

**(1994) 08 BOM CK 0099**

**In the Bombay High Court**

**Case No :** Criminal Writ Petition No. 284 of 1994

Kamleshkumar Ishwardas Patel

APPELLANT

Vs

Union of India and others

RESPONDENT

**Date of Decision :** 26-08-1994

**Acts Referred:**

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 11, 3  
Constitution of India, 1950 — Article 141, 22, 226, 367  
Criminal Procedure Code, 1973 (CrPC) — Section 465  
General Clauses Act, 1897 — Section 11, 21  
National Security Act, 1980 — Section 14, 8

**Citation :** (1995) 43 BLJR 295 : (1995) 2 BomCR 640 : (1994) CriLJ 3105 : (1994) 2 MhLj 1669 : (1995) 1 RCR(Criminal) 91

**Hon'ble Judges :** A.M. Bhattacharjee, C.J.;V.P. Tipnis, J;V.A. Mohta, J

**Bench :** Full Bench

**Advocate :** M.G. Karmali, S.H. Sanjanwalla, Madhu M. Patel and Ms. A.M.Z. Ansari, for the Appellant; R.M. Agarwal and Mrs. Ranjana Desai, Public Prosecutor and S.G. Page, Government Pleader, for the Respondent

## Judgement

Bhattacharjee, C.J.—The Order of Reference which has occasioned the constitution of this Full Bench has been passed by Mohta, J., sitting with Bahuguna, J. and the three questions which have been referred to for the consideration of this Full Bench are as under :-

- (1) Has the specially empowered officer under the COFEPOSA Act also an independent power to revoke the order of detention in view of Section 11 of the COFEPOSA Act read with Section 21 of the General Clauses Act ?
- (2) Are observations in Amir Shad Khan and another Vs. L. Hminglana and others, regarding power of revocation of specially empowered officer under the COFEPOSA Act not binding on this Court ?
- (3) Does failure to take independent decision on revocation of order of detention by the specially empowered officer under the COFEPOSA Act and merely

forwarding the same with recommendation to reject, result in non-compliance with constitutional safeguard under Art. 22(5) of the Constitution.

2. We have heard very interesting arguments advanced by Mr. Karmali for the Petitioner, by Mr. Agrawal for the Union of India and by Mrs. Ranjana Desai for the State of Maharashtra and while we have derived considerable assistance from them, we have never entertained any doubt throughout the course of the arguments that the answers to question No. 1 and also question No. 2 must be in the affirmative.

3. Article 22(5) categorically provides that when a person is detained in pursuance of an order made under any law providing for preventive detention, the authority making an order shall, as soon as may be, communicate to such person the grounds on which the order has been made and "shall afford him the earliest opportunity of making a representation against the order". This clause does not specify as to whom the representation is to be made and how the representation is to be dealt with, but then as was pointed out by Chief Justice Kania as early as in 1950 in *A.K. Gopalan Vs. The State of Madras*, a preventive detention law which does not make provision as regards these two points, cannot be challenged on that ground alone as being opposed to Art. 22(5). The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ("COFEPOSA Act", for short), while providing in Section 3(3) for the communication to the person detained in pursuance of a detention order of the grounds on which the order has been made, has not specified in so many words as to whom or to which authority a representation against the order is to be made by the detenu. Some other Acts, e.g. Section 8 of the National Security Act, 1980, make specific provisions as to the authority to whom such a representation is to be made. But what has not been done expressly in the COFEPOSA Act has nevertheless been done impliedly or indirectly by the provisions of Section 11 of the Act which provide for the Authorities which may revoke or otherwise modify a detention order and it would be trite to say that a representation can and must obviously be made to such Authorities empowered to revoke or modify the order, for their consideration as to whether the detention order warrants such revocation or modification.

