, had been committed in the matter of detention of the petitioner herein. It is apparent that the Government felt that in case the detention order was not revoked, it was most likely to be set aside by this Court because of the procedural error, i.e., that the "supporting documents relied upon were not served contemporaneously along with the grounds of detention on the petitioner".

(8) Mr. Ram Jethmalani, learned counsel for the petitioner has contended that the impugned order dated the 14th September, 1988 which was passed on the same grounds as the one which was issued on 24th May, 1988 has rendered the protection of Article 22(4) of the Constitution of India ineffective. According to him the act of the respondents offends the mandate of that Article inasmuch as the detention of the petitioner is being authorised for a longer period than three months without obtaining the report from the Advisory Board.

(9) He further submits that the order has been passed in mala fide exercise of jurisdiction. The argument is that after the revocation of the earlier order u/s 11(1) of the Cofeposa, no further order of detention could be passed under that preventive law by virtue of Section 15 of the present Act. The exercise of power by Shri K. L. Verma, empowered officer under "the Act" (Narcotics) who had passed the earlier order also (under COFEPOSA), is illegal and unconstitutional. His reliance is on Abdul Latif Abdul Wahab Sheikh Vs. B.K. Jha and another, . In the said case the real question for consideration was the same as has been urged before us : Whether a law may be made providing for successive orders for detention in a manner as to render the protection of Article 22(4) of the Constitution ineffective? The learned Additional Solicitor General, learned counsel for the respondent however, urged that the said decision of the Supreme Court is in conflict with the law laid in earlier cases decided by larger Benches of that Court and is, Therefore, not to be followed. At any rate, it is submitted that the constitutional safeguards in the present case have not been infringed.

(10) Mr. Ramaswamy, learned Additional Solicitor General and the other learned Government counsel who have appeared in other writ petitions in which also the successive orders of detention have been challenged (those petitions are being decided separately) have strenuously urged that the law of the land is that in habeas corpus proceedings, the Court has to consider the legality of the detention on the date of hearing. If on the date of hearing it cannot be said that the detenu has been wrongfully deprived of his personal liberty, a writ of, habeas corpus cannot issue.

(11) In Naranjan Singh Nathawan Vs. The State of Punjab, , a Constitution Bench

of the Supreme Court held that:

"Once it is conceded that in habeas corpus proceedings, the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of institution of the proceedings, it is difficult to hold in the absence of proof of bad faith that the detaining authority cannot supercede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complied with the requirements of the law in that behalf."

(12) In *Jagdev Singh Vs. State of Jammu and Kashmir*, , after surveying the case law on the point, another Constitution Bench "of the Supreme Court held:

"These cases certainly show that a fresh order of detention can be passed on the same facts, if for any reason the earlier order of detention has to be revoked by the Government. Further we do not find anything in the defense of India Act (hereinafter referred to as the Act) and the Rules which forbids the State Government to cancel one order of detention and pass another in its place. Equally we do not find anything in the Act or the Rules which will bar the Government from passing a fresh order of detention on the same facts, in case the earlier order of detention or its continuance is held to be defective for any reason. This is of course subject to the fact that the fresh order of detention is not vitiated by mala fides. So, normally a fresh order of detention can be passed on the same facts provided it is not mala fide, if for any reason the previous order of detention or its continuance is not legal on account of some technical defect as in the present cases."

(13) The submission on behalf of the respondents is that as the law laid by the Constitution Benches has not been noticed in *Abdul Latif's* case (supra), the proper course for this Court is to follow the opinion expressed by the larger Benches of the Supreme Court. The reliance for this submission is on *Union of India (UOI) and Another Vs. K.S. Subramanian*, and *The State of U.P. Vs. Ram Chandra Trivedi*, . In these cases it has been held that where a High Court finds any conflict between the views expressed by larger and smaller Benches of the Supreme Court, it cannot disregard or skirt the views expressed by larger Benches. It was observed that the proper course for a High Court in such a case is to try to find out and follow the opinion expressed by larger Benches of the Supreme Court in preference to those expressed by smaller Benches of the Supreme Court.

