
(2006) 02 GAU CK 0011

In the Gauhati High Court

Case No : WP (Criminal) No's. 35 and 36 of 2005 and 6 of 2006

Konsam Brojen Singh

APPELLANT

Vs

State of Manipur and Others

RESPONDENT

Date of Decision : 27-02-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 22, 22(4), 22(5)
National Security Act, 1980 — Section 3, 3(1), 8(1)

Citation : (2006) 2 GLR 452 : (2006) 1 GLT 375 : (2006) 1 GLT 371

Hon'ble Judges : B. Sudershan Reddy, C.J.; T. Nandkumar Singh, J.; P.G. Agarwal, J.; Amitava Roy, J.; A. Hazarika, J

Bench : Full Bench

Advocate : D. Phurailatpam, S. Jhaljit, Nikel Singh and Ngongo, for the Appellant; A. Potsangbam, S. Napoleon Singh, S. Sarma, A.K. Phookan, A. Sarma, M.R. Phathak and T.K. Roy, S. Chakraborty, A.G., Nagaland and A.G., Mizoram and N. Dutta, Amicus Curiae, for the Respondent

Final Decision : Dismissed

Judgement

B. Sudershan Reddy, C.J.

If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought -not free thought for those who agree with us but freedom for the thought that we hate." - Justice Oliver Wendell Holmes in his Immortal Dissent in U.S. v. Schwimmer 279 U.S. 664 .

Prologue

1. When the Supreme Court revisited the question whether an officer especially empowered to pass order for preventive detention is required to consider the representation submitted by the detainee in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, which is considered to be a comprehensive work of learning, it was perceived to have provided final solution to the problem

arising in that regard. The significant progress has been made on both constitutional and philosophical fronts, as various issues have been significantly clarified and diverse position given to cogent articulation, yet the debate over interpretation of Article 22(5) has recently been intensified, with advocates and foes bitterly divided as ever,

2. The debate on protection of life and liberty and protection against arrest and detention involves complex and sensitive issues. No doubt a great deal has already been said much of it on merit and on point. That occasion has arisen once again and the issue is presented for consideration before the Court vested with the power of judicial review. The modern activist State is a concomitant of the complexity of modern society ; it is inevitably with us. We must meet the challenge rather than see it was not before us.

3. One of the most treasured liberties provided in the Constitution and perhaps the liberty that sets the Indian apart from many third world countries, is equality before law and equal protection of laws ; protection of life and personal liberty and protection against arrest and detention. The principle is enshrined in the trinity of Articles 14, 21 and 22 of the Constitution. Liberty is not amorphous concept that exist in the minds of dreamers and scholars but a real significant liberty effecting our everyday life as citizens of this great country. There have been times in our history when liberties, although sought, were not realized by all citizens. Liberty forms an important component of part of justice which all political systems governed by Rule of law and constitutionalism, aspire to secure. It is an essential and indispensable ingredient of Government of laws. If the Constitution is the embodiment of our aspirations, it must have become so very largely because of those three articles. Each is a protection with centuries of history behind it after dearly brought with the blood and lives of people determined to prevent oppression of their rulers. Ours is a Government of laws and not of men.

4. In a Government of law existence of the Government will be imperilled if it fails to observe the laws scrupulously. This principle was artfully enunciated by Justice Louis D. Brandeis almost seventy years ago. To quote : "Government is the patent, omnipresent teacher. For good or ill, it teaches the whole people by its example. If the government becomes a law-breaker, it breeds contempt for the law ; it invites every man to become a law unto himself; it invites anarchy". [(See *Olmstead v. US* 277 U.S. 438 (1928))]

5. We saw in the past what happens when the State bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime. "The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organized violence. The legitimacy of the constitutional order is undermined rather than reinforced when the State acts unlawfully" (see *Mohammed v. President of the Republic of South Africa* 2001 (3) S.A. 893.

6. The United States Supreme Court while upholding the right of aliens detained outside the sovereign territory of the United States to invoke a petition for a Writ of Habeas Corpus made significant observation : "At stake in this case is, nothing less than the essence of a free society. Even more important than the method of selecting the people's rules and their successors is the character of the constraints imposed on the Executive by the rule of law. Unrestrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber ... for it this nation is to remain true to its ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny", (Justice Stevens in *Rasul v. Bush* (2004) 542 US 1 : while approvingly quoted his own view in *Padilla v Rumsfeld* [2004 124 Set 2711]

7. While the need for society to protect itself against acts of terrorism today is self evident, it remains all the greatest importance, that in a society which upholds the rule of law, if a person is detained, that individual should have access to all the guaranteed rights so that the question of whether the detention is lawful or not can be evaluated. If it is not lawful, then he has to be released.