4. If one goes by the mere letters of Section 11 without reading it meaningfully, it may appear at the first blush that the only authorities which have been empowered to exercise the power of revocation or modification are the State Government and the Central Government. But Section 21 of the General Clauses Act, 1897, which would even otherwise have applied to the provisions of the COFEPOSA Act *ex proprio vigore*, clearly, provides that the power to issue or make an order would include the power to amend, vary or rescind the order. Even though Section 21 of the General Clauses Act would have applied on its own, Section 11 of the COFEPOSA Act has taken anxious care to provide in the opening words of the section that empowerment of the State Government and the Central Government with the authority to revoke or modify an order of

detention would be "without prejudice to the provisions of Section 21 of the General Clauses Act, 1897." It should also be noted that Art. 22(5) of the Constitution uses the expression "the authority making the order" and since as a result of the operation of Art. 367 of the Constitution, the provisions of the General Clauses Act, 1897 apply for the interpretation of the Constitution also, the person "making the order" would automatically be clothed with the power to revoke or modify the same. We, therefore, have no manner of doubt that even though Section 11 of the COFEPOSA Act expressly mentions only the State Government or the Central Government as the authority empowered to revoke or modify a detention order, the authority making the order of detention would also have clear authority to revoke or otherwise modify the same as a result of the operation of the provisions of Sections 21 of the General Clauses Act, which has been expressly (though unnecessarily) saved by the provisions of Section 11 of the COFEPOSA Act and also of Art. 22(5) of the Constitution read with Art. 367 thereof. This ought to have been sufficient to dispose of question No. 1 as noted hereinabove, but then, as noted in the Order of Reference, a two Judge Bench decision of the Supreme Court in *State of Maharashtra and Another Vs. Sushila Mafatlal Shah and Others*, appears to be very categorical in laying down that there is nothing in the COFEPOSA Act to show, that in addition to his right to make a representation to the State Government and the Central Government against the order of detention, the detenu has a further right to make a representation to the officer himself who has made the order of detention. Even after adverting to the provisions of Section 21 of the General Clauses Act, 1897, operation whereof has been expressly saved by the opening words in Section 11 of the Act, the two Judge Bench has held that even if the order of detention is made by a specially empowered officer of the Central Government or the State Government, the said order will give rise to obligation to be fulfilled by the Government to the same degree and extent to which it will stand obligated if the detention order had been made by the Government itself and, therefore, it is the concerned Government that would constitute the Detaining Authority under the Act and not the officer concerned who made the order of the detention. It has accordingly been held further that it is to that Government that the detenu should be afforded opportunity to make representation against the detention order at the earliest opportunity, and not to the officer making the order of detention. In the order under appeal before the Supreme Court in *State of Maharashtra and Another Vs. Sushila Mafatlal Shah and Others*, , a Bench of this High Court, after due advertence to the relevant provisions of the Constitution and the laws, held that the officer making the order of detention is no doubt the Detaining Authority and the detenu has a right to make to such officer, and such officer has also the mandatory obligation to consider, a representation made by the detenu against the order of detention. The Supreme Court has nevertheless overturned this decision of this High Court in *State of Maharashtra and Another Vs. Sushila Mafatlal Shah and Others*, .

5. It appears that the attention of the two Judge Bench of the Supreme Court in

State of Maharashtra and Another Vs. Sushila Mafatlal Shah and Others, was not drawn to the earlier three Judge Bench decision of the Supreme Court in Ibrahim Bachu Bafan Vs. State of Gujarat and Ors, where the three Judge Bench, after referring to the provisions of Section 21 of the General Clauses Act and Section 11(1) of the COFEPOSA Act, has held that the authority or the officer making the order of detention shall, and cannot but, have the power to revoke or modify the order of detention. To the same effect is also the decision of later three Judge Bench in Amir Shad Khan and another Vs. L. Hmingliana and others, where, though without any advertence to either Ibrahim Bachu Bafan Vs. State of Gujarat and Ors, or State of Maharashtra and Another Vs. Sushila Mafatlal Shah and Others, , it has again been held that u/s 21 of the General Clauses Act, operation whereof has been expressly saved by the opening words of Section 11 of the COFEPOSA Act, the officer making order of detention in exercise of the power specially conferred upon him u/s 3 of the COFEPOSA Act, is also the authority to whom the person detained is entitled to make representation against the order of detention and such officer is also obliged to consider the same and to make decision thereon.

