

(1986) 07 GUJ CK 0017

In the Gujarat High Court

Case No : Spl. Criminal Application No. 848 of 1985

Kalidas Devji Mali Vaghari

APPELLANT

Vs

Police Commissioner, Baroda and Others

RESPONDENT

Date of Decision : 17-07-1986

Acts Referred:

Bombay General Clauses Act, 1904 — Section 21, 23
Constitution of India, 1950 — Article 22(5)

Citation : AIR 1988 Guj 80

Hon'ble Judges : R.J. Shah, J;M.B. Shah, J;G.T. Nanavati, J

Bench : Full Bench

Advocate : V.M. Trivedi, for the Appellant; G.D. Bhatt, Public Prosecutor, for the Respondent

Judgement

Nanavati, J.—By this petition, the petitioner challenges the order of his detention passed by the Commissioner of Police, u/s 3(1) of the Gujarat Prevention of Anti-social Activities Act, 1985 (hereafter referred to as "the Act"). This petition was first heard by a Division Bench (Coram : A. M. Ahmadi and D. H. Shukla, JJ.). It was, inter alia, contended before the Division Bench that as the impugned order of detention was passed by the-Commissioner of Police, he had the power to vary or rescind the same u/s 21 of the Bombay General Clauses Act, 1904 (hereafter referred to as the Act of -1904"); and, therefore, he was under a legal and constitutional obligation to consider the representation made by the detenu for that purpose. The Division Bench did not agree with other contentions raised on behalf of the detenu. It was also not inclined to accept the aforesaid. contention. However, in view of the earlier decision of the Division Bench consisting of myself and my learned brother M. B. Shah, J. in spl. Criminal Appl. No. 614 of 1985 decided on 3-9-1985, wherein it is observed as under :

"It is now well settled that the detaining authority is under a statutory and constitutional obligation to consider the representation made by a detenu against the order of his detention. If the representation is not considered, then that

default on the part of the detaining authority would render the continued - detention of the detenu illegal."

It thought it proper to refer this matter to a larger Bench. After referring to .the power of revocation u/s 21 of the Act of "1904, it observed that this power also must be considered in the context of the specific provision contained in Section 9(1) of the Act. It further observed that since under the scheme of the Act, the order passed by the authorised officer is required to be approved by the State Government and as the Act in terms provides that the representation shall be made to the State Government, it would appear in view of the decision of the Supreme Court in Raj Kishore Prasad Vs. State of Bihar and Others, that the duty to consider the. representation rests on the State Government. The Division Bench was of the view that the statement of law made by the Division Bench while deciding Spl. Criminal Appln. No. 614 of 1985 "may be in tune with the observations of the Supreme Court in the case of Santosh Anand v. Union of India, (1981) 2 SCC 420 , but "it does appear to be consistent with the observations of the Supreme Court in Raj Kishore"s case." As stated earlier, the said Division Bench was of the view that the detaining authority was under no obligation to consider the representation made by the detenu. But for the course adopted by it, it would have affirmed the order of detention and dismissed the petition. In view of the order passed by the Division Bench, this petition is now placed before us for deciding the above stated question of law.

2. Article 22 of the Constitution gives protection against arrest and detention in certain cases. So far as preventive detention is concerned, it contains two safeguards. One is that no law providing for preventive detention can authorise the detention of a person f or a longer period than three months unless an Advisory Board constituted in accordance with the provisions contained in clause (4) of that Article reports before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention, except in cases where there is a law made by the Parliament prescribing circumstances under which and the class or classes of cases in which a person may be detained for a longer period without obtaining the opinion of the Advisory Board. Second safeguard is contained in clause (5) of that Article. It provides that 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. Though it provides for making of a, representation, it does not pro,,, ideas to whom such a representation is to be made.

3. The Gujarat Prevention of Anti-social Activities Act, 1985 provides for preventive detention of bootleggers, dangerous persons, drug offenders, immoral traffic offenders and property grabbers, with a view to preventing them from acting in any manner prejudicial to the maintenance of public order. Section no of the Act confers power on the State Government to pass an order of detention

against a person, if it is satisfied with respect to him that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, it is necessary so to do. Sub-section (2) enables District Magistrates and Commissioners of Police, if authorised in that behalf and on being so satisfied to exercise the power contained in sub-section (1). When an order of detention is made by such an authorised officer, he is required to forthwith report the fact to the State Government 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. The order passed by such an officer cannot remain in force for more than 12 days unless in the meantime it is approved by the State Government. Section 9 of the Act requires the detaining authority to communicate to the detenu the grounds on which the order of detention has been, made. The grounds are required to be communicated as soon as possible but not later than seven days from the date of detention. That section also casts an obligation on the detaining authority to afford the detenu earliest opportunity of making a representation against the order of detention to the State Government. Section 9 of the Act thus takes care of the requirements of Article 22 of the Constitution, and further provides to whom the representation can be made.

4. In *A.K. Gopalan Vs. The State of Madras*, , while considering the validity of the Preventive Detention Act (1950) on the ground that it was violative of Article 22(5) inasmuch as it did not make any provision as to the person to whom representation was to be made and how it was to be dealt with, the "Supreme Court observed that the, Constitution is silent about the person or authority to whom a representation can be made and how it has to be dealt with. But that being the procedure laid down by the Constitution, it held that the law made by the Parliament in respect of preventive detention cannot be held to be invalid because it does not make any provision on these two points".. The observations made by the Supreme Court in paragraph 24 of its judgment further indicate that in absence of any provision in the Act as to the person to whom the representation is to be made, it will have to be made to the authority making the order of detention.

5. Section 8 of the Maintenance of internal Security Act, 1971 provided for representation against the detention order to an appropriate Government. While interpreting that section in the light of Article 22 of the Constitution, the Supreme Court, in *Haradhan Saha Vs. The State of West Bengal and Others*, has observed that the said section which casts an obligation on the State Government to consider the representation affords the detenu all the rights which are guaranteed by Article 22(5).

6. Same view has been taken by the Supreme Court while considering a similar provision under the National Security Act. In *Raj Kishore Prasad Vs. State of Bihar and Others*, it is held that in view of the specific provision contained in Section 8 which requires that the detaining authority shall afford earliest opportunity to make a representation not to the detaining authority but to

appropriate Government, it follows as a corollary that the; appropriate Government must consider it.

7. Considering the scheme of the Act and the aforesaid observations of the Supreme Court, we are of the opinion that if such a provision is made in the Act providing for preventive detention then Article 22(5) will have to be read along with that provision. We, therefore, hold that the representation contemplated by Article 22(5) and Section 9(1) of the Act can be made to the State Government and not to the authorised officer. We further hold that it is the duty of the State Government to consider such a representation and the authorised officer is under no obligation to consider the same.

8. Next question which arises, for consideration is whether in view of the scheme of the Act, the authorised officer passing the order of detention is under any obligation to consider the representation if made to him for the purpose of revoking or modifying the order of detention passed by him. It was contended on behalf of the respondents that the power of revocation available u/s 21 of the Act of 1904 must be Considered in the context of the specific provision contained in Section 9(1) of the Act. It was further contended that since under the scheme of the Act the order passed by the authorised officer is required to be approved by the State Government and since the Act in terms states that the representation shall be made to the State Government, it should be held that the Act contemplates exercise of power of revocation only by the State Government and not by the authorised officer. The Division Bench, which heard the petition earlier, was inclined to take this view. In the alternative, it was submitted that as the order of detention passed by the authorised officer on its own remains operative for a maximum period of 12 days only and can survive beyond that period only if in the meantime it is approved by the State Government, the authorised officer can exercise power of revocation till the order passed by him is approved by the State Government and not thereafter. Lastly, it was urged, again in the alternative, that this power would be available to the authorised officer only till the order of detention passed by him is confirmed by the State Government after obtaining the report of the Advisory Board.