8. The Supreme Court of Israel delivered its decision upon a challenge brought on behalf of the Palestinian complainants concerning the security fence being constructed through Palestinian land. While upholding the complaints concerning the excessive way for which wall had been created in several areas said : "Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the State's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and herspirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security.

(emphasis is of ours)

9. While evaluating the importance and critical areas reviewed in the said decision it is observed in *Public Committee against Torture in Israel v. The Government of Israel* "we are aware that this decision does not make it easier to deal with that reality. This is the destiny of a democracy - she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the upper, hand. This rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they

strengthen her spirit and this strength allows her to overcome her difficulties. That goes for this case as well. Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for." (both these decisions are referred in Constitutionalism Human Rights & the Rule of Law : Essays in honour of Soli J Sorabjee, Edited by Prof. Mool Chand Sharma Raju Mamachandran).

10. With these few words we shall now revert to cases on hand.

CORE QUESTION:

11. The short question that falls for our consideration in this batch of writ petitions is whether the detenu under the National Security Act, 1980 (for short "Act") has a right to make representation to the detaining authority in addition to his right to file representation as provided for u/s 8(1) of the Act to the appropriate Government and whether Article 22(5) of the Constitution of India confers any such additional right ? The question received attention of this Court in more than one case.

BACKGROUND AND SEQUENCE OF EVENTS:

12. That a Division Bench of this Court in Thounaojam Lukhoi Singh v. The District Magistrate, Imphal and Ors. 1997 (1) GLT 427 while adverting to the contention that the detaining authority can also revoke the detention order and as such it was incumbent on the part of the detaining authority to inform the detenu accordingly that he can also make a representation to the detaining authority observed "unlike in COFEPOSA and NDPS Act, in the case of detention under National Security Act, a specific provision has been made in Section 8(1) of the Act that a representation against the order of detention must be made to the appropriate Government. Therefore, the argument that such a representation can also be made to the detaining authority is not well founded". The decision rendered by the Supreme Court in Kamleshkumar Ishwardas Patel (supra), according to the Division Bench, is not applicable in the case of detention under National Security Act since the Apex Court considered the validity of the detention order under COFEPOSA and NDPS Act in Kamleshkumar (supra). The ratio of the decision was accordingly confined and held applicable only to the detention order under COFEPOSA and NDPS Act.

13. In Ahanthem Mema @ Nirmala Devi v. District Magistrate, Imphal East and Ors. 2004 (1) GLT 633 , another Division Bench of this Court relying upon the decision of the Supreme Court in Kamleshkumar (supra) and as well as State of Maharashtra and Others Vs. Santosh Shankar Acharya, held that non-consideration of the representation made by the detenu by the detaining authority would be hit by the fundamental right guaranteed under Article 22(5) of the Constitution and make the detention order illegal. The Court took the view that in a case where an Officer other than the State Government issues an order of detention under Sub-section (2) of Section 3, his powers as detaining

authority to deal with the representation under the provisions contained in Section 21 of the General Clauses Act cannot be said to be taken away merely because Section 8(1) of the Act specifically provides for making a representation to the State of Government and the same Division Bench in *Thanglenmang Hangsingh v. District Magistrate, Senapati District and Ors.* (2004) (1) GLT 646 held that the provisions under Article 22(5) of the Constitution cast an obligation on the detaining authority to inform the detainee "detained under any preventive detention law of his right of making representation to the detaining authority before approval of the order of detention by the State Government. This is the established principle of law. In the case at hand, the detaining authority apparently did not inform the detainee of his right to make a representation before him (detaining authority). There is, therefore, a serious lapse on the part of the detaining authority. This lapse alone vitiates the order of detention."

14. That another Division Bench in *Jagdish Debbarma @ Jester v. State of Tripura and Ors.* 2004 (3) GLT 353 took the same view and held that the detaining authority is under obligation to inform the detainee of his right to make a representation before him within 12(twelve) days of the execution of the detention order and noncommunication thereof would vitiate the detention order. The Court took the view that non-communication of the fact to the detainee that he has a right to make a representation to the detaining authority would constitute an infraction of the valuable constitutional right guaranteed to the detainee under Article 22(5) of the Constitution and such failure would make the order of detention invalid.

15. In *Rongjam Momin v. Union of India and Ors.* 2005 (1) GLT 173, a Division Bench of this Court while considering the validity of a detention order made u/s 3(1) of the Meghalaya Preventive Detention Act, 1985 and having found that it is in *peri materia* with the relevant provisions of the National Security Act held that the detainee has a right under Article 22(5) of the Constitution to be informed of his entitlement to file a representation to the detaining authority. The failure on the part of the detaining authority to inform the detainee of his right to file a representation to the detaining authority resulted in infringement of fundamental rights guaranteed under Article 22(5) of the Constitution.