6. While making the Order of Reference, the Division Bench, speaking through Mohta, J., was inclined to hold that it was to be governed by the decisions in Ibrahim Bachu Bafan Vs. State of Gujarat and Ors, and Amir Shad Khan and another Vs. L. Hmingliana and others, , as they emanated from Larger Benches than in State of Maharashtra and Another Vs. Sushila Mafatlal Shah and Others, . But his attention was drawn to a Division Bench decision of this High Court in Hiralal Ganeshmal Jain Vs. The State of Maharashtra and others, . Where the Division Bench, speaking through Sujata Manohar, J., (as she then was) held that the question was to be governed by the decision in State of Maharashtra and Another Vs. Sushila Mafatlal Shah and Others, which was a direct decision on the point and not according to the observations in Ibrahim Bachu Bafan Vs. State of Gujarat and Ors, and Amir Shad Khan and another Vs. L. Hmingliana and others, , which, though emanating from Larger Benches, were in the nature of obiter. Thus being confronted with an authority of co-equal Bench of this Court, the Division Bench thought the matter should be referred to a Larger Bench for consideration and for reconsideration, if necessary, of the decision in Hiralal Ganeshmal Jain 1983 Cri LJ 1209 (supra).

7. It must be borne in mind that what has been made binding under the provisions of Article 141 of the Constitution of India is "the law declared by the Supreme Court". If there is a clear enunciation or declaration of law, the same would be binding even though such declaration was not strictly necessary for the disposal of the case or the declaration of law is not followed by actual application thereof in the case in question. The law declared as well as applied in a particular decision becomes the *ration decidendi* of the case while a mere declaration of law, even though solemn and thoroughly reasoned, without application thereof in the case in question is branded as *obiter dictum*. Since Article 141 uses the expression "the law declared" as was the case in Section 212 of the preceding

Constitution, being the Government of India, Act, 1935, "a declaration of law" even though not accompanied by actual application thereof, is binding on all other Courts within the territory of India. From that point of view, it may be idle and futile to ascertain whether a declaration of law, which is otherwise clear, forms part of the ratio or is only obiter, as it would be equally binding in either case. It is true that in both the cases. Ibrahim Bachu Bafan Vs. State of Gujarat and Ors, and Amir Shad Khan and another Vs. L. Hmingliana and others, , the question as to whether the officer specially empowered in this behalf to make the order of detention is also entitled and required to consider and decide the representation made by the detenu, was not essentially required to be considered for the disposal of the case. In Ibrahim Bachu Bafan Vs. State of Gujarat and Ors, the order of detention was quashed on the ground that the power of making a fresh order u/s 11(2) of the COFEPOSA Act was not available to be exercised as the previous order was not revoked u/s 11(1) but was only quashed by the High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution and in Amir Shad Khan and another Vs. L. Hmingliana and others, the order of detention was quashed on the ground that even though the detenu categorically requested the Detaining Authority to take out copies of his representation and to send them to the State Government and the Central Government, the same request was not acceded to resulting thereby in violation of the provisions of Article 22(5) and, therefore the observations in the aforesaid two decisions relating to the power and obligation of the officer making the order of detention to consider and decide the representation made by the detenu were obviously obiter dicta. But as we have already indicated, any observation in any decision of the Supreme Court amounting to clear declaration of law is good enough to bind us under Article 141, whether or not any such declaration has been followed therein with actual application. And that being so, the declaration of law emanating from a larger Bench would obviously outweigh any contrary observation in a smaller Bench and it may not be even relevant to consider as to whether any such declaration, whether by the larger Bench or the smaller Bench, was or was not accompanied by actual application thereof. Our answers to the question No. 1 and No. 2 are therefore that the officer specially empowered u/s 3 of the COFEPOSA Act has also the power to revoke the order of detention in view of Section 11 of the COFEPOSA Act read with Section 21 of the General Clauses Act and that the observations in Amir Shad Khan and another Vs. L. Hmingliana and others, regarding the power of revocation by such officer are binding on us.

8. As to the Question No. 3, we propose to answer in the negative. The undisputed facts, as stated in the order of reference, are that the detaining authority did inform the detenu about his right of representation and the detenu did make a representation to the detaining authority as well as to the Advisory Board. But it is alleged that the detaining authority did not take any independent decision but submitted the representation along with the file to the Secretary, Ministry of Finance, with the endorsement "may be rejected". It further appears

that the Secretary, in his turn, again did the same exercise and forwarded the representation with the file to the Finance Minister who, on consideration of the materials on record, rejected the representation.

9. It has been urged, on the authority of a two-Judge Bench decision of the Supreme Court in *Santosh Anand v. Union of India*, (1981) 2 SCC 420 that merely forwarding the representation with an endorsement "may be rejected", does not amount to taking independent decision. It has been urged further that the detaining authority has been empowered and is bound to take decision on its own and that failure to take a decision one way or the other cannot but result in non-compliance with the constitutional safeguard under Article 22(5) of the Constitution. There are no doubt observations in *Santosh Anand* (supra) in support of the view that the failure on the part of the detaining authority to consider and finally dispose of the representation and merely forwarding the same with the endorsement "the representation may be rejected" to the higher authority would amount to non-compliance with the constitutional safeguard under Article 22(5) and would invalidate the detention order.