9. In order to find out whether there is any substance in these contentions, it would be necessary to examine the nature of power of revocation and/or modification and other relevant aspects.

10. Relevant provisions of law in this behalf are Section 15(1) of the Act and Section 21 of the Act of 1904. Section 15(1) of the Act reads as under :

"15(1). Without prejudice to the provisions of Section 21 of the Bombay General Clauses Act, 1904 a detention order may, at any time for reasons to be recorded in writing, be revoked or modified by the State Government, not with stand in that the order has been made by an authorised officer."

Section 21, of the Act of 1904 is as under

21. Where, by any Bombay Act, or Gujarat Act a power to issue notifications, orders, rules or by-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bylaws, so issued."

Power of detention imposes a drastic restriction on the liberty of a citizen. Therefore, such a power -is entrusted to a very high authority like the State Government. Under certain circumstances, subordinate officers of the State Government are also authorised to exercise that power. With a view to see that it is not exercised by the subordinate officers arbitrarily or improperly, duty is cast on the State Government to approve the order of detention within twelve days. As it is the supervising and overseeing authority it is also given a power to revoke or modify the order of detention notwithstanding the fact that the order has been made by an authorised officer.

11. Section 21 of the Act of 1904 embodies a rule of construction based upon the principle that the power to create includes power to destroy and also the power to alter what is created. No doubt, it being a rule of construction, it must have reference to the context of a subject matter of a particular statute to which it is being applied. Therefore, the nature and extent of this power must be governed by the relevant statute, which confers the power to make an order. As pointed out earlier, there is no specific provision in the Act empowering the detaining authority to add to, amend, vary or rescind any order made by it u/s 3 of the Act. There is no specific provision in the Act, which prohibits the detaining authority from doing so. It is in this context that we have to examine the effect of Section 21 of the Act of 1904. While interpreting a similar provision contained in Section 14 of the Maintenance of Internal Security Act, 1971. the Supreme Court, in *Ram Bali Rajbhar Vs. The State of West Bengal and Others*, has observed as under :

"The State Government can revoke or modify a detention order if it is satisfied, on new or supervening conditions or facts coming to light, that a revocation or modification had become necessary. Section 14 of the Act vests a wider power than that which the State Government may have possessed-under the provisions of S. 21 of the General Clauses Act, which is, by having been specifically mentioned in section 14 of the Act, made applicable in such cases. The language of section 14 of the Act, however, makes it clear that the power u/s 14 is not necessarily subject to the provisions of section 21, of the General Clauses Act. This means that a revocation or modification of an order of the State Government is possible even without complying with the restrictions laid down in section 21 of the General Clauses Act. Nevertheless, as the wider power u/s 14 of the Act does not override but exists "without prejudice to the provisions of section 21 of the General Clauses Act, the correct interpretation of the provisions, read together, would be that it is left to the State Government in the exercise of its discretion, either to exercise the power read with provisions. of

Section 21 of the General Clauses Act or without the aid of section 21 of the General Clauses Act."

In this case, we are not concerned with the question as to whether the power of the State Government u/s 15(1) is wider than the power u/s 21 of the Act of 1904. But what is required to be noted is that in view of the reference to section 21 of the General Clauses Act in section 14 of the Maintenance of Internal Security Act, the Supreme Court observed that section 21, by having been specifically mentioned in section 14 of the Act, is made applicable in such cases.

12. In *Nathalal Govindji Jhagada Vs. State of Gujarat and Others*, , this Court had also an occasion to consider such a question which had arisen under the Gujarat Disturbed Areas (Maintenance of Public Order) Ordinance, 1980. Therein it is observed as under :

"It is true that by virtue of Section 21 of the Bombay General Clauses Act, by which power has been reserved to the Commissioner of Police u/s 15 of the Ordinance, it was open to the detenu to make a representation to the Commissioner of Police. but it must be borne in mind that once the State Government approves of the order of detention u/s 4(3) it is the act of the approval which sets the seal to the detention And the earlier order of the Commissioner of Police recedes in the background and, therefore, Section 9(2) of the Ordinance provides for representation being made to the State Government. In the instant case, Article 22(5) of the Constitution cannot be said to be infringed because Article 22(5) speaks of a representation against the order of detention but does not specify to which authority the representation should be made. It is true that, as the provisions of the Ordinance stand, in view of the provisions of Section 15, power to rescind the order of detention remains in the Commissioner of Police by virtue of Section 4(2) read with Section 21 of the Bombay General Clauses Act. u/s 15, power to revoke an order of detention passed by whichever authority it may be is conferred upon the State Government."

The observations made by the Supreme Court and this Court ", in our opinion, clearly indicate that when the order of detention is passed by an authorised officer, the power to rescind or modify the same remains with him. We do not find anything in the scheme of the Act which would compel us to hold that the authorised officer has no power to revoke the order passed by him. We see no justification for taking such a view. If such an interpretation is put upon sections 3 and 15 of the Act and section 211 of the Act of 1904, then it would lead to a position which cannot be said to have been intended by the Legislature. Take a case where the State Government itself has passed the order of detention. If what is contended on behalf of the respondents is accepted, then it would mean that even the State Government as the detaining authority will have no power to revoke the order passed by it.

13. In *Sat Pal v. State of Punjab*, AIR 1981 SC 2230, the Supreme Court has

pointed out. While considering the nature of power of revocation under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, that the power of revocation conferred on the appropriate Government under Section, 11 of the said Act is independent of the power to confirm or set aside the order of detention u/s 8 of the said Act. It is further pointed out in that case that the power of revocation conferred on the Central Government u/s 11 of the said Act is a supervisory power, and is intended to be an additional check or safeguard against the improper exercise of its power of detention by the detaining authority or the State Government. There are certain other observations also made by the Supreme Court in the said judgment which have a bearing on the question involved in this case. In paragraph 8 of its judgment, the Supreme Court has observed, "The constitutional imperatives of Article 22(5) enjoin that where the detenu makes simultaneously a representation to the detaining authority as well as an application for revocation u/s 11 of the Act, they must both be dealt with by the appropriate Government at the same time, and there is no question of any conflict of jurisdiction." In paragraph 10 of the judgment, it has been observed, "The power u/s 11(1)(b) may either be exercised on information received by the Central Government from its own sources including that supplied by the State Government u/s 3(2), or from the detenu in the form of a petition or representation The use of the words "at any time" in section 11, gives the power of revocation and over-riding effect on the power of detention u/s 3." In paragraph 11 it is further observed. "The making of an application for revocation to the Central Government u/s 11 of the Act is, therefore, part of the constitutional right a citizen has against his detention under a law relating to preventive detention. While Art. 22(5) contemplates the making of a representation against the order of detention to the detaining authority, which has to be referred by the appropriate Government to the Advisory Board constituted u/s 8(a) of the Act, Parliament has, in its wisdom, enacted section 11 and conferred an additional safeguard against arbitrary executive action."