(14) We have carefully considered the submissions made by the learned counsel for the respondents. We have read the judgment in *Abdul Latif's* case (supra) a number of times. It is true that the above referred two decisions of the Constitution Benches in the cases of *Niranjan Singh Nathavan* and *Jagdev Singh* (supra) have not been noticed but the law laid by the Supreme Court to the effect that in habeas corpus proceedings the Court has to consider the legality of the detention on the date of hearing, has been specifically noticed. In paragraph

4 of the reported judgment, reference has been made to the opinion expressed in *A.K. Roy and Others Vs. Union of India (UOI) and Others*, and *Talib Hussain Vs. State of Jammu and Kashmir*, . The former case was decided by a Constitution Bench and the later by a Division Bench (a Single Judge during vacation). After noticing the opinion expressed therein, it was held in paragraph 5 :

"Neither of the cases cited by the learned counsel for the State deal with the question now at issue even in a remote way. They do not have any application. We only desire to add that in a habeas corpus proceedings, it is not a sufficient answer to say that the procedural requirements of the Constitution and the statute have been complied with before the date of hearing and Therefore, the detention should be upheld. The procedural requirements "are the only safeguards available to a detenu since the court is not expected to go behind the subjective satisfaction of detaining authority. The procedural requirements are, Therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard. If a reference to "an Advisory Board is to be made within three weeks, it is no answer to say that the reference, though not made within three weeks, was made before the hearing of the case. If the report of the Advisory Board is to be obtained within three months, it is no answer to say that the report though not obtained within three months, was obtained before the hearing of the case. If the representation made by the detenu is required to be disposed of within a stipulated period, it is no answer to say that the representation though not disposed of within three months, was disposed of before the hearing of the case."

(15) The ratio in *Abdul Latif's* (supra) case is that although the making of successive orders of detention is permissible yet a successive order cannot be made in a manner as to render the protection of Article 22(4) of the Constitution ineffective. To sustain the provision enabling the making of successive detention order and to ensure that that power does not "collide" with Article 22(4) of the Constitution, the provision has been read down. The second order of detention is thus permissible subject of course to it being passed bona fide but it has to be made within the statutory time limits provided in the detention law which are in accordance with the mandate of Article 22(4) of the Constitution. Such a question had not arisen earlier before the Supreme Court. Learned counsel for the respondents have not been able to cite any case law where this question has been decided. However, as noticed earlier, the learned counsel for the respondents submits that even no merits that case has no application. The argument is. that the impugned order has been passed by an empowered officer under a different enactment, i.e., the Narcotic Drugs Act than the one made earlier, with a view to achieve a different object. Mr. Ramaswamy urges that it is permissible to re-detain a detenu under a particular detention law after revoking the detention order passed earlier under another detention law, even after three months of the detention. According to him this process can be repeated successively even up to five times or more. He gave us an example of a person

whose prejudicial activities could be covered under five different preventive laws enforced in the State of Tamil Nadu. He insisted that five different authorities one after another after revocation of the earlier orders under those laws with different objects in view, could re-detain that person even if he continued to be in confinement. It is his contention that the repeated orders of re-detention based on those grounds which had come to light before passing of the first detention order would be in accord with the statutory laws as well as the provisions of Article 22(4) of the Constitution. This contention in our view is startling. We told him so.

(16) To appreciate the rival contentions urged before us, it is necessary at this stage to set out the relevant dates in this matter. On our asking, the following chart was prepared by learned counsel for the parties :-

"24-5-1988 First order of detention. 28-5-1988 Date of detention. 9-6-1988 Declaration u/s 9(1). 16-6-1988 Declaration served on the detenu 17-6-1988 Writ filed in the Bombay High Court. 27-6-1988 Reference to the Advisory Board. 27-7-1988 Copy of letter of reference served on the detenu. 7-9-1988 Meeting of the Advisory Board. 14-9-1988 Order revoked. 14-9-1988 Fresh order of detention served on the detenu in Jail. 22-9-1988 Letter to the Advisory Board intimating the revocation. 30-9-1988 Declaration u/s 10(1) of Partnership Act. 30-9-1988 Reference to the Advisory Board. 15-10-1988 Declaration served on the detenu. 15-10-1988 Reference letter served on the detenu. 4-11-1988 Hearing before the Advisory Board. 12-11-1988 Report of Advisory Board received 18-11-1988 Confirmation order. 24-11-1988 Confirmation order served on detenu."