10. It must, however, been noted that under the COFEPOSA Act, as will clearly appear from the provisions of Section 11 thereof, the State Government or the Central Government, as the case may be, are also the appropriate authorities for consideration of the representation, though the officer specially empowered to make the order of detention is also one such authority because of the provisions of Section 21 of the General Clauses Act. The question, therefore, is that where such a representation is made to the officer making the order of detention, whether the failure on his part to come to a final decision on his own would by itself, be fatal if, in fact, the officer nevertheless forwarded the representation to the appropriate Government and the latter considered and rejected the same. The entire basis for the decision in *Santosh Anand* (supra) is the assumption that the detenu cannot approach the State Government unless and until the representation is rejected by the detaining authority and/or cannot approach the Central Government either unless he fails to get relief from the State Government. The observation (at p. 422) that "if the representation is rejected by the 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 order revoked" is a clear pointer to that effect. According to that ratio., therefore, the failure on the part of the detaining officer to consider and to finally decide the representation deprives the detenu of his right to approach the State Government or the Central Government, as the case may be, for further consideration of the representation.

11. We would, however, like to point out, and this we obviously do with respect, that the same may not be a correct reading of the provisions of Section 11 and other provisions of the COFEPOSA Act and that this has also been clearly pointed out by a later two-Judge Bench decision of the Supreme Court in *Sat Pal Vs. State of Punjab* and others, to the effect that there should be no hesitation "in

repelling the contention that the power of revocation conferred on the Central Government u/s 11 is not attracted until the State Government has considered the representation made by the detenu and rejected it ....", and that "under the Act a detenu has a right to simultaneously make a representation to the detaining authority" "as also the right to apply to the Central Government for revocation of the Central Government for revocation of the detention order u/s 11". Reference in this connection may also be made to another later two-Judge Bench decision of the Supreme Court in *Raj Kishore Prasad Vs. State of Bihar and Others*, . That was a case, not under the COFEPOSA Act, but under the National Security Act, 1980; but it must be noted, however, that the provisions of Section 14 of the National Security Act are in *pari materia* with Section 11 of the COFEPOSA Act and that being so, under both the Acts, the representation can simultaneously be made to the detaining authority as well as to the State Government or the Central Government. It was pointed out by the two-Judge Bench that even though "constitutionally speaking a duty is cast on the detaining authority to consider the representation" yet if in fact and in effect the appropriate Government has finally considered the representation of the detenu, "it cannot be said that there is contravention of Article 22(5)". It should also be noted that the decision in *Santosh Anand (supra)* was also noticed by the two-Judge Bench in *Raj Kishore Prasad Vs. State of Bihar and Others*, .

12. There should be no doubt, as pointed out in *Sat Pal Vs. State of Punjab and others*, , which was a case under the COFEPOSA Act, that "the Court must look at the substance of the matter and not act on mere technicality. We must not for a moment forget that all the rights guaranteed by Part III of the Constitution may be required to suffer in the interests of the security of the State as has been pointed out by a three-Judge Bench of the Supreme Court, while dealing with a case under the COFEPOSA Act, in *Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others*, , to which our attention has been drawn by Mr. Agrawal. The relevant observations are as hereunder :-

".... smuggling of foreign exchange racketeering and related activities have a deleterious effect on the national economy and thereby a serious adverse effect on the security of State. The society must be protected from that social menace by immobilizing the persons by detention of the persons engaged in those operations and to disrupt the machinery established for furthering smuggling and foreign exchange manipulations (Statement of Objects and Reasons of 1975 Act). Preventive detention unlike punitive detention which is to punish for the wrong done, is to protect the society by preventing wrong being done. Though such powers must be very cautiously exercised not to undermine the fundamental freedoms guaranteed to our people, the procedural safeguards are to ensure that, yet these must be looked at from a pragmatic and common sense point of view. The exercise of the power of preventive detention must be strictly within the safeguards provided. We are governed by the Constitution and our Constitution embodies a particular philosophy of Government and a way of life and that necessarily requires understanding between those who exercise powers

and the people over whom or in respect of whom such power is exercised. The purpose of exercise of all such powers by the Government must be to promote common well-being and must be to subserve that common good. It is necessary to protect therefore the individual rights in so far as practicable which are not inconsistent with the security and well-being of the society. Grant of power imposes limitation on the use of the power. There are various procedural safeguards and we must construe those in proper light and from pragmatic commonsense point of view. We 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 country and national security may claim in certain circumstances higher priority.