14. A representation for revocation of an order of detention is thus quite different from a representation contemplated by Article 22(5) of the Constitution. This position is also clarified by the Supreme Court in Santosh Anand's case (1981-2 SCC 420) (supra), wherein it is observed, "Under Article 22(5) as interpreted by this Court, as also under the provisions of section 11 of the COFEPOSA it is clear that a representation should be considered by the detaining authority, who on a consideration thereof can revoke the detention order and if the representation is rejected by detaining authority it is open to the detenu to approach the State Government for revocation if of the order and failing that it is open to him to approach the Central Government to get the detention order .revoked." That there is a difference between initial representation that a detenu has a right to make on receipt of the grounds of detention, and a representation that can be made u/s 11 of the COFEPOSA is also made clear by the Supreme Court in Smt. Pushpa Vs. Union of India (UOI) and Others, .

15. A relevant aspect that is required to be borne in mind is that the Legislature has thought it fit to confer power of revocation or modification of the order of detention for the benefit of the detenu; and it was for that reason that the Supreme Court in *Haradhan Saha Vs. The State of West Bengal and Others*, has observed that such a power which is for the benefit of the detenu carries with it the duty to exercise that power whenever and as soon as changed or new factors call for the exercise of that power.

16. Another relevant aspect required to be considered is what happens to the order of the authorised officer after it is first approved and then confirmed by the appropriate Government. It was faintly urged that when the appropriate Government approves the order of detention, it gets merged into the order of approval and it is really the order of the appropriate Government which remains in the field and the detention is actually continued, because of that order and not because of the initial order of detention passed by the authorised officer. Similar argument was advanced with respect to the subsequent order of confirmation, which the appropriate Government has to pass. In our opinion, there is no substance in this contention. Definition of the words "detention order" in section 2(d) of the Act and other provisions of the Act indicate that the original order of detention does not lose its identity; and it is really pursuant to that order that the detention continues. What happens as a result of the approval granted by the State Government is that the earlier order of the Commissioner of Police recedes in the backgrounds as pointed out by this Court in *Nathalal Govindji Jhagada Vs. State of Gujarat and Others*, , but it does not cease to exist. Subsequent confirmation or revocation by the State Government is of the detention order and not that of the order of approval passed by it. Neither while granting approval nor confirming the order of detention, the State Government acts as an appellate authority.

17. Having considered the nature and extent of the power of revocation and other relevant aspects and the decisions referred to above, we are of the opinion that there is nothing in the scheme of the Gujarat Act which can persuade us to take a view that after the order passed by the District Magistrate or the Commissioner of Police is approved by the State Government, no representation can be made to that authority for revoking the order passed by it. It may be observed that an order of detention takes away liberty of a citizen. It can be allowed to stand only so long as detention is considered necessary. Detention must be put to an end if no justification for its continuance, in view of the changed circumstances or for some other valid reasons, is made out. It is really with this object that power is also conferred on the State Government to revoke the order passed by its subordinate authorised officers. We see no good reason to hold that the authority which took away the liberty of a citizen by passing an order of detention should not have the power to restore the same if the circumstances so demand. We have preferred to put that construction which not only saves the power of the detaining authority but also helps in restoration of the liberty of the citizen.

18. In the field of personal liberty when the subject is of preventive detention, the courts have clearly learned in favour of the citizen as he is put behind bars without a trial. The interpretation wherever required has been in favour of the citizen. as he was sought to be subjectively detained by the detaining authority. and perhaps the only defence, which was open for the subject, was under the procedural safeguards. When one appreciates the aforesaid view-point. Then one would hardly be inclined to put a construction which is unfavourable to the citizen, unless the Legislature has expressly provided for such interpretation or by necessary implication, such an intention on the part of the legislature has got to be inferred. The present is neither a case which falls under the aforesaid first category, nor is it a case which falls under the second category mentioned above. The Legislature in the present case has circumscribed the powers of the detaining authority by providing that an order of detention passed by it would lapse after 12 days from the date of the passing of the order, unless the State Government has within the said period endorsed and ratified the same. In the present case, we are not much concerned with the aspect of passing a detention order. What we are concerned with is the power of revocation of -such detaining authority. We are clearly of the view that within the "period of said 12 days, (he detaining authority has power of revocation which can be exercised up to the time Unless within the said period of 12 days the State Government endorses the same. After such an endorsement of the State Government, it is clear that the detaining authority by necessary implication has no power of revocation in the same set of circumstances. There is, however. nothing in the Act or elsewhere which indicates that the power of revocation cannot be exercised by the detaining authority if circumstances subsequently change. In view of section 23 of the Bombay General Clauses Act, the detaining authority has a power of revocation and the same, in our view, has neither been expressly or by necessary implication taken away by the Act. The Act has circumscribed the passing of a detention order and not the power of the revocation of the detaining authority in the wake of the new circumstances. The detaining authority is, therefore, bound to consider a representation for revoking the order of detention if the same is made in a new set of circumstances.

19. We are, therefore, of the view that even after the order of detention passed by the authorised officer is approved or confirmed by the State Government a representation can be made of him to revoke the order passed by him. If the original detaining authority has such power of revocation. then as a necessary corollary it must be held that the detenu has a right to make a representation to that authority calling upon him to exercise that power. Of course that power will have to be exercised only if the case for revoking the order of detention is made out in view of the changed circumstances or for some other valid reason. That power can be invoked at any time so long as the detention continues. If such a representation is made, then obviously in order to make that right of making a representation effective and full of content original detaining authority must be held to be under a legal duty to consider the same. Whether such duty can be

said to be constitutional obligation or not is a question which we need not examine. We are of the opinion that if an order of detention is passed by the Commissioner of Police or the District Magistrate under the Act, then so long as the detention continues. they will have the power " -to revoke the order passed by them; and the detenu will have a right to make a representation to them to revoke that order. And it will be the corresponding duty on the part (if that authority to consider the same. The 6ewexpressed by the Division Bench in its decision in Special criminal Appln. No. 614 of 1985 is really not inconsistent with the decision of the Supreme Court in Rai Kishore's case (AIR 19h3 SC 320) (supra) because the Supreme Court was concerned with the representation made under Article 22(5) of the constitution read with section 9(1) of the COFEPOSA: and it was not called upon to consider whether the original detaining authority is under such an obligation or not in view of the power of revocation available to it.

20. With this answer, we send the matter back to the Division Bench for finally disposing of the same.

M.B. Sham, J.

21. I have gone through the draft judgment prepared by my learned Brother Nanavati J., but I regret my inability to agree on the point that u/s 21 of the General Clauses Act the detaining authority has power to revoke the detention order passed by it and therefore it has to be held that it is the statutory obligation of the detaining authority to consider the representation and its non-consideration would invalidate the detention order. The reasons there for are given here in below.

22. The question which is referred to the Full Bench is whether the following observation made by the Division Bench while deciding Special Civil Applin. No. 614 of 1985 decided on 3rd September 1985 is correct enunciation of law in view of the decision of the Supreme Court in Raj Kishore Prasad Vs. State of Bihar and Others, . The Division Bench has observed as under :

It is now well settled that the detaining authority is under a statutory and constitutional obligation to consider the representation made by a detenu against the order of his detention. If the representation is not considered, then the default on the part of the detaining authority would render the continued detention of the detenu illegal .