(17) Now to advert to the earlier writ petitions. It was on, 20th June, 1988 when rule nisi was issued in the writ petition filed on behalf of the detenu by the Bombay High Court. The Union of India and Shri K. L. Verma, especially empowered officer, were respondents 1 and 2 in that petition also. As noticed earlier, one of the grounds taken in the writ petition was that copies of some of the documents relied upon by the detaining authority had not been supplied to the detenu along with the grounds of detention. It is submitted that an advance copy of the petition had been served on the Union of India prior to the preliminary hearing in that Court. At any rate, it is to be presumed that the matter pertaining to the detention of the petitioner had been put before the Central Government by the detaining authority even earlier than 9th June, 1988 when the declaration u/s 9(1) of the Cofeposa was issued. It is because of the said declaration that the reference to Advisory Board was not made by the Government within 5 weeks from the date of detention as provided u/s 8 of the COFEPOSA. The Central Government or in this case the Additional Secretary to that Government was required under law to go through the papers and apply his mind afresh to the matter of detention. It was expected of him to find out that procedural error had been committed and to rectify it at that stage before issuing the declaration. The reference was, however, made as per the chart on 27th

June, 1988 to that Board. In view of the declaration it had to submit its report within 5 months and 3 weeks of the detention. But as the order of detention was revoked on 14th September, 1988, the Advisory Board was informed on 22nd September, 1988 about it. Qua the said declaration issued on 9th June, 1988, it is, however, averred in the counter affidavit by Shri K. L. Verma that on revocation of the detention order that declaration was rendered "non est".

(18) Thus on the respondents' own showing the detenu was kept under detention for over 3 period of three months and three weeks without obtaining a report from the Advisory Board within three months.

(19) There is no doubt that the order of revocation issued on 14th September, 1988 u/s 11(1) of the Cofeposa was within jurisdiction. But in view of amendment of Section 3 of that Act (as per Section 15 of "the Narcotics Drugs Act)." another detention order u/s 11(2) of the Cofeposa could not have been passed. The proviso which has been added in Section 3 thereof by way of amendment reads:-

"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 u/s 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 or u/s 3 of the Jammu & Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psycho" tropic Substances Ordinance, 1988."

(20) Therefore it is submitted, on behalf of the respondents that in view of the subjective satisfaction of the detaining authority, the second order to re-detain the petitioner had to be passed under the New Act (Narcotics Drugs Act). The first order was revoked because of a technical error it is urged. The passing of the second order it is submitted, even after the period of three months is legal and permissible. The reliance is on Jagdev Singh's (supra) case. The learned Additional Solicitor General has also cited Sampat Prakash Vs. State of Jammu and Kashmir, . (8) He has referred to Niranjan Singh's (supra) case in support of this contention also. Another case relied upon is Ujagar Singh Vs. The State of The Punjab, .

(21) In the last mentioned case, one Ujagar Singh was originally arrested and detained under the East Punjab Public Safety Act on 29th September, 1948. He was released on 28th March, 1949 but on the same date there was an internment order passed against him. On 29th September, 1949 he was re-arrested. On 2nd March, 1950, an order of detention under the Preventive Detention Act, 1950 was served on him and on 3rd April, 1950 he was served with the grounds of detention dated 11th March, 1950.

(22) The challenge to the legality of the detention order was mainly on two grounds : (1) that as the grounds of detention mentioned in the later order of 2nd March, 1950 were the same as the one specified in 1948 or 1949, the impugned order of detention was made mechanically and was really mala fide in the sense that there was nothing to show that there was any fresh satisfaction

on the part of the detaining authority; and (2) that the grounds were not given "as soon as may be" which was a requirement u/s 7 of the Act and as an unusually longer period of time elapsed between the order of detention and the giving of the grounds, the detention must be held to be unlawful after the lapse of reasonable time. Negating the first contention, their Lordships observed that :

"There is nothing strange or surprising in the fact that the same grounds have been repeated after the lapse of several months in both the cases, when it is remembered that the petitioners were under detention and in jail during the whole of the intervening period."

(23) While holding that the order of detention was not made mala fide as alleged, it was stated :

"No fresh activities could be attributed to them. There could only be a repetition of the original ground or grounds whether good or bad. It does not follow from this that the satisfaction of the detaining authority was purely mechanical and that the mind did not go with the pen. The past conduct or antecedent history of a person can be taken into account when making a detention order, and, as a matter of fact it is largely from prior events showing the tendencies or inclinations of the man that an inference could be drawn whether he is likely even in the future to act in a manner prejudicial to the maintenance of public order. If the authority satisfied himself that the original ground was still available and that there was need for detention on its basis, no mala fides can be attributed to the authority from this fact alone."