"As has been set out by Thomas Jefferson "to lose our country by a scrupulous adherence to written law would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.""

13. We have given the matter our best and anxious-most consideration and we have felt that there is some amount of conflict between the decisions in *Raj Kishore Prasad Vs. State of Bihar and Others*, , as according to the former the failure on the part of the detaining authority to consider and decide the representation is fatal to the order of detention, though according to the latter, such failure may not be fatal if in fact and in effect the same has finally been considered by an appropriate authority specified under the relevant law. As we have already noted, in the case at hand, even assuming that there was a failure on the part of the officer making the order of detention to consider and decide the representation, the representation has nevertheless been considered and decided by the Finance Minister, who is undoubtedly an appropriate authority for the purpose of consideration of the representation and decision thereon.

14. It has been pointed out by one of us, while speaking for a Special Bench of the Calcutta High Court in *Bholanath Karmakar and Others Vs. Madanmohan Karmakar and Others*, on the question as to the course to be followed by the High Court when confronted with contrary decisions of the Supreme Court emanating from Benches of co-equal strength, as hereunder :-

"..... When contrary decisions of the Supreme Court emanate from Benches of equal strength, the course to be adopted by the High Court is, firstly, to try to reconcile and to explain those contrary decisions by assuming, as far as possible, that they applied to different sets of circumstances. This in fact is a course which was recommended by our ancient Jurists - "Srutirdwaidhe Smritirdwaidhe Sthalaveda Prakalapate" - in case there are two contrary precepts of the Sruties or the Smritis, different cases are to be assumed for their application. As Jurist Jaimini said, contradictions or inconsistencies are not to be readily assumed as they very often be not real but only apparent resulting from the application of the very same principle to different sets of facts - "Prayoge Hi Virodha Syat". But

when such contrary decisions of co-ordinate Benches cannot be reconciled or explained in the manner as aforesaid, the question would arise as to which one the High Court is obliged to follow."

"One view is that in such a case the High Court has no option in the matter and it is not for the High Court to decide which one it would follow but it must follow the later one. According to this view, as in the case of two contrary orders issued by the same authority, the later would supersede the former and would bind the subordinate and as in the case of two contrary legislations by the same Legislature, the later would be the governing one, so also in the case of two contrary decisions of the Supreme Court rendered by Benches of equal strength, the later would rule and shall be deemed to have overruled the former. P. B. Mukharji, J. (as his Lordship then was) in his separate, though concurring, judgment in the Special Bench decision of this Court in *Pramatha Nath Mitter and Others Vs. Hon"ble The Chief Justice of the High Court at Calcutta in the State of West Bengal and Others*, , took a similar view, S. P. Mitra, J. (as his Lordship then was) also took such a view in the Division Bench decision of this Court in *Sovachand Mulchand v. Collector, Central Excise*, AIR 168 Cal 174, para 56. To the same effect is the decision of a Division Bench of the Mysore High Court in *New Krishna Bhavan v. Commercial-tax Officer*, AIR 1961 Mys 3 and the decision of the Division Bench of the Bombay High Court in *Vasant Tatoba Hargude and Others Vs. Dikkaya Muttaya Pujari*, . A Full Bench of the Allahabad High Court in *U.P. State Road Transport Corporation Vs. The State Transport Appellate (Tribunal), U.P. Lucknow and Others*, has also ruled to that effect. The view appears to be that in case of conflicting decisions by Benches of matching authority, the law is the latest pronouncement made by the latest Bench and the old law shall change yielding place to new."

"The other view is that in such a case the High Court is not necessarily bound to follow the one which is later in point of time, but may follow the one which, in its view, is better in point of law. Sandhawalia, C.J. in the Full Bench decision of the Punjab & Haryana High Court in *Indo Swiss Time Limited Vs. Umrao and Others*, took this view with the concurrence of the other two learned Judges, though as to the actual decision, the other learned Judges differed from the learned Chief Justice. In the Karnataka Full Bench decision in *Govindanaik G. Kalaghatigi Vs. West Patent Press Co. Ltd. and Another*, , the minority consisting of two of the learned Judges speaking through Jagannatha Shetty, J. also took the same view (*supra*, at p. 95) and in fact the same has been referred to with approval by Sandhawalia, C.J. in the Full Bench decision in *Indo Swiss Time Limited Vs. Umrao and Others*, ."