The aforesaid question arises in the context of the provisions of the Gujarat Prevention of Anti-social Activities Act. 1985. The Act empowers the State Government to pass an order of detention of any person u/s 3(1) with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. Sub-section (4) of section 3 provides that for the purpose of section 3 a person shall be deemed to be acting in any manner prejudicial to the maintenance of public order when such person is engaged in or is making preparation for engaging in any activities, whether as a bootlegger or dangerous person or drug offender or immoral traffic offender or property grabber which

affect adversely or are likely to affect adversely the maintenance of public-order. Under sub-section (2) if, having regard to the circumstances prevailing or likely to prevail in any area, within the local limits or jurisdiction of a District Magistrate or a Commissioner of Police. the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct that the District Magistrate or the Commissioner of Police may also exercise the powers conferred upon the State Government under sub-section (1). When such order is passed by the District Magistrate or the Commissioner of Police authorised under sub-section (2) of section 3 it is considered to be passed by an authorised officer. Sub-section (3) provides that when any order is made by an authorised officer, he is required to forthwith report the fact to the State Government, 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. It further provides that no such order shall remain in force for more than twelve days after the making thereof, unless, in the meantime, it has been approved by the State Government. This would mean that the order passed by the authorised officer would remain in force for a period of twelve days and it would automatically stand vacated unless it is approved during that period of twelve days. The other important provision which has a bearing on the question is section 9(1) which reads as under :

"9(1) When a person is detained in pursuance of a detention order the authority making the order shall, as soon as may be, but not later than seven days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the State Government."

This sub-section enjoins a duty on the authority making the order to communicate .to the detenu the groundson which the order has been made and also requires it to afford him the earliest opportunity of making representation against the order to the State Government. Therefore, this section in terms provides that representation against the detention order is required to be made to the State Government. It nowhere mentions that the authorised officer who has passed the order under sub-section (2) of section 3 is required to consider the representation against the detention order. This section incorporates the requirement of Article 22(5) of the Constitution" of India which casts a duty on the authority making a detention order to communicate the grounds of detention and to afford to the detenu an earliest opportunity of making, a representation against the order. Section 11 provides that the State Government shall within three weeks from the date of detention of a person place before the Advisory Board constituted by it u/s 10 the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and where the order has been made .by an authorised officer, also the report made by such officer under sub section (3) of section 3. It should be noted that no duty is cast upon the authorised officer who has passed the detention order to submit any papers directly "to the Advisory Board. u/s 13(t) after receipt of the report of the Advisory Board that there is, in its opinion, sufficient cause for the

detention of the detenu, the State Government may confirm the detention order and continue the detention of the detenu for a period not exceeding the maximum period prescribed by section 14 as it deems fit. Sub-section (2) of section 13 provides that if the Advisory Board has reported that there is, in its opinion no sufficient cause for the detention of the person concerned, the State Government shall revoke the detention order and cause, the detenu to be released forthwith. This section 13(1) and (2) also now her " e provides that the authorised officer is required to pass any order of confirming detention order or revoking detention order. Sub-section (1) of section 15 is reproduced hereunder as the learned advocate for the detenu has heavily relied upon it :

"15. (I)Without prejudice to the provisions of section 21 of the Bombay General Clauses Act, 1904,a detention order may, at any time for reasons to be recorded in writing, be revoked or modified by the State Government, notwithstanding that the order has been made by an authorised officer.-

This sub-section empowers the State Government to revoke or modify the detention order notwithstanding that the order has been made by an authorised officer.

23. In this case it is an admitted fact that the representation made by the detenu was considered by the State Government. Copy of the representation was sent to the authorised officer. The learned advocate for the detenu submitted that as the authorised officer i.e. the detaining authority has not considered the representation of the detenu, it is in violation of his constitutional right guaranteed under Article 22(5) and also the statutory obligation of the detaining authority. Hence, the continued detention of the detenu is illegal and void.

24. In view of the Supreme Court decision in the case of Raj Kishore Prasad Vs. State of Bihar and Others, , this contention is without any substance and it is not open to the High Court to take any contrary view because of this binding decision. In that case the Supreme Court dealt with similar provisions of the National Security Act, 1980. Section 3(2) of the said Act empowers the Central Government or the State Government to pass detention order with a view to prevent such person from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance pf supplies and services essential to the community. Sub-section (3) empowers the State Government, if it is satisfied that it is necessary so to do, to direct, by order in writing, the District Magistrate or Commissioner of Police to exercise the powers conferred by sub-section (2) of section 3 on the State Government. The State Government can make an order which would enable the District Magistrate or Commissioner of Police to exercise the power in the first instance for a period not exceeding three months but the State Government may. if satisfied in the manner provided in subsection (3), amend such order extending the period from time to time but not exceeding three months at any one time. In exercise of this power the District Magistrate made the detention order against the detenu. The

detenu made representation to the detaining authority for quashing the order of detention. In the meantime the case of the detenu was referred to the Advisory Board thereafter his representation was rejected by the Chief Minister. On behalf of the detenu it was contended that as the District Magistrate had never applied his mind to the representation and did not take any decision with regard thereto but merely forwarded the same with his remarks to the Chief Minister who rejected the same, his continued detention was illegal and void. The Supreme Court negatived the said contention and held that the scheme of the Act shows that Parliament desired to confer the drastic power of deprivation of liberty without a trial or an opportunity to be heard before being detained on high authority like the Central or the State Government. When the Parliament permitted the Central or State Government to permit exercise of power by the officers like the District Magistrate or Commissioner of Police, it thought it prudent to provide that even if the officers like District Magistrate or Commissioner of Police exercise this power the detenu must have an opportunity to make representation to Central or State Government as the case may be so that the functionary on whom Parliament chose to confer power must apply its mind to the representation of the detenu. The Court further held that as the Chief Minister has considered the representation and rejected it after calling for para-wise remarks of the detaining authority, it was not possible to accept the contention that the failure of the detaining authority to consider the representation would invalidate the order. The Court has also considered the case of Santosh Anand v. Union of India, (1981) 2 SCC 420, and has held that it would not be of any help. It would be worthwhile to reproduce the following discussion in the aforesaid case :

"Article 22(5) enjoins duty on the detaining authority to communicate the grounds of detention to the person detained and also to afford him earliest opportunity of making, a representation against the order of detention. This constitutional obligation has been, statutorily recognized in Section 8 of the Act" with a specific provision. Section 8 prescribes a time schedule within which a copy of the grounds has to be furnished to the detenu and further enjoins a duty to afford the detenu the earliest opportunity of making a representation against the order? not to the detaining authority but to the appropriate Government. Constitutional mandate was that the detaining authority must afford a reasonable opportunity to the detenu to make a representation. This Court in several decisions spelt out a duty of the detaining authority to consider the representation as expeditiously as possible. But the scheme of the Act "shows that Parliament desired to confer this drastic power of deprivation of liberty without a trial and opportunity to be heard before being detained on high authority like the Central or the State Govt. When Parliament permitted the Central or State Government to permit exercise of power by the officers like the District Magistrate or Commissioner of Police, it thought it prudent to provide that even if the officers like District Magistrate or Commissioner of Police exercise this power, the detenu must have an opportunity to make representation to

Central or State Government as the case may be so that the functionary on whom Parliament chose to confer power must apply its mind to the representation of the detenu. Therefore, Section 8 made a statutory departure and provided for making representation to the appropriate Government. The contention is that constitutionally speaking a duty is cast on the detaining authority to consider the representation. That is of course true. But in view of the scheme of the Act, Parliament has now made it obligatory on the appropriate Government to consider the representation " This is 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. Therefore, 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. And be it noticed that the Chief Minister rejected the representation after calling for the remarks of the District Magistrate who made the detention order. In this background the decision of this Court in Santosh Anand v. Union of India, (1981) 2 SCC 420 would not be of help."