(24) As far as the second ground of attack was concerned, it was held that the Act (impugned therein) did not fix the time within which the grounds should be furnished to the detenu. It merely stated that the communication must be "as soon as may". This meant reasonable dispatch and that was reasonable must depend on the facts of each case. Therefore, it was observed that:

"No ordinary time limit can be set down. The delays in the communication of the grounds in the two petitions have been adequately explained by the Home Secretary who says in his affidavit that the grounds had to be supplied to nearly 250 detenus and that the pointing of the necessary forms occupied sometime."

(25) In our view the above quoted authority is of no help to the respondents, it seems that under the Preventive Detention Act, 1950, no statutory time limit had been provided within which grounds had to be supplied to the detenu. Presently in all the Preventive laws, as far as we know, such a time limit has been statutorily laid down. Under Cofeposa as well as the Act under discussion. the grounds have to be communicated "as soon as may be" after the detention but ordinarily not later than 5 days and in exceptional circumstances and for reasons to be recorded in writing, not later than 15 days from the date of detention. Sub clause (3) of Section 3 of Cofeposa and sub-clause (3) of Section 3 of the Narcotics Act have been incorporated specifically "for the purposes of clause (5)

of Article 22 of the Constitution".

(26) The real question for consideration as we have noticed above is not whether a successive order of detention can be passed but whether it can be passed to render the protection of Article 22(4) of the Constitution ineffective.

(27) In Sampat Parkash's (supra) case cited by the respondents, the petitioner had been detained u/s 3(1)(a)(i) of the Jammu & Kashmir Preventive Detention Act, 1064 on March 16, 1968. On September 16, 1968, the order was revoked and -another order was served on him. On September 24, 1968, the petitioner was served with the grounds for fresh order of detention. Apart from the contention that the second detention order was made mala fide, a number of other pleas were taken in the petition for the issue of a writ of habeas corpus. One of them was that the petitioner's case was not referred to the Advisory Board within sixty days of the date of detention. After scrutinising the affidavit filed on behalf of the respondents, it was observed that the Government had not acted mala fide in making the original order or the fresh order. It was further held that the grounds of detention for the two orders were not identical and that when the first order was passed, the petitioner was not intended to be detained for a period exceeding six months. We may note that by virtue of Article 35(a) of the Constitution, the provisions of the Jammu & Kashmir Preventive Detention Act could not be attacked on the ground that those were in conflict with Article 22 of the Constitution. At any rate the question before us is entirely different. However, we entirely agree that there is no constitutional bar in making a successive order of detention.

(28) Before proceeding further on this aspect of the case, it would be advantageous at this stage to deal with the contention of Mr. Ram Jethamalani that the impugned order was really made mala fide to defeat the acquired rights of the petitioner under Article 22(4) of the Constitution. Connected with this issue is the submission of the learned Additional Solicitor General of India that the order had been made by another detaining authority under the Act, the object of which Act was different from the one given in Cofeposa Act and, Therefore, permissible, It is also urged that additional material had been collected after the passing of the first detention order which necessitated the making of the second order of detention after the first had been revoked.

(29) Mr. Ram Jethamalani urged that on their own showing the respondents were well aware that the first order was likely to be set aside, as the documents relied upon by the detaining authority had not been served contemporaneously Along with the grounds of detention on the detenu and thus he had been deprived of his fundamental rights under Article 22(5) of the Constitution to make an effective representation. In the event of the Court holding that the detention was bad on that score, the respondents could not have under law passed a successive order. His reliance on Ibrahim Bachu Bafan Vs. State of Gujarat and Ors, is well founded. It is settled now that where an order of detention has been quashed by a High Court, Section 11(2) of the "COFEPOSA" [in the present case Section

12(2) of "the Act"] is not applicable and the detaining authority is not entitled to make another order u/s 3 on the same grounds.

(30) The respondents, however, cite Jagdev Singh's case (supra), a passage of which has been quoted above. In this case, after noticing the decision in Avtar Singh v. State of Jammu & Kashmir Air 1967 S.C. 1797 (11), wherein it was held that if a mistake was committed by the Government in the matter of review, it could not correct it and the detenu must go free, their Lordships held that if the Government had power to pass a fresh order of detention on the same facts in cases where the earlier order or its continuance failed for any defect, it had the power to pass such fresh order during the defect. In such a case, it could not be said that the fresh order was mala fide order passed to circumvent Rule 30A of the defense of India Act and Rules.