"This later view appears to us to be in perfect consonance with what our ancient Jurist Narada declared - *Dharmashastra Virodhe Tu Yuktiyukta Vidhe Smrita* - that is, when the Dharmashastras or Law Codes of equal authority conflict with one another, the one appearing to be reasonable, or more reasonable is to be preferred and followed. A modern Jurist, Seervai, has also advocated a similar

view in his Constitutional Law of India, which has also been quoted with approval by Sandhwalia, C.J. in *Indo Swiss Time Limited Vs. Umrao and Others*, and the learned Jurist has observed that "judgments of the Supreme Court, which cannot stand together, present a serious problem to the High Courts and Subordinate Courts" and that "in such circumstances the correct thing is to follow that judgment which appears to the Court to state the law accurately or more accurately than the other conflicting judgment."

"It appears that the Full Bench decision of the Madras High Court in *R. Rama Subbarayalu Reddiar Vs. Rengammal*, , would also support this view where it has been observed (at p. 452) that "where the conflict is between two decisions pronounced by a Bench consisting of the same number of Judges, and the subordinate Court after a careful examination of the decisions came to the conclusion that both of them directly apply to the case before it, it will then be at liberty to follow that decision which seems to it more correct, whether such decision be the later or the earlier one". According to the Nagpur High Court also, as would appear from its Full Bench decision in *AIR 1943 340 (Nagpur)* , in such case of conflicting authorities, "the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other", thereby indicating that the subordinate Courts would have to prefer one to the other and, therefore, would be at liberty to follow the one or the other."

"Needless to say that it would be highly embarrassing for the High Court to declare one out of the two or more decisions of the Supreme Court to be more reasonable implying thereby that the other or others is or are less reasonable. But if such a task falls upon the High Court because of irreconcilable contrary decisions of the Supreme Court emanating from Benches of co-ordinate jurisdiction, the task, however uncomfortable, has got to be performed."

"We are inclined to think that a five-Judge Bench of the Supreme Court in *Atma Ram Vs. The State of Punjab and Others*, , has also indicated (at p. 527) that such a task may fall on and may have to be performed by the High Court. After pointing out that when a Full Bench of three Judges was inclined to take a view contrary to another Full Bench of equal strength, perhaps the better course would have been to constitute a larger Bench, it has, however, been observed that for otherwise the subordinate Courts are placed under the embarrassment of preferring one view to another, both equally binding on them. According to the Supreme Court, therefore, when confronted with two contrary decisions of equal authority, the subordinate Court is not necessarily obliged to follow the later, but would have to perform the embarrassing task "of preferring one view to another".

".... We are, however, inclined to think that no blanket proposition can be laid down either in favour of the earlier or the later decision and, as indicated hereinbefore, and as has also been indicated by the Supreme Court in *Atma Ram Vs. The State of Punjab and Others*, , the subordinate Court would have to prefer one to the other and not necessarily obliged, as a matter, of course, to follow

either the former or the later in point of time, but must follow that one, which according to it, is better in point of law. As old may not always be the gold, the new is also not necessarily golden and ringing out the old and bringing in the new cannot always be an invariable straight-jacket formula in determining the binding nature of precedents of co-ordinate jurisdiction."

The law as enunciated in that Special Bench decision, as quoted hereinabove, has our unqualified concurrence.

15. Our attention has been drawn by Mrs. Ranjana Desai to the Full Bench decision of the Allahabad High Court in *Ganga Saran Vs. Civil Judge, Hapur, Ghaziabad and others*, where also a similar view has been taken by the three Judge Bench (at p. 118). With respect, this can be the only reasonable solution and the only way out, when we are confronted with contrary decisions of the Supreme Court emanating from co-equal Benches. Both being binding on us by reason of their authority, we cannot but have the unpleasant task of choosing that one which appears to have better authority of reasons. During the preparation of this judgment our attention has also been drawn to the Division Bench of this High Court in *Mansing Surajsingh Padvi Vs. The State of Maharashtra*, where Tarkunde, J., speaking for the Bench, has also taken the same view after referring to, with approval, the following observations in *Salmond on Jurisprudence*, 12th Edition Page 153 :-

"Where authorities of equal standing are irreconcilably in conflict, a lower court has the same freedom to pick and choose between them as the schizophrenic court itself. The lower court may refuse to follow the later decision on the ground that it was arrived at per incuriam, or it may follow such decision on the ground that it is the latest authority. Which of these two courses the court adopts depends, or should depend, upon its own view of what the law ought to be."