In view of the aforesaid enunciation of law, after taking into consideration similar provision of the National Security Act and also Article 22(5) of the Constitution of India. it cannot be said that the District Magistrate or the Commissioner of Police is statutorily or constitutionally required to consider the representation made by the detenu against the order of detention.

25. When the Supreme Court has negated exactly identical contention, it would not be open to this Court to go behind it and/or to take any different view of the matter. This is well settled position in view of the several binding decisions.

26. In the case of Ballabhadas Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, , the Court has held that the decision of the Supreme Court was binding on the High Court and the High Court could not ignore it because they thought that the relevant provisions were not brought to the notice of the Court.

27. In the case of Porbandar Nagar Palika Vs. V.G. Patel Controlling Authority Under the Payment of Gratuity Act, 1972 and Others, , the Division Bench of this Court has held that a declaration of law made by the Supreme Court on a given point cannot be brushed aside by the process of examining the basis of its reasoning and ascertaining whether the said basis has been undermined by some pronouncements made in a different context in another decision of the Supreme Court.

28. In the case of Thakkar Vithalbhai Hargovind and Another Vs. Kachhia Jagjivan Motilal (Deed.) by his Heirs Bai Kashi and Others, , after considering the case of Smt. Somvanti v. State of Punjab, AIR 1963 SC 151, the Division Bench of this Court has held that the mere circumstance or fact that the Supreme Court has not considered the effect of several decisions which existed on a particular

point would not detract from the weight or the binding effect of the decision of the Supreme Court.

29. In the case of T. Govindaraja Mudaliar Vs. The State of Tamil Nadu and Others, , while dealing with similar contention the Supreme Court in paragraph 10 has held as under :

"It is apparently too late in the day now to pursue this line of argument. In this connection we may refer to the observations of this court in Mohd. Ayub Khan Vs. Commissioner of Police, Madras and Another, 4 according. to which even if certain aspects of question were not brought to the notice of the court it would decline to enter upon re-examination of the question since the decision had been followed in other cases. In Smt. Somavanti and Others Vs. The State of Punjab and Others, a contention was raised that in none of the decisions the argument advanced in that case that a law may be protected from, an attack under Art. 31(2) but it would be still open to challenge under Art. 19(1)(f), had been examined or considered. Therefore, the decisions of the court were invited in the light of that argument. This contention, however, was repelled by the foil -9 observations at p. 794 (of SCR) : (at pp 160-161 of AIR) :

"The binding effect of decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided."

It is common ground in the present cases that the validity of Chapter IV-A of the Act has been upheld on all previous occasions and merely because the aspect now presented based on the guarantee contained in Art. 19(1)(f) was not expressly considered or a decision given thereon will not take away the binding effect of those decisions on us.

30. From the aforesaid discussions, in my view, it is not open to this court to say that even though Supreme Court has negatived the similar contention that as the authorised officer has not considered the representation of the detenu but it is considered by the appropriate Govt. only and therefore the detention order is illegal or in violation of Art. 22(5).

31. Presuming that it is open to consider the above issue, then the first question which would arise for determination is whether under the Constitution or statute is there any obligation on the part of detaining authority itself to consider the representation made by the detenu or whether any other authority specified under the statute can consider the representation. This point is also concluded by the Supreme Court in series of decisions. As early as in 1950 in the case of A.K. Gopalan Vs. The State of Madras, while interpreting the provision of Article 22 the Supreme Court interpreted Article 22(5) of the Constitution and held that Constitution is silent as to the person to whom the representation has to be made or how it has to be dealt with. If a law made by the Parliament in respect of preventive detention does not make provision on these points, it is not invalid and that the contention that the representation should be to an outside body has

no support in law.

32. In the case of *Sk. Abdul Karim and Others Vs. State of West Bengal*, , the Supreme Court interpreted the language of Article 22(5) and observed that Article 22(5) does not expressly say to whom the representation is to be made and how the detaining authority is to deal with the representation. But it is necessarily implicit in the language of Article 22(5) that the State Government to whom the representation is made should properly consider the representation as expeditiously as possible.

33. This view was affirmed by the Supreme Court in the case of *John Martin Vs. State of West Bengal*, . After considering the aforesaid decision and the observation of the two learned Judges in *A.K. Gopalan's Case*, the Court held that there has been a long catena of decisions of the Supreme Court where the view has been consistently taken that representation of the detenu must be considered by the State Government. Article 22(5) provides inter alia that the authority making the order of detention shall afford the detenu the earliest opportunity of making representation against the order of detention. It does not say as to which is the authority to which the representation shall be made or which authority shall consider it.

34. From the aforesaid decisions it is clear that there is no constitutional obligation that the detaining authority itself must consider the representation of the detenu. The Preventive Detention Law may provide as to which authority shall consider the representation of the detenu and if that is provided, it would be sufficient compliance of Article 22(5).

35. As against this, the learned advocate for the petitioner vehemently submitted that following decisions of the Supreme Court lay down that it is the constitutional obligation of the detaining "authority itself to consider the representations :

- (1) *Jayanarayan Sukul Vs. State of West Bengal*, .
- (2) *Vimalchand Jawantraj Jain Vs. Shri Pradhan and Others*, .
- (3) *Smt. Pushpa Vs. Union of India (UOI) and Others*, .
- (4) *Santosh Anand v. Union of India*, (1981) 2 SCC 420 .

36. All these decisions nowhere deal with the contention that the detaining authority itself should deal with the representations.

37. In *Jayanarayan Sukul Vs. State of West Bengal*, , the Court, after interpreting Article 22(5), has broadly laid down the procedure as under

"Broadly stated, four principles are to be followed in regard to representation of detenu. 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 representation 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 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 Government will send the case along with the detenu's representation to the Advisory Board. If thereafter the Advisory Board will express an opinion in favour of release of the detenu the Government will release the detenu. If the Advisory Board will express any opinion against the release of the detenu the Government may still exercise the power to release the detenu."

Nowhere the Court has considered whether Article 22(5) requires that detaining authority itself should consider the representation of detenu.

38. In the case of Narendra Purshotam Umrao Vs. B.B. Gujral and Others, , the Court dealt with the interpretation of section 8 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and Article 22(5) of the Constitution. The Supreme Court held that 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 accord him the earliest opportunity of making representation against the order.

39. In Vimalchand Jawantraj Jain Vs. Shri Pradhan and Others, , in paragraph 3 the Court has held that it will, therefore, be seen that one of the basic requirements of clause (5) of Article 22 is that the authority making the order of detention must afford the detenu the earliest opportunity of making a representation against the order of detention. Now this requirement would become illusory unless there is a corresponding obligation on the detaining authority to consider the representation of the detenu as early as possible. The learned advocate for the petitioner vehemently relied upon and submitted that the words which are used by the Supreme Court are that the detaining authority must consider the representation of the detenu as early as possible and therefore it is the constitutional obligation of the detaining authority to consider the representation. It should be noted that in the COFEPOSA Act there is no specific provision which provides that the specified authority would consider the representation of the detenu.