(31) In Avtar Singh's case (supra), it had been held that where the original order of detention was a good order for the first period of six months, it would not be open to the State Government to pass a fresh order of detention on the same facts after cancelling the order on the expiry of six months, for that would be going round the provisions of Rule 30A and that the only way in which the detention could continue after the first period of six months, where a good order was originally passed, was to make a review in proper manner, as indicated in P.L. Lakhanpal Vs. The Union of India (UOI) and Another, .

(32) In the present case it is clear from the counter affidavit that after the detention on 28th May, 1988, investigations were carried out and lot of fresh material as is obvious from the documents (running into over 700 pages) relied upon by the detaining authority was collected. We have gone through the return. That material does support the subjective satisfaction of the detaining authority that the petitioner was liable to be kept in continued detention. From the averments in the counter affidavit, the case sought to be made out is that such a person if set free would be a menace to the society. We are of the view that the "error" committed was not deliberate. It is true that such an error resulting in deprivation of the right to make effective representation ought not be committed and, if committed, be corrected within the statutory time limit. But in view of the averments of the respondents it cannot be said that any fraud has been committed by the authorities.

(33) Now advertent to the question of power to pass the second or successive order of detention under another Act, We may note that Mr. Ram Jethmalani has not challenged the validity of Section 12(2) which provides for passing of such an order after the revocation of the first one. In the present case a successive order u/s 11(2) of the Cofeposa Act could not have been passed because of the bar and, Therefore, the order had to be passed under the present Act. We agree with Mr. Ramaswamy that it is not the requirement of law to pass a successive order only on new or fresh grounds. The law permits the second order to be passed on the grounds which were the basis of the earlier order. In the present case, as noticed above the detention order was passed with a view to preventing the

petitioner from abetting the export from India of Narcotic drugs. In the earlier order, Shri K. L. Verma, who was the detaining authority, in that case also, passed that order with a view to preventing the petitioner from "abetting the smuggling of goods. Although the prejudicial activity which led to the passing of successive orders and the grounds on which the subjective satisfaction was based were practically the same or absolutely the same, the power to pass such an order is within jurisdiction. It is unnecessary to deal with the case law cited on behalf of the parties on the question whether the additional material in support of the impugned order constituted fresh grounds. We are of the view that it was permissible under the Act to pass such an order and the exercise of jurisdiction in passing the impugned order was not mala fide.

(34) Now to come back to the main question, which as we have noticed above, had also arisen for consideration in Abdul Latif's case (supra). It has been dealt with in paragraph 3 of the reported judgment. It was held :

"The real question for consideration is whether a law may be made providing for successive orders for detention in a manner as to render the protection of Article 22(4) of the Constitution ineffective ? For example, can a fresh order of detention be made every 89th day making it unnecessary to obtain the report of the Advisory Board within three months of the detention ? That is what it will amount to if the submission of the learned counsel for the State is accepted. It, Therefore, becomes imperative to read -down action 15 of the Gujarat Prevention of Anti-social Activities Act, 1985 which provides for the making of successive orders of detention so as to bring it in conformity with Article 22(4) of the Constitution. If there is to be a collision between Article 22(4) of the Constitution and Section 15 of the Act, S. 15 has to yield. But by reading down the provision, the collision may be avoided and Section 15 may be sustained. So, avoiding the collision course, we hold that if the report of the Advisory Board is not made within three months of the date of detention, the detention becomes illegal notwithstanding that it is within three months from the date of the second order of detention."

(35) The "argument of Mr. Ramaswamy is that the above ratio does not apply to the present case at all. According to him after issuance of declaration u/s 10(1) of the Act on 30th September, 1988, the case was referred to the Advisory Board on that very day and its report received on 12th November, 1988, which was within the period prescribed of "5 months and 3 weeks" from the date of initial detention i.e., 28th May, 1988. His submission is that because of the effective declaration u/s 10(1) of the Act, the period prescribed u/s 9 of the Act for obtaining the report of the Advisory Board is extended from 11 weeks to 5 months and 3 weeks. Therefore, he says that the detention is not in contravention of clause (4) read with clause (7) of Article 22 of the Constitution.