16. The issue came up for consideration once again before a Full Bench of this Court in WP(C) No. 44/2002. On reference being made by a Division Bench of this Court, Full Bench framed the following question for its consideration : -

Whether the detainee under the National Security Act has a right to make representation against the order of detention to the authority making such order, even if the Act provides for making the representation to the appropriate authority ?

17. The Full Bench after referring to the earlier decision on the subject referred to hereinabove and relying upon the decision of the Supreme Court in *Kamleshkumr (supra)* held that the right of making representation to the

detaining authority is traceable to Article 22(5) of the Constitution and "even if the provisions of the National Security Act do not confer any right on the detainee to make representation to the detaining authority and has given a right to make representation, u/s 8(1), to, the appropriate Government, the Constitutional right of the detainee guaranteed under Article 22(5) of the Constitution cannot be taken away as it is fundamental right conferred on such a detainee by the Constitution to make representation to the detaining authority". The Court accordingly declared the decision of this Court in Thounaojam Lukhoi Singh (supra) as not a good law. The reference was accordingly answered.

18. The learned Advocate General, Manipur relying upon the judgments of the Apex Court in Veeramani Vs. State of T.N., and Amin Mohammed Qureshi Vs. Commissioner of Police, Greater Bombay, submitted that all the decisions of this Court referred to hereinabove except the decision in Thounaojam Lukhoi Singh (supra) are per in curiam being contrary to the judgments of the Apex Court in Veeramani v. State of T.N. (supra) and Amin Mohammed Quershi (supra). That is how the Division Bench of this Court referred the matter for consideration by a Larger Bench. The Division Bench having considered the submissions so made by the learned Advocate General formulated the following two important questions of law, namely -.

(i) Whether right of the detainee under National Security Act guaranteed under Article 22(5) of the Constitution of India has conferred on him the right to file representation to the detaining authority in addition to his right to file representation u/s 8(1) of the National Security Act to the appropriate Government ?

(ii) If so, whether failure of the detaining authority and the appropriate Government to inform the detainee of such right shall vitiate the detention order under National Security Act ?

19. Notices were accordingly issued to the learned Advocates General of Assam, Nagaland, Meghalaya, Tripura and Mizoram to assist the Court. The Court also appointed Shri Nilay Dutta, learned Senior Advocate to assist the Court as *amicus curiae*. We have heard all of them in great detail.

Storm of submissions and rain of precedents

20. The learned Counsel for the petitioners submitted that the detainee has additional right to make representation to the detaining authority in addition to his right to file representation u/s 8(1) of the Act to the appropriate Government. The failure on the part of the detaining authority to inform the detainee of his right to make such representation vitiates the detention order under National Security Act.

21. The learned Advocate General, Manipur submitted that representation to be submitted for consideration by the detainee is not to the detaining authority but the appropriate Government in view of the specific provision contained in Section

8 of the Act. The detaining authority is not under any obligation to inform the detainee that he can make a representation to the detaining authority also. The learned Advocate General placed heavy reliance upon the judgments of the Supreme Court reported in Veeramani (supra) and Amin Mohammed Quershi (supra). The learned Advocate General also relied upon the decision of the Apex Court in Raj Kishore Prasad Vs. State of Bihar and Others,

22. The sum and substance of the submissions made by the learned Advocate General was that a detainee under National Security Act does not have a right to make a representation to the detaining authority in addition to the right to make such representation as provided for in Section 8 of the Act. The learned Advocate General of Assam submitted that National Security Act is a self-contained one and opportunity to make representation to the appropriate Government would satisfy the constitutional mandate enshrined in Article 22(5) of the Constitution. Reliance was placed on the decisions of the Supreme Court in Ram Bali Rajbhar Vs. The State of West Bengal and Others, and Pankaj Kumar Chakrabarty and Others Vs. The State of West Bengal,

23. The learned Advocate General, Mizoram submitted that the detainee has a right to make a representation against the order of detention as envisaged under Article 22(5) of the Constitution read with Section 8 of the Act. Such a right includes the right to make a representation even to the detaining authority, who is entitled in law, to revoke the order of detention before the said order is approved by the State Government. The learned Advocate General, Nagaland also made similar submissions. He contended that the detaining authority is the one who passes the detention order and in law may be entitled to rescind or modify his own orders. Advocate General, Meghalaya submitted that representation can be made only to the appropriate Government as provided for u/s 8 of the Act and the same would satisfy the constitutional requirement. The learned Advocate General, Tripura relying on Veeramani (supra) and Amin Mohammed Quershi (supra) submitted that the said decisions since not overruled even by implication this Court is bound by the ratio laid down therein. It was contended that the authority passing the detention order has no jurisdiction to modify or withdraw the detention order and it is the appropriate Government alone which may either approve or not approve the order of detention after receiving the report in the matter from the authority who passed the detention order. The right to make representation as provided for u/s 8(1) of the Act satisfies both the constitutional as well as statutory requirement of making representation and there is no additional right conferred upon the detenu to make representation to the detaining authority.