40. In the case of Smt. Pushpa Vs. Union of India (UOI) and Others, , the Chief Secretary had passed the detention order and had rejected the representation

made by the detenu and it was sought to be contended before the Supreme Court that as the appropriate Government had not considered the representation made by the detenu, the detention order was illegal. The Supreme Court negated the said contention by holding that clause (5) of Article 22 of the Constitution makes it obligatory for the authority making an order of preventive detention to communicate to the detenu, as soon as may be, the grounds on which the order has been made and should afford him the earliest opportunity of making a representation against the order. This right to make a representation imposes a corresponding duty on the detaining authority to consider the representation. The court further held that there is nothing in the scheme of Article 22 or the provisions of the COFEPOSA Act which requires that the representation ought always to be considered by the appropriate Government notwithstanding the fact that the order of detention has been made by an officer specially empowered in that behalf. The Court further held that the initial representation which the detenu has a right to make on receipt of the grounds of detention would ordinarily be addressed to the detaining authority because it is that authority which has taken a decision adverse to detenu and which has to be persuaded to reconsider the same. This decision also does not d- "with a case wherein a specific provision is made as to who would consider the representation of the detenu. On the contrary, the decision in terms lays down that there is - nothing in the scheme of Article 22 or the provisions of the COFEPOSA Act which requires that the representation ought always to be considered by the appropriate Government.

41. In *Santosh Anand v. Union of India*, (1981) 2 SCC 420 , while dealing with the COFEPOSA Act the Court held that the representation of the detenu was considered by the Chief Secretary as the detaining authority only for submitting the same for orders to the Administrator who in his turn after considering it rejected the same. The Supreme Court held that the Chief Secretary as the detaining authority has not rejected it. Therefore, continued detention. Was illegal. The Court held that under Article 22(5), as, interpreted by the Supreme Court, as also under the provisions of Section 11 of the COFEPOSA Act it is clear that a representation should be considered by the detaining authority, who on a consideration thereof can revoke the detention order and if the representation is rejected by detaining authority it is open to the detenu to approach the State Government for revocation of the order and failing that it is open to him to approach the Central Government to get the detention order revoked.

42. Even. the Supreme Court in the case of *Raj Kishore Prasad Vs. State of Bihar and Others*, has held that the aforesaid decisions would not be of any help. It should further be borne in mind that in all the aforesaid decisions the Supreme Court was not dealing with similar provisions such as Section 8 of the National Security Act or Gujarat Prevention of Anti-social Activities Act, 1985 which in terms provides that representation should be considered by the appropriate Government.

43. The aforesaid decisions therefore would not in anyway advance the contention of the petitioner that there is constitutional obligation on the part of the detaining authority itself to hear the representation. If Preventive Detention Law provides that the State Government or Central Government shall consider the representation, then it would be sufficient compliance with the provision of Art. 22(5) of the Constitution.

44. Then the other question, which would require consideration is, apart from the constitutional obligation, is there any statutory obligation on the part of the detaining authority to consider the representation of the detenu? It is an admitted fact that under the Gujarat Prevention of Anti-social Activities Act there is no specific provision which requires that authorised officer who had passed the detention order is required to consider the representation made by the detenu. Section 9(1) in terms provides that when a person is detained in pursuance of a detention order the authority making the order, shall as soon as may be, but not later than seven days "from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the State Government. So the only authority, which is required to consider the representation under the law, is the State Government and not the authorised officer who has passed the detention order.

45., Hence there is no statutory obligation on the part of authorised officer to consider the,,. representation made by the detenu. However, the argument is advanced by the learned advocate f or the petitioner that even though there is no statutory obligation on the part of the authorised officer who has passed the detention order to consider the representation, yet u/s 21 of the Bombay General Clauses Act, the authorised officer has power to rescind or modify the detention order and, therefore, the authorised officer is bound to consider the representation against detention order. Section 21 of the Bombay General Clauses Act reads as under :

"21Where, by any Bombay Act (or Gujarat a Act) a power to issue notifications, orders rules or by-laws in conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend "vary or rescind any notifications, orders, rules or bylaws, so issued."

Presuming that section 21 of the Bombay General Clauses Act, 1904 enables the authorised officer to add to, amend, vary or rescind the detention order subject to like sanctions and conditions (if any), yet from this it cannot be inferred that there is statutory obligation oil the part of the authorised officer to consider the representation and communicate. its decision to the detaining authority and failing it, the continued detenii6fti!~Void, Neither the Supreme Court nor this Court has laid down any such law. All the decisions which are cited at the Bar deal with the specific power conferred under the relevant Preventive Detention law. on the State Government and/or the Central Government to revoke the

order of detention. At the time of arguments the learned advocate for the petitioner has failed to point out any such decision which lays down that as u/s 21 of the General Clauses Act the authorised officer has power to revoke or modify the detention order and, therefore, he is bound to consider the representation of the detenu and his failure to consider it makes the detention order void or that even if the representation is considered, if the detenu is not informed about it, the detention order becomes void.

46. Reliance was placed upon the decision of the Supreme Court in the case of Smt. Kavita Devidasani Vs. State of Maharashtra and Others, . In that case while dealing with COFEPOSA Act the Court held that the power of the State Government and the Central Government u/s 11 of the COFEPOSA Act to revoke orders of detention is in addition to the power u/s 21 of the General Clauses Act to revoke their own orders. In that case on behalf of the detent a contention was raised that as the representation was disposed of by the Minister of State, Home Affairs, Government of Maharashtra, without any authority to do so, his continued detention was illegal. The Court rejected the said contention by holding that the order of detention was not made by Shri Samantas an Officer of the State Government specially empowered in that behalf but by the State Government itself acting through the instrumentality of Shri Samant, a Secretary to Government authorised to so act for the Government under the Rules of Business. Government business can never get through if the same individual has to act for the Government at every stage of a proceeding or transaction, however, advantageous it may be to do so. The Court further observed :

"Nor can it be said that it would be to the advantage of the detenu to have the matter dealt with by the same individual at all stages. It may -perhaps be to the advantage of the detenu if fresh minds are brought to bear upon the question at different stages. It is unnecessary to pursue the matter any or legal infirmity in the representation having been considered by the Minister of State, Home Affairs, Government of Maharashtra

These observations of the Supreme Court indicate that it is not necessary that the same authority which had passed the order should consider the representation. Nor can it be said that it would be to the advantage of the detenu.

47. In the case of Sat Pal Vs. State of Punjab and others, , the Supreme Court dealt with the power of revocation conferred on the Central government u/s 11 of COFEPOSA Act. The Court held that power of revocation is exercisable at two stages. In the first place, there is a duty cast on the appropriate Government, i.e. the Central Government or the State Government as the case may be, to revoke the detention order u/s 8(f) of the Act and cause the person to be released forthwith, where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention. Secondly, the Central Government may, at any time, under Clause (b) of subsection (1) of section 11 of the Act, revoke an order of detention that has been made by an officer of the Central Government Or by a State Government. Under Clause (a) thereof, the State Government may likewise

exercise such power in relation to an order made by an officer of the State Government. u/s 11(1)(b) of the Act, the Central Government, -therefore, has the overriding power to revoke a detention order, at any time, made by the State Government, or an officer of the State Government, under subsection (1) of section 3 of the Act. the Court further held that the constitutional imperil. fives of Art. 22(5) enjoin that where the detenu makes simultaneously representation to the detaining authority as well as an application for revocation u/s 11 of the Act, they must both be dealt with by the appropriate Governments at the same time, and there is no question of any conflict of jurisdiction. The Court held that "the detenu has, therefore, fight to approach the Central Government by representation for re-vocation of order of detention u/s 11(1)(b) and when such representation is made, the State Government has corresponding duty to forward it to the Central Government for necessary action. In the aforesaid case, the Supreme Court has in terms laid down that at two stages Government can revoke the detention order i.e. (i) in view of the opinion by the Advisory Board, and (ii) after consideration of the representation u/s It. Nowhere it has been laid down that there is third stage of revoking the detention order by the detaining authority as per section 21 of the General Clauses Act which enjoins the. duty to consider the representation.

