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**(1986) 03 BOM CK 0061**

**In the Bombay High Court**

**Case No : Criminal Writ Petition No. 868 of 1985**

Nandkishore Purohit

APPELLANT

Vs

Home Secretary and Others

RESPONDENT

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**Date of Decision : 11-03-1986**

**Acts Referred:**

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 9(1)  
Constitution of India, 1950 — Article 22

**Citation : (1986) 2 BomCR 25**

**Hon'ble Judges : C.S. Dharmadhikari, J;B.G. Kolse Patil, J**

**Bench : Division Bench**

**Advocate : M.G. Karmali and Madhu Patel, for the Appellant; P.P. Hidlikar, Public Prosecutor for respondent Nos. 1 and 2 and R.M. Agrawal, for Union of India-respondent No. 3, for the Respondent**

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## **Judgement**

C.S. Dharmadhikari, J.—In this writ petition the declaration of the detenu i.e. Shri Shyam Ranjit Singh Rathod under the provision of the COFEPOSA ACT, is challenged on various grounds. It is an admitted position that in pursuance of an order issued on 22nd of July, 1985 the detenu came to be detained on the 1st of August, 1985. Along with the order of detention the grounds as well as copies of the documents referred to and relied upon were supplied by the detaining authority to the detenu. Therefore on 16th of August, 1985 a declaration came to be made u/s 9(1) of the COFEPOSA Act by the Additional Secretary to the Government of India. This declaration was served on the detenu on 7th of September, 1985. The matter was referred to the Advisory Board on 19th of September, 1985 and ultimately the order of detention came to be confirmed on 6th day of January 1986. Thus it is an admitted position that a reference came to be made to the Advisory Board after the normal period though within the extended time in view of the declaration issued u/s 9(1) of the COFEPOSA Act. The relevant portion of the declaration reads as under :

"AND WHEREAS, I the undersigned specially empowered in this behalf by the

Central Government, have carefully considered the material bearing on the matter in my possession

NOW THEREFORE, I, the undersigned, hereby declare that I am satisfied that the aforesaid Shri Shyam Ranjitsingh Rathod is likely to engage in transporting smuggled goods in Bombay, which is an area highly vulnerable to smuggling, as defined in Explanation I to section 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974"

2. It is pertinent to note that the order of detention is issued by the State Government whereas the declaration came to be made by the Additional Secretary to the Government of India for and on behalf of the Central Government. It is also admitted position that it was nowhere stated either in the declaration or contemporaneously otherwise that was the material considered by the declaring authority while making the declaration u/s 9(1) of the COFEPOSA Act. In this view of the matter, learned Counsel Shri Karmali placed strong reliance upon the various decisions of this Court including in Criminal Writ Petition No. 14 of 1985 Smt. Veronica Caitaninho D" Souza v. The Union of India and others), decided on 27th November, 1985 by Shah and Couto, JJ., and a subsequent decision in Criminal Writ Petition No. 815 of 1985 Smt. Roshanara Mohamed Akhtar Motiwala v. The Union of India and Ors., decided by R.A. Jahagirdar and A.D. Tated, JJ. on 10th January, 1986, a decision in Criminal Writ Petition No. 823 of 1985 Shri Kishan Chunilal Shah v. Union of India and others decided by the same Bench on the same day as well as other decisions. He has also placed reliance upon the latest decision of the same bench in Criminal Writ petition No. 69 of 1986 Mohamed Haneef Umer v. The Union of India, decided on 28th of February, 1986. According to Shri Karmali the present case is wholly covered by the said decisions.

3. However, the learned Counsel Shri Agrawal appearing for the Union of India tried to distinguish the said decisions and contended that in the present case after issuance of the declaration, the advocate for the detenu wrote a letter to the Central Government on 25th February, 1985 enquiring as to what was the material on the basis of which the declaration was issued. The Central Government informed the detenu as well as the Advocate for detenu vide its letter dated 7th October, 1985 that the material relied upon was the same as supplied to him and there was no other material which was relied upon while making the declaration. Thereafter the detenu made a representation on 5th December, 1985 which was rejected on 12th December, 1985. In this representation also similar contention was raised which came to be rejected on the same ground. Therefore, according to Shri Agrawal this is a case where the detenu was informed that the declaration was based on the same material, and hence it is distinguishable on facts so far as the earlier decisions in the field are concerned. The contention of Shri Agrawal at the first blush appears to be impressive but when considered in the background of various decisions of this Court, we have no other alternative but to hold that the illegality already

committed cannot be cured by such subsequent events. Admittedly the letter dated 7th October, 1985 was issued beyond the period of 68 days from the date of detention.