24. Shri Nilay Dutta, learned senior counsel assisting the Court as amicus curiae submitted that the right to submit a representation against an order of detention flows from the constitutional provisions of the Article 22(5) and even if a law of preventive detention does not include the right to submit a representation, such right would follow and get superimposed by Article 22(5). It is in that context the

Supreme Court in *Kamlesh Kumar* (supra) held that representation can be made in addition to any other authority which is empowered by law to revoke the order of detention. It was submitted that the decisions of the Apex Court indicate two different streams. The first stream includes the decision in *Navalshankar Ishwarlal Dave and another Vs. State of Gujarat and others*, *Amanulla Khan Kudeatalla Khan Pathan Vs. State of Gujarat and Others*, and *State of Maharashtra and Others Vs. Santosh Shankar Acharya*. The second stream includes *Veeramani* (supra) and *Amin Mohammed Quershi* (supra). The first stream of cases would support the views of the various Division Bench of this Court ending with the Full Bench decision. All the judgments in both streams are of coordinate Benches of 2(two) Judges. On the matter of applicability of the ratio, therefore, it would be necessary to lay down the principle for following either of the two streams. The learned senior counsel submitted that the ratio in *Veeramani* (supra) has been explained and distinguished in *State of Maharashtra* (supra). *Amanullah Khan Kudeatalla Khan Pathan* (supra) is also subsequent in point of time. The learned senior counsel accordingly submitted that it would be appropriate to follow the ratio laid down in the first stream of cases.

25. We have carefully considered the storm of submissions and meticulously gone through the precedents.

A word about constitutional logic of protection against detention in certain cases

26. The power to imprison a man without trial, not for what he had already done, but for what he might hereafter do, was entrusted by the Parliament to the Executive.

27. The framers of the Indian Constitution accepted preventive detention as a necessary evil; but that evil should not be aggravated by an interpretation which would drain Article 22(4) to (7) of its contents if a reasonable alternative construction was possible it would avoid that result.

28. It is required to notice that in our country preventive detention is recognized as a normal topic of legislation by entry 9, List I, and entry 3, List III of Schedule Seven. Article 22 confers fundamental rights. Articles 22(1) and (2) provides safeguards for personal liberty. These safeguards are withdrawn in the case of preventive detention and replaced by safeguards provided by Article 22(4) to (7).

29. That unlike in other countries the preventive detention laws are not emergency legislations. They are not war type legislations. The Constitution of India confers legislative competence to the Parliament as well as State Legislatures to pass laws permitting preventive detention. However, the permissible limits of legislation empowering preventive detention are provided under Article 22 of the Constitution, which forms an integral part of Part III of the Constitution of India. It has to be borne in mind that Article 22(4) to (7) of the Constitution of India prescribes minimum procedures that must be included in any law permitting preventive detention and as and when such requirements are not observed the detention even if void ab initio, ceases to be in accordance

with procedures established by law and infringes the fundamental rights of the detainee guaranteed under Articles 21 and 22(5) of the Constitution. It is no doubt true that Article 22(5) of the Constitution is not the source of legislative power but the subject of preventive detention undoubtedly has been brought into the Chapter in fundamental rights.

30. The legislative power under the relevant entries referred to hereinabove is plenary, subject to the limitation on their powers imposed by Article 22(5) as qualified by Article 22(6); though restrictions under Article 22(5) are imposed on the Executive which passes orders of detention, in effect they are also restrictions on legislative power under entries 9 and 3 because any law empowering the Executive to disregard the limitations imposed by Clause (5) of Article 22 read with Clause (6) would be void.

31. The Supreme Court time and again stated and restated the principle that the statutory and the constitutional provisions relating to preventive detention must be strictly complied with "...it is not permissible in matters relating to the personal liberty and freedom of a citizen to take either a liberal or a generous view of the lapses on the part of the officers. In matter where the liberty of the citizen is involved/ it is necessary for the officers to act with utmost expedition and in strict compliance with the mandatory provisions of the law", (see Hem hall Bhandari v. Sikkim AIR 1987 SC 765.

32. In Vijay Narayan Singh v. Bihar, Chinnappa Reddy, J observed "our Constitution does not give a carte blanche to any organ of the State to be the sole arbiter.... Preventive detention is considered so treacherous and such an anathema to civilized thought and democratic polity that safeguards against undue exercise of the power to detain without trial have been built into the Constitution itself and incorporated, as Fundamental Right... when demanded, where there has been any excessive detention, that is, whether the limits set by the Constitution and the Legislature have been transgressed. Preventive detention is not beyond judicial scrutiny."