48. After considering the aforesaid decision and other decisions of the Supreme Court, the Supreme Court in the case of State of Uttar Pradesh Vs. Zavad Zama Khan, , while dealing with similar provision of section 14 of the National Security Act, 1980, has held in paragraph 13 as under :

"The principle that emerges from all these decisions is that the power of revocation conferred on the Central Government u/s 14 of the Act is a statutory power which may be exercised on information received by the Central Government from its own sources including that supplied by the State Government under sub-section (5) of S. 3 or from the detenu in the form of a petition for representation. It is for the Central Government to decide whether or not it should revoke the order of detention in a particular case. In the present case, the detenu was not deprived of the right of making a representation to the detaining authority under Art. 22(5) of the Constitution read with S. 8(1) of the Act. Although the detenu had no right to simultaneously make a. representation against the order of detention to the Central Government under Art. 22(5) and there was no duty cast on the State Government to forward the same to the Central Government, nevertheless the Stat Government forwarded the same forthwith. "the Central Government duly considered that representation which is effect was nothing but a representation for revocation of the order of detention u/ s 14 of the Act. That being so it was not obligatory on the part of the Central Government to consider a second representation for revocation u/s 14. We may profitably refer to Phillippa Anne Duke's case : 1982CriLJ1389 (supra), where in some what similar circumstances it was held that failure of the Central Government to consider a representation for evocation of an order of detention u/ s 11(1)(b) of the COFEPOSA Act handed over to the Prime Minister during her

visit to England did not render the continued detention invalid. It was observed :

"Representations from whatever source addressed to whomsoever officer of one or other department of the Government cannot be treated as a representation to the Government under S. 11(1)(b) of the COFEPOSA Act."

From the discussion of the aforesaid decisions it is clear that they deal with specific statutory power conferred under the Preventive Detention Act and that if that power is not properly exercised, it may invalidate the detention order, but the aforesaid decisions nowhere deal with the enabling power conferred u/s 21 of the General Clauses Act. The aforesaid decisions also make it clear that power of revocation of the order is a statutory power which should be exercised by the appropriate Government on the basis of information received by it or from the detune in the form of representation.

49. The learned advocate for the petitioner vehemently contended that as the question is of personal liberty of a citizen, the Court should interpret the statute in such a manner that it would advance the cause of personal liberty of a citizen and it is the bounden duty of the Court to see that a citizen is not deprived of his personal liberty otherwise than in accordance with law. He submitted that even though there is no specific statutory power, yet there is enabling power u/s 21 of the General Clauses Act that the authority who has passed the order, can revoke the order and it can exercise the said power in the like manner and subject to the like sanctions and conditions and, therefore, it should be held that the authorised officer Was bound to consider the representation and communicate his decision to the detune. In my view, this contention is devoid of any substance. No doubt; while interpreting the provisions of Preventive Detention Act, the Court should be vigilant enough to safeguard the personal liberty of a citizen, but at the same time t6e Court is also required to consider the question of social l99_8GuJ./7 VIT G-25 security or national security, Personal liberty would be meaningless if liberty is given to murder anybody in a broad day light in thickly populated big city-with impunity. -It should be remembered that procedural safeguards are not based on sentimental concerns for the criminals and fundamental rights or procedural safeguards for maintaining liberty of an individual should not be a device to coddle criminals or provide the technical loopholes through which the dangerous persons can escape the consequences of their acts under the guise of personal liberty. If this is permitted it would sanction the subversion of social security. It is-equally true that before detaining any person, the authority should strictly observe the procedure established by the Constitution and the law. It is the bounden duty of the Court to satisfy itself that all the safeguards provided by law have been. scrupulously observed and that the subject is not deprived of his personal liberty otherwise than in accordance with law. Further, the Court's writ is the ultimate insurance against the illegal ,detention, but at the same time when the authority has properly followed the procedure prescribed under the law and when there is no violation 6f constitutional guarantee, then there is no reason to hold that because there As

enabling power of revocation under the General Clauses -Act, therefore also the authorised officer must consider the representation.

50. In the case of Ram Bali Rajbhar Vs. The State of West Bengal and Others, , dealing with the provisions of Maintenance of Internal Security Act, in Para 14 the Supreme Court has observed :

"Hence, this court cannot order a release from detention, upon a Habeas Corpus Petition, until it is satisfied that a petitioner's detention is really unwarranted by law. This means that in a case of detention under the Maintenance of Internal Security Act, 1971, the petitioner has to show a violation of either Art. 21 or Art. 22 of the Constitution. That personal liberty of the citizen which the law so sedulously and carefully protects can also be taken away by the procedure established by law when it is used to jeopardise public a good and not merely private interests."

51. In the case of Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others, , the Supreme Court, while dealing with the provisions of COFEPOSA (Conservation of Foreign Exchange and Prevention of Smuggling Activities Act), has pertinently observed :

"There are various procedural safeguards for the protection and we must construe those in proper light and from pragmatic commonsense point of view must remember that observance of written law about . the procedural safeguards for the protection of the individual is normally the high duty of public official but in all circumstances not the highest. The law of self-preservation and protection of the court and national security -may claim in certain circumstances higher priority.

52. In this set of circumstances when the law of Preventive Detention has ,provided proper safeguards by giving the detenu a right to file representation to the State Govt. and when law provides the obligatory duty of the State Govt. to consider it, it would be too much to hold that because u/s 21 of the General Clauses Act the authorised officer has enabling power to revoke t he detention order passed by it, there fore it should be held that it is the statutory obligation of the authorised officer to consider the representation and its non-consideration would invalidate the detention order. In my view, this interpretation would be totally an unreasonable one and it would create unnecessary hurdle in implementation of Preventive detention Law. Liberty guaranteed .to an individual under the Constitution would become meaningless without adequate social security. It would be worthwhile to refer to the lecture of Justice Krishna Iyer delivered at the time of "Sarat Chandra Bose Memorial Lecture" where he has stated that his lecture focuses on law as a means to justice and the Constitution as an instrumentality for that goal. He has referred to the quotation of &B. Shaw which is as under:

"I am, and have always been, and shall now always be, a revolutionary writer, because our laws make law impossible, our liberties destroy all freedom our

property is organized robbery; our morality is an impudent hypocrisy, our wisdom is administered by inexperienced or mal-experienced dupes, our power is wielded by cowards and weaklings, and our honors false in all its points. I am an enemy of the existing order."

It should be noted that laws should not be interpreted to make implementation of laws impossibility or that liberties should not be such that they destroy all freedoms.