(36) The argument though attractive, is untenable. The submission loses sight of the mandate of the Act as well as the Constitution. The declaration dated the 30th September, 1988, on which reliance is being placed in support of this

argument, was admittedly made after the expiry of 5 weeks of detention of the petitioner herein. Although the detention order dated the 24th May, 1988 made u/s 3 of the Cofeposa was revoked, yet the detention of the petitioner herein continued to be with effect from 28th May, 1988. For him that was the "D-Day" i.e. Dooms Day. The limitations provided under the statute and the three months period provided under Article 22(4) of the Constitution begin from that day. The earlier order having been revoked on 14th September, 1988, it is stated that the declaration passed u/s 9(1) of the Cofeposa was rendered "non est". It is said so in so many words in the counter affidavit. In reply to paragraph "O", it is averred by Shri K. L. Verma that :

"It is submitted that the order of detention under Cofeposa Act has been revoked and, Therefore, the declaration issued on 9th June, 1988 is rendered non est."

(37) The said declaration under the Cofeposa was made within five weeks of the detention but the order having been revoked and the subsequent declaration under Section. 10(1) not having been made within five weeks from the date of detention, it cannot be urged that it would have a retrospective effect. It cannot be said that it would resurrect the earlier detention passed under COFEPOSA. In law the stand of the respondents that the said declaration is "non est" is correct. The present declaration cannot possibly be held to have come into force even prior to the date of second detention order which was passed under another preventive law after three months of the "D-Day". The declaration made on 30th September, 1988 after passing of the impugned order of detention, which declaration according to the above chart was served on the detainee on 15th October, 1988, was of no effect. The principles enunciated in Abdul Latif's case (in paragraphs 3 and 5 quoted above) are squarely applicable to the present case. The detention with effect from 28th May, 1988 has thus become illegal notwithstanding that a report of the Advisory Board was obtained within " 5 months and 3 weeks" of the date of detention.

(38) We do not agree that Abdul Latif's case is not to be followed. One of the Government counsel wanted us to hold that this decision is per incuriam. We disagree. We are bound to follow the same.

(39) Before parting with the case we may mention that it was urged by Mr. Rajinder Dutt, Central Government Standing Counsel (who was assisting the learned Additional Solicitor General) and other Senior Central Government Counsel, who appeared in other petitions, that such an error as has occurred in the present case, can only be rectified if it is pointed out either by the detainee in his representation or by a counsel engaged on behalf of the Government in case a petition is filed seeking quashing of the detention. In the present case it is submitted that the detainee did not file any representation. The error was pointed out during the hearing of the earlier petition and by way of abundant precaution, the earlier order of detention passed on 24th May, 1988 was revoked and another order passed on 14th September, 1988 before the conclusion of the arguments.

(40) In our view this is an argument of desperation. The provisions of preventive laws have to be strictly complied with not only in spirit but in letter also. The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 as well as the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act require the appropriate Government to consider the case of each and every detenu within five weeks from the date of detention. The Central Government at any rate, has a supervisory function to perform. Within this period of five weeks it is open to the Central Government either to refer the matter to the Advisory Board or to pass a declaration under the appropriate provision under which a person may be detained for a period longer than three months without obtaining the opinion of the Advisory Board. It is within that period that the Central Government (in the present case Additional Secretary, specially empowered in this behalf) could have and ought to have revoked the order on finding out that a procedural error had been committed by the detaining authority. It was open thereafter to the appropriate authority to pass a fresh order within that very period of five weeks and obtain report of the Advisory Board within three months of the detention or extend the period by making a declaration. The argument that the functionaries of the Government are hard pressed for time, is of no avail. The further argument that the Sue points of law regarding the compliance with the mandatory provisions of Article 22(4) and 22(5) of the Constitution are not known to a functionary is also untenable. It is too late in the day to say that a detaining authority or a supervisory authority is unaware of the legal requirement that the copies of the documents which had been relied upon by the detaining authority are to be supplied contemporaneously along with the grounds to the detenu.

(41) In the view which we have taken, it is not necessary to deal with the submission made on behalf of the petitioner that some of the relied upon documents, particularly the statement of one Gala had not been supplied to the detenu by the detaining authority. We may note that according to the counter affidavit, that statement recorded in America by the Enforcement Agency, was not placed before the detaining authority.

(42) Thus the result of the above discussion is that the petitions are to be allowed. We order accordingly. We set aside the continued detention of the petitioner under the impugned detention order and make the Rule absolute. We direct that the petitioner be set at liberty forthwith unless required to be detained under any other valid order passed by a Court or any other competent authority.