It may also be noted that the same view was taken by one of us (Bhattacharjee, C.J.) in *Gopal Chandra Kalay v. State* 1981 Lab IC 422 and in *Union of India v. Ashok* AIR 1983 Sik 19 and also by a learned single Judge of this Court in *The Special Land Acquisition Officer (I), Bombay and Another Vs. The Municipal Corporation of Greater Bombay*, . We may, however, note that the Full Bench of the Allahabad High Court in *Ganga Saran* (supra) has failed to notice an earlier Full Bench decision of that Court itself in *U.P. State Road Transport Corporation* (AIR All 1) which laid down a contrary proposition.

16. The Common Law rule is that "the criminal should not go free because the Constable blundered". This principle has been accepted in India, as will appear from the provisions of Section 465 of the Code of Criminal Procedure, 1973, and also its predecessor, being Section 537 of the preceding Code of 1898. In the United States of America, however, because of the prohibition contained the Fourth Amendment of the American Constitution against unreasonable search and seizure, the principle of "exclusionary rule of evidence" has been evolved providing that materials obtained by illegal search or seizure must be excluded

from evidence against the criminal. As already noted, this rule of "exclusionary rule of evidence" has virtually been ruled out in India by the aforesaid provisions of the Code of Criminal Procedure, and as has been held by the Supreme Court in a series of decisions, the illegality of search or seizure will not vitiate the seizure or shut out any evidence collected thereby unless prejudice to the accused has in fact been shown to have taken place. Reference in this connection may be made, among others, to the decisions of the Supreme Court in *Sunder Singh Vs. State of Uttar Pradesh*, , *Radhakishan Vs. State of U.P.*, and in *State of Maharashtra Vs. Natwarlal Damodardas Soni*, . Even in America, the birth place of the "exclusionary rule of evidence", a deviation is now being made as would appear from *Stone v. Powell* and *Wolf v. Rice* 1976 428 US 465 where it has been pointed out that "application of the rule thus deflects the truth-finding process and often frees the guilty".

17. It is true, that the principle, as contained in Section 465 of the Code of Criminal Procedure, to the effect that every error, omission or irregularity cannot have a vitiating effect unless a prejudice has in fact been caused, is to be applied in criminal trials. But even when the detention is not punitive, but is preventive only, we are inclined to think that any and every error, omission or deviation must not be allowed to vitiate the process, unless the Court is satisfied that the detenu was likely to be prejudiced thereby, or that there has been an infraction of any mandatory provision of law.

18. For all these reasons, we would proceed to govern ourselves by the decisions in *Sat Pal* AIR 1980 SC 2230 (supra) and in *Raj Kishore Prasad Vs. State of Bihar and Others*, both by reason of their authority as well as by the authority of their reasons and we would accordingly hold that where, as here, the representation made by the detenu has in fact been duly considered and decided by an appropriate authority, the mere fact that another authority, rather of a lower rank, has failed to consider or decide the same, cannot, by itself, affect the validity of the order of detention. As observed in *Sat Pal Vs. State of Punjab and others*, "the Court must look at the substance of the matter and not act on mere technicality". As was also observed in a much earlier five-Judge Bench decision of the Supreme Court in *Thakur Pratap Singh Vs. Shri Krishna Gupta and Others*, , the tendency of the Courts towards technicality is to be deprecated for "it is the substance that counts" and must take precedence over mere form or technicality. We are satisfied that in this case the representation made by the detenu was in fact, in effect and in substance considered by the appropriate authority. As already indicated, we answer Question No. 3 in the negative.

19. Having thus answered the questions referred to us for our consideration, we would now direct that the writ petition filed by the detenu shall be placed before the appropriate Bench forthwith for final disposal on the other questions involved. The office is directed to take immediate steps so that the matter may be placed before the appropriate Bench during the course of the next week.

20. Ordered accordingly.