53. Further, if this contention is accepted, it would lead to absurdity and it would not be possible for the State Government to implement the "Act smoothly. u/s 3(1) of the Act the detaining authority is the State Government. However, u/s 3(2) an authorised" officer can exercise the power of the State Government and pass an order of detention, if the State Government, by order in writing, has directed the District Magistrate or the Commissioner of" Police to exercise the said power after arriving at a satisfaction that it is necessary so to do. Therefore, the authorised officer is exercising the power of the State Government, if there is a direction to that effect by the State Government. That means that the State Government is delegating its function u/s 3(1) by a written order to the District Magistrate or .the Commissioner of Police of a particular specified area. This delegation .of the power is not general and the State Government has to pass appropriate written order after taking into consideration circumstances prevailing or likely to prevail in any area within the local limits of the. Jurisdiction of a District Magistrate or Commissioner of Police. Further, this delegation is limited and this is abundantly clear from Section 3(3) which provides that when any detention order is made by an athorised officer, he shall forthwith report the fact to the State Government, 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 detention 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., Therefore, the result .would be, if the order is not approved by the State -Government, it automatically comes to an end. If the order is approved by the State Government, then, would it be open to the said authority to revoke the said order without the approval of the approving authority? In my view, if this construction is accepted, then, it would lead to a chaotic situation whereby a delegated or subordinate officer can sit in appeal against the decision of his superior authority. Take for instance that the detenu submits a representation to the State Government as well as to the authorised officer as in this case Now, the State Government,, after considering the said representation, arrives at a conclusion that the detention order is perfectly justified. Can the subordinate officer -or authority, i.e. authorised officer, arrive at a contrary conclusion and revoke the detention order passed by him? In my-view, this cannot be permitted. At the most the authorised officer may send his remarks or opinion to the State Government that because of the facts stated by the detenu in his representation, the detention order maybe revoked, but to accept the contention that the authorised officer is entitled to revoke the

detention order would lead to. absurdity, chaos and in-subordination. Therefore,. in my opinion, there is no, justification for creating such anomaly or absurdity by process of interpretation.

54. In my view, this aspect is, to some extent, dealt with by the Division Bench of this Court in the case of Nathalal Govindji Jhagada Vs. State of Gujarat and Others, . No doubt, in that case the Court has in terms held that it was not necessary to deal with the second "submission made on behalf of the detenu that the detaining authority is the Commissioner of Police and he has the power to revoke the order, in view of Section 21 of the Bombay General Clauses Act which has been saved by Section 15 of the Ordinance Gujarat Disturbed Areas (Maintenance of Public Order Ordinance, 1980). In that case it was contended that as the petitioner was informed that the representation should be made to the State Government and that information was misleading, and, therefore, detenu's right to make representation to the detaining authority under Article 22 of the Constitution was frustrated by wrong advice given by the Commissioner of Police.. The Court observed as under:

"It is true that by virtue of Section 21 of the Bombay General Clauses Act, by which power has been reserved to the Commissioner of Police u/s 15 of the Ordinance it was -open to the detenu to make a representation to the Commissioner of Police but it must be borne in mind that once the State Government approves of the order of detention under S. 4(3) it is the act of the approval which sets the seal to the detention and the earlier order of the Commissioner of Police recedes in the background and therefore Section 9(2) of the Ordinance provides for representation being made to the State Government. In the instant case, Article 22(5) of the Constitution cannot be said to be infringed because Article 22(5) speaks of a representation against the order of detention but does not specify to which authority the representation, should be made."

This observations of the Division Bench in terms lay down that once the Government approves the order of detention, then approval of the Government sets the seal to the detention order and the earlier order of the Commissioner of Police recedes in the background. Once, the order of the authorised officer recedes in the background, in my opinion, it cannot be said that he has authority to revoke the order u/s 21 of the General Clauses Act. No doubt, the Division Bench has subsequently observed as under

"It is a mere fact that, as the provisions of the Ordinance stand, in view of the provisions of Section 15, power to revoke the order of detention remains -in the Commissioner of Police by virtue of section 4(2) read with Section 21 of the Bombay general Clauses Act."

The Court thereafter negated the contention of the detenu that because he was informed about his right u/s 9(1) of the Ordinance to make representation to the State Government, he -misled and, therefore, his fundamental right under

Article 22(5) was in any way violated. Because of the aforesaid observation of the Division Bench, it cannot be said that the Division Bench has, in any way, dealt with or decided that u/s 21 of the General Clauses Act the Commissioner of Police is required" to determine the representation, made by it detenu and thereafter to communicate subdivision to the detenu and if dues has not been done, the detention order becomes void. In my view, the aforesaid observation is to be read along with the aforequoted previous observation which, in term rightly lays down that once the State Government approves the dentition order it sets the seal to the detention and the earlier order of the Commissioner of Police recedes in the background. Once the order of the authorised officer recedes in the background, the authorized officer cannot revoke it in tiny set of circumstances without the approval of the approving authority "State Government. Take therefore, in my view there is no justifiable reason to accept the contention of the learned -advocate for the petitioner.

55. In view of the afore said discussion it is not necessary to consider the contention of the learned Public Prosecutor that after lapse of 12 days or after the detention order is approved by the State Government, the authorised officer i.e. the Commissioner of Police or District Magistrate has no p6wer to revoke the detention order and the entire scheme of the Act reveals that after the order is passed by the authorised officer, he becomes functions officier. For this he has referred to various provisions of the Act. He has submitted that after passing the detention order the authorised officer has to forward his report to the State Government together with grounds on which the detention order has been made as required u/s 3(3) of the Act; thereafter he is not required to J take any further action in the matter and the "life of the said detention order only for a : period of 12 days if the said order is not ,If approved by the State government within 12 days. It is his contention that thereafter he is hot required to do anything and becomes functus officio, because Section 5 of the Act provides that the State Government has to regulaten the place and conditions of detention; that the State Government can direct removal of detenu from one place of detention to another place of detention with is the state that u/s 9 the representation are, required to be considered by the state Government; that u/s 11 the State Government has to., refer the matter to the Advisory Board; that. if the advisory Board has reported that there is sufficient cause for, detention of the - detenu, the State Government may confirm the detention order and in any case where the Advisory Board has reported that them is no sufficient cause .for detention of the-person concerned, the State Government has-to revoke the detention order; that u/s 16 the power of temporary release of the person -detained is also with the State Government and not with the authorised officer. The learned Public Prosecutor, therefore, submitted that after the order is approved by the State, Government, the authorized officer has no jurisdiction to revoke the, detention order He further submitted that in any case even if that power is there u/s 21 of the General Clauses Act, the said power is subject to like sanctions and conditions i.e. it must be approved by the State Government. As stated above, I

am not required to decide the aforesaid contention.

56. In view of the afore going discussion, in my-view, the general observation in Special Criminal Appin. No. 614 of 1985 that "it is now well settled that the detaining authority is under a statutory and constitutional, obligation to consider the representation made by a detenu against the order of his detention" is -not the correct law. In each case it would depend upon the statutory provision of the Preventive Detention Act.

When representations are required to be considered under the statute by a specified "authority, then there, would be sufficient compliance with Article 22(5) of the "Constitution. If representation is considered by the specified authority under the Act then the representation is not required to be considered by the authorised officer who has passed the detention order and it cannot be ""held that the default on the part of the authorised officer to consider the representation would render the continued detention of the detenu illegal.

FURTHER ORDER

57. The matter may now be placed before die Division Bench for passing appropriate final order.

58. In my view, this order is not required to, be passed because, this order is already passed ,when the judgment was pronounced ."by the Full Bench and it is incorporated in the judgment of my learned brother Nanavati J.

59. Order accordingly.