

(1964) 03 P&H CK 0022
In the Punjab And Haryana At Chandigarh

Parkash Chandra	Vs	APPELLANT
Union of India (UOI) and Another		RESPONDENT

Date of Decision : 11-03-1964

Acts Referred:

Air Force Act, 1950 — Section 34, 35
Constitution of India, 1950 — Article 166, 168, 22, 220, 77
General Clauses Act, 1897 — Section 3
Government of India Act, 1935 — Section 49, 59
Official Secrets Act, 1923 — Section 5

Citation : (1965) CriLJ 119

Hon'ble Judges : Gurdev Singh, J;A.N. Grover, J

Bench : Division Bench

Judgement

A.N. Grover, J.—This is a petition under Article 220 of the Constitution for a writ in the nature of habeas corpus for the production of the body of Parkash Chandra, who is at present being detained u/s 3(1)(a)(i) of the Preventive Detection Act, 1950 (hereinafter called the Act) in the Central jail at Tehar, and for directing that he is set at liberty.

2. The petitioner became an Associated Chartered Accountant in the year 1938 In England and on 17th July 1940 he joined the British Air Force. in 1844 he was transferred to the Indian Air Force and