33. Lord Atkin in a great dissenting judgment (Liversidge v. Sir John Anderson [1942] A.C 244 declared "... amid the clash of arms, the laws are not silent... it has always been one of the pillars of freedom, one of the principles of liberty for which we are now fighting, that the Judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the Executive, alert to see that any coercive action is justified in law.

34. Lord Simonds spoke in the tradition of centuries when he said "blind unquestioning obedience is the law of tyrants and of slaves :.... Arrested with or without warrant, the subject is entitled to know why he is deprived of his freedom, if only in order that he may, without a moment's delay, take such steps as will enable him to regain it". (See Christie vs. Leachinsky [(1947) AC 573].

35. Social security may require the Executive should have power to make preventive arrest, but individual freedom requires that a man should have

protection from unlawful detention. The principles so far laid down suggest that it is the duty of the Courts to balance the conflicting interest.

Relevant constitutional provision

36. In the present case, we are concerned only with Clause (5) of Article 22, which runs as follows:

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.

37. It confers specific fundamental rights and imposes constitutional obligation and commands the authority making the order to communicate the grounds, as soon as may be, on which the order has been made. The second right given to the detainee relates "the earliest opportunity" of making the representation against the order. The provision does not specify as to whom such a representation could be made but the representation to be made is against the order of detention passed by the authority. The right to make a representation against the detention order itself is a distinct fundamental right guaranteed under Article 22(5) of the Constitution. Even in the absence of any such provision, in a given preventive detention law, the detainee has fundamental right of making representation against the order of detention. The Legislature in due recognition of such a guaranteed fundamental right may provide for the procedure and other details and may specify the authority to whom such a representation could be made. The right to make such a representation is, thus, traceable to guaranteed fundamental, rights and not to any municipal law.

38. In *Kamleshkumar* (supra) the Supreme Court in an authoritative pronouncement held "the object and purpose of the representation that is to be made by the person detained as to enable him to obtain relief at the earliest opportunity, the said representation has to be made to the authority which can grant such a relief, i.e., the authority which can revoke the order of detention and set him liberty. The authority that has made the order of detention can also revoke it. This right is inherent in the power to make the order. It is recognised by Section 21 of the General Clauses Act. 1897 though it does not flow from it. It can, therefore, be said that Article 22(5) postulates that the person detained has a right to make a representation against the order of detention to the authority making the order. In addition, such a representation can be made to any other authority which is empowered by law to revoke the order of detention.

(emphasis is of ours)

39. This authoritative statement of law, in our considered opinion, is not confined and applicable only in cases of orders for preventive detention under COFEPOSA and PIT NDPS Act. Though the question that had fallen for consideration in

Kamleshkumar (supra) was in the context of orders for preventive detention passed by Officers empowered by the Central Government under COFEPOSA Act and PIT NDPS Act ; the Supreme Court in clear and categorical terms held that the question posed has to be considered in the light of the provisions relating to the preventive detention contained in Article 22 of the Constitution as well as provisions contained in the relevant statutes. Having so considered the matter the Apex Court in clear and categorical terms held the right to make representation against the order of detention to the authority making the order is recognized as a distinct fundamental right guaranteed under Article 22(5) of the Constitution of India. The argument that the law declared by the Apex Court in Kamleshkumar (supra) is applicable only in the context of detention order under COFEPOSA is devoid of merit. The additional right to make representation against the order of detention to the authority concerned itself is a distinct fundamental right conferred under the provisions of the Article 22(5) of the Constitution and it is immaterial whether that fundamental right is incorporated in the law authorizing preventive detention. The right to make such a representation, forms an integral and non-negotiable constituent of our enduring constitutional value.

40. In Vimalchand Jawantraj Jain Vs. Shri Pradhan and Others, it is held "it is now settled law that the power to preventively detain a person cannot be exercised except in accordance with the constitutional safeguards provided in Clauses (4) and (5) of Article 22 and if any order of detention is made in violation of such safeguards, it would be liable to be struck down as invalid. It is immaterial whether these constitutional safeguards are incorporated in the law authorizing preventive detention, because even if they are not, they would be deemed to be part of the law as a super-imposition of the Constitution which is the supreme law of the land and they must be obeyed on pain of invalidation of the order of detention...."

41. In Navalshankar Ishwarlal Dave and another Vs. State of Gujarat and others, the Supreme Court while construing Section 3 of the Gujarat Prevention of Anti-Social Activities Act, 1985, which is in pari materia to Section 8 of the National Security Act, held that the power to rescind the detention order would be available to the authorized officer during its operation of 12 days from the date of execution of the detention order or approval by the State Government, whichever is earlier. But the general power of revocation was conferred only on the State Government and the authorised officer has no express power or general power u/s 21 of the General Clauses Act to revoke or modify the order if the State Government approved of it under Sub-section (3) of Section 3 read with Section 3(1) of the said Act.