4. The decision in Smt. Veronica Caitaninho D' Souza case, which is perhaps the main decision in the field, it is laid down by this Court that "the detenu's right, to be furnished with the material considered and relied upon by the detaining authority for the purpose of reaching the satisfaction of the necessity of issuing a declaration cannot be thwarted by informing him later that the same material was considered and relied on... It is possible that a different material which was not present before the detaining authority might be taken into consideration by the authority issuing the declaration. It is not for the detenu to assume or imagine on his own that the material must be the same and proceed to make a representation. It is the bounden duty of the authority issuing the declaration to furnish the material on which he has based his satisfaction. The mere fact that it is subsequently disclosed to the detenu that the material is the same will not be enough in law. It is well settled that Article 22 enjoins that the detenu must be afforded the earliest opportunity of making a representation and, therefore it is no defence to say that the material was already in possession of the detenu. We do not mean to say that where the authority issuing the declaration makes it clear simultaneously along with the declaration or in the declaration itself that he has relied on the same material copies of which have already been supplied to the detenu, he should be given a second set of such material. In such a case it can be said to be a mere formality to furnish a second set of copies. However, when the detenu is not told while serving the declaration on him that the order is being issued on the same material it is incumbent on the authority to furnish the material to the detenu along with the declaration. It is only, then that the detenu would be in a position to effectively exercise his right of making a representation". Thereafter the Division Bench had made a reference to the observations of the Supreme Court in Mohd. Zakir Vs. Delhi Administration and Others, and ultimately held that "even as regards section 9, the detenu has the constitutional right to make an effective representation and there is no question of his demanding the documents to enable him to make a representation against the declaration. In our view, therefore, the declaration u/s 9 is liable to be quashed on the ground that the copies of documents relied on-by the second respondent were not furnished to the detenu. Failure to furnish copies of documents clearly affects the valuable right of the detenu to be afforded the earliest opportunity of making an effective representation against the declaration. The impugned declaration u/s 9(1), therefore, is liable to be quashed". Following this very decision another Division Bench of this Court consisting of R.A. Jahagirdar and A.D. Tated, JJ. held that such a statement should be made either in the declaration or simultaneously, with it. The Division Bench also made a reference to the later decision of the Supreme Court in Satar Habib Hamdani Vs. K.S. Dilipsinhji and Others, wherein the Supreme Court observed that "there are two safeguards available to the detenu whenever a

declaration u/s 9 is made. The first one is that what is specified in that section is to apply his mind before issuing the declaration and secondly the Advisory Board has to take a specific decision that the continued detention of the detenu is satisfied. The continued detention of the detenu would be justifiable only if the declaration made u/s 9 is valid. Obviously, therefore, the Advisory Board has to go as held by the Supreme Court, behind the declaration u/s 9 and consider the question as to whether there is sufficient cause for the continued detention. If the Advisory Board can go behind the declaration u/s 9 of the Act, then there will be a corresponding right vested in the detenu to make a representation and to plead before the Advisory Board that the declaration made u/s 9 is not valid for one reason or the other and, therefore, the view taken by the Division Bench of Panaji Bench is in consonance with the decision of the Supreme Court in Satar Habib Hamdani's case". Thereafter the Division Bench observed that " the right to make a representation will be necessarily denied, if while serving a copy of the declaration made u/s 9(1) upon the detenu, the material on the basis of which the detention is made, is not supplied to the detenu. At least it should be mentioned in the declaration itself that the material on the basis of which the subjective satisfaction is arrived at, was the same". The Division Bench found that if this is not done, then the continued detention of the detenu would be bad. Obviously this was held because the reference made to the Advisory Board was beyond the period of five weeks and the report was also submitted by the Advisory Board after 11 weeks. In view of the law laid down by the two Division Benches of this Court, in our view the distinction sought to be made by Shri Agrawal cannot be accepted. This being the position in law, we have no other alternative but to hold that the continued detention of the present detenu is vitiated, since it is an admitted position that while serving the declaration, the detenu was not informed accordingly.

In the result, Rule is made absolute and the detenu is directed to be released forthwith, if not required in any other case.