42. Similar is the view taken in Amanullah Khan Kudeatalla Khan Pathan (supra) wherein it is held that it is a constitutional obligation of the detaining authority to consider the representation made by the detenu for revoking or modifying the detention order and non-consideration would tantamount to violation of constitutional rights to a detenu under Article 22(5) and the right to make a

representation to the detaining authority is, thus, traced to the fundamental right guaranteed under Article 22(5) of the Constitution.

43. In Santosh Shankar Acharya (supra) while construing Sections 3 and 8 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders and Dangerous Persons Act, 1981, which are exactly in pari materia to Sections 3 and 8 of NSA, held "the only logical and harmonious construction of the provisions would be that in a case where an order of detention is issued by an officer under Sub-section (2) of Section 3 of the Act, notwithstanding the fact that he is required to forthwith report the factum of detention together with the ground and materials to the State Government and notwithstanding the fact that the Act itself specifically provides for making a representation to the State Government u/s 8(1), the said detaining authority continues to be the detaining authority until the order of detention issued by him is approved by the State Government within a period of 12 days from the date of issuance of the detention order. Consequently, until the said detention order is approved by the State Government the detaining authority can entertain a representation from a detainee and in exercise of his power under the provisions of Section 21 of the General Clauses Act could amend, vary or rescind the order, as is provided u/s 14 of the Maharashtra Act. Such a construction of powers would give a full play to the provisions of Section 8(1) as well as Section 14 and also Section 3 of the Maharashtra Act. This being the position, noncommunication of the fact to the detainee that he could make a representation to the detaining authority so long as the order of detention has not been approved by the State Government in a case where an order of detention is issued by an officer other than the State Government under Sub-section (2) of Section 3 of the Maharashtra Act would constitute an infraction of a valuable right of the detainee under Article 22(5) of the Constitution and the ratio of the Constitution Bench decision of this Court in Kamleshkumar case (supra) would apply notwithstanding the fact that in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, the Court was dealing with an order of detention issued under the provisions of the COFEPOSA Act.

(emphasis supplied)

44. The decision in Veeramani (supra) upon which heavy reliance was placed by the Advocates General, Manipur and Tripura has been distinguished in Santosh Shankar Acharya (supra) in which it is held that the ratio, if any, in Veeramani (supra) is required to be understood in the light of the Constitution Bench decision in Kamleshkumar (supra). It is observed that Veeramani (supra) relied upon the judgment of the Supreme Court in State of Maharashtra and Another Vs. Sushila Mafatlal Shah and Others, which has been directly considered and overruled in Kamleshkumar (supra). It is not open to appreciate the ratio of the decision in Veeramani (supra) in any manner other than the manner in which the same was understood by the Supreme Court in Santosh Shankar Acharya (supra).

45. It is settled law and it requires no restatement at our hands that when an

earlier judgment of the Supreme Court is analyzed and considered by latter Bench of that Court then the view taken by latter as to the true ratio of the earlier case is authoritative. In any case that view is binding on the High Courts. If any authority is required in support of the proposition the same can be found in *State of Punjab v. Teja Singh* 1979 Crl. U 1648 and *T. Muralidhar Rao Vs. State of A.P. and Others*,

46. In *Amin Mohammed Quershi* (supra) relying on *Veeramani* (supra) the Apex Court observed "the representation could be made only to the Central Government and the State Government, as the case may be, and not the detaining authority ; therefore, the detaining authority is not under obligation to tell the detinue that he can make a representation to it also" The Supreme Court merely followed the verdict in *Veeramani* (supra). The observation made by the Apex Court in *Santosh Shankar Acharya* (supra) in respect of the decision in *Veeramani* (supra) may equally be applicable to the decision in *Amin Md. Quershi* (supra). That at any rate, this Court is not precluded in following the ratio and the law declared in *Santosh Shankar Acharya* (supra) which is subsequent in point of time to both *Veeramani* (supra) and *Amanulla Khan* (supra).

47. In *Wasiuddin Ahmed Vs. District Magistrate, Aligarh, U.P. and Others*, the Supreme Court emphasized the need for observance of procedural safeguards, particularly in cases of deprivation of life and liberty and interpreting Article 22(5) the Court observed "it is, therefore, imperative that the detaining authority must "apprise" a detinue of his constitutional right under Article 22(5) to make a representation against the order of detention and of his right to be heard before the Advisory Board. The right of the detinue to make a representation under Article 22(5) would be, in many cases, little avail if the detinue is not informed of his right."

The procedural safeguards envisaged under Article 22(5) of the Constitution to make representation against the order of detention are substantive in nature forming part of the package of constitutional right. Procedures are the means by which standard of fair treatment are applied in legal processes ; procedures are instrumental to fair treatment and the claim for any particular procedure is contingent on its serving that end. (See *Galligan Due process and Fair Play* (Oxford, Clarendon Press, 1996). Such procedural devices are always extended to giving of reasons and basing of decisions on evidence.

48. In *Union of India (UOI) and Another Vs. Sneha Khemka and Another*, the Apex Court held a right to make a representation is a facet of fundamental right "the cleavage in opinion of this Court as to whether the detaining authority can pass an order revoking the order of detention came up for consideration before a Constitution Bench of this Court in no uncertain terms held that the revoking authority has the requisite jurisdiction to revoke an order of detention."

49. However, the learned Advocate General, Manipur further relying on the decisions of the Supreme Court in *Sk. Abdul Karim and Others Vs. State of West*

Bengal, Pankaj Kumar Chakrabarty and Others Vs. The State of West Bengal, and John Martin Vs. State of West Bengal, strenuously contended that consideration of the representation by the State Government alone is a sufficient compliance of Article 22(5). The representation is required to be made by the detenu to the appropriate Government as provided for under Sub-section (1) of Section 8 National Security Act and it is the appropriate Government which has to consider the representation. Relying on Raj Kishore Prasad (supra), the learned Advocate General further contended that in view of the specific provision contained in Section 8 of National Security Act a representation is not contemplated to the detaining authority but the appropriate Government and it is the appropriate Government which must consider the representation.

50. The decisions reported in Haradhan Saha Vs. The State of West Bengal and Others, and John Martin (supra) do not deal with the situation with which we are confronted in the cases on hand. In neither of the decision it has been held as contended by the learned Advocate General, Manipur that a person detained under the provisions of the MISA have no right to make any representation to the detaining authority and the detaining authority cannot consider the representation of the detenu. The contention that a person detained under MISA has an additional right to make a representation to the detaining authority and, therefore, the detaining authority is under constitutional obligation to inform the detenu of his right to make representation to the detaining authority also was not urged. In Haradhan (supra) the constitutional validity of the MISA was challenged and the same has been upheld by the Apex Court. While advertng to the provisions of the said Act the Constitution Bench observed that Section 8 follows all provisions of Article 22(5) of the Constitution since it enjoins opportunity of making the representation against the order to the State Government. There is no further discussion as to whether the detenu is entitled to make representation to the detaining authority in addition to his right to make representation to the State Government.

51. In John Martin (supra) the contention urged on behalf of the petitioner was that the representation of the petitioner ought to have been considered by an impartial Tribunal constituted by the State Government and it was not sufficient compliance with the requirements of Article 22(5) that it should have been considered by the State Government. Repelling the contention the Court held that Section 8(1) of the MISA lays down in clearest terms which admit of no doubt that the opportunity which is to be afforded to the detenu is to make a representation against the order of detention to the appropriate Government and it is the appropriate Government which has to consider the representation. There was no contention that the detenu has an additional right to make representation to the detaining authority for its consideration. These decisions do not render any help whatsoever in resolving the issue that arises for our consideration in these writ petitions. Reliance on the said decision is misplaced.

Maxim "Expressum Facit Cessare Taciturn

52. The learned Advocate General, Manipur relying upon the maxim "*Expressum Facit Cessare Taciturn*" ("when there is express mention of-certain things, then anything not mentioned is excluded") contended that there is no express mention in Section 8 of the Act of any additional right conferred upon the detainee to make representation to the detaining authority. The contention was that it is expressly mentioned in Section 8 of the Act about the right to make representation to the appropriate Government and anything not mentioned is excluded. This submission was made relying on the decision in *Union of India and Another Vs. Tulsiram Patel and Others*, The submission, in our considered opinion, is totally untenable and unsustainable for the simple reason that it is based on the assumption as if the right to make representation is traceable to Section 8 of the National Security Act, 1980. It has been consistently held that a person detained under whatsoever preventive detention laws has two rights under Article 22(5) : (i) to be informed, as soon as may be, of the grounds on which the order of detention is based ; i.e., the grounds which led to the subjective satisfaction of the detaining authority, and (ii).to be afforded the earliest opportunity of making a representation against the order of detention, i.e., to be furnished with the sufficient particulars to enable him to make a representation which on being considered may obtain relief to him.

53. In *State of Punjab and Others Vs. Jagdev Singh Talwandi*, the Supreme Court observed the interpretation of Article 22(5) consistently adopted by the Court is, perhaps, one of the outstanding contributions of the Court to advance the cause of human rights. It is therefore obvious even in the absence of such a provision in National Security Act, 1980, the detainee still would have right to make a representation against the order of detention. The right to make a representation to the detaining authority by a detenu in addition to his right to make such a representation to the appropriate Government is rooted in. Article 22(5) of Constitution of India. In our considered view the controversy, if any, in this regard is set at rest by the judgment of the Constitution Bench in *Kamleshkumar* (supra). The issue is no more in *res integra*. This additional right to make a representation to any other authority other than the appropriate Government which is empowered by law to revoke order of detention is held to be an integral part of guaranteed fundamental right under Article 22(5) of the Constitution.

Contention based on General Clauses Act

54. The question whether the District Magistrate exercising the power of detention u/s 3(2) of the Act is the detaining authority and whether Section 21 of the General Clauses Act, 1897 would confer any power upon the District Magistrate to rescind or modify the detention order need not be gone into in view of the authoritative pronouncement of the Apex Court again in *Kamleshkumar* (supra) in which it is held that the authority that has made the order of detention has the inherent right to revoke it and the same is recognised by Section 21 of the General Clauses Act. The right to revoke does not flow from Section 21 of the General Clauses Act but it is recognized by it. The District Magistrate or

Commissioner of Police, as the case may be, who are empowered to pass orders of detention are undoubtedly the detaining authorities because they can not pass orders of detention unless they arrive at the subjective satisfaction as provided for in Sub-section (2) of Section 3 of the Act. Subjective satisfaction to be arrived at to make order detaining a person is the same whether it is exercised by the Central Government, State Government, District Magistrate or Commissioner of Police, as the case may be. The formation of such opinion as an erroneous one on whatever grounds can always be brought to the notice of the authority making the order and the authority has inherent right to revoke the order on being satisfied the order to be erroneous.

55. We are in complete agreement with view taken by this Court in *Ahanthem Mema @ Nirmala Devi* (supra), *Thanglenmang Hangsing* (supra), *Rongjam Momin* (supra), *Jagadish Debbarma @ Jester* (supra).

56. The view taken by the Full Bench in WP (Crl.) No, 9/2002 (Imphal) that the right of making representation to the detaining authority is traceable to Article 22(5) and it shall always be available to a detainee even if there is no provision made u/s 8 of the Act is in conformity with the law declared by the Supreme Court. However, in the course of discussion, the Full Bench observed "the State's power to enact the law relating to preventive detention having flown from Article 22(4) of the Constitution, the right of making the representation to the detaining authority u/s 22(5) shall still available...". The law relating to preventive detention does not flow from Article 22(4) of the Constitution, but the legislative competency is conferred under the relevant entries about which we have discussed in detail. That portion of the judgment is not correct and the same is accordingly overruled.

57. For all the aforesaid reasons, we hold:

(1) That a detainee has two rights under Article 22(5) of the Constitution:

(i) to be informed, as soon as may be, the grounds on which the order of detention is passed, i.e., the grounds which led to the subjective satisfaction of the detaining authority, and

(ii) to be afforded the earliest opportunity of making a representation against the order of detention. The twin rights are available to a detainee whether they are provided for or not in the preventive detention laws.

(2) The right to make representation to the detaining authority by a detainee in addition to his right to file representation to the Central Government or appropriate Government is also guaranteed under Article 22(5) of the Constitution which forms part of package of guaranteed fundamental right. No distinction as such could be made in this regard in respect of the detention orders made either under COFEPOSA, PIT NDPS or National Security Act, 1980, as the case may be.

(3) The detaining authority is under the constitutional obligation to inform the

detenue of his right to make such a representation to the detaining authority.

(4) The failure to inform the detenue of such right to make representation to the detaining authority vitiates the detention order made even under the provisions of the National Security Act, 1980.

58. The Reference is answered accordingly.

Relief

59. In the cases on hand, admittedly, the detaining authorities did not communicate to the detenue of their right to make representation to the detaining authority in addition to their rights to make representation to the appropriate Government. The detention orders are, therefore, liable to be set aside and quashed. The detention order Nos. CRIL/NSA/5 of 2005 dated 15.6.2005 passed by the District Magistrate, Chandel, No. CRIL/3/NSA/DM.BRP/2005/290 dated 4.7.2005 passed by the District Magistrate, Bishnupur District, No. CRIL.10/NSA/DM-BPR/2005/773 dated 21.11.2005 issued by the District Magistrate, Bishnupur shall accordingly stand quashed. The respondents are accordingly directed to release the detenues forthwith, if otherwise not required. They are accordingly set at liberty.

60. Let a Writ of habeas corpus be issued accordingly in each case.

61. Writ petitions are accordingly allowed. No costs.

Epilogue

62. The Court acknowledges the assistance given by all the learned Advocates General and place its appreciation on record.

63. Before we part with the cases, we must acknowledge the dispassionate and invaluable assistance rendered by Shri Nilay Dutta as Amicus Curiae. The Court graciously acknowledges the services rendered by him and places the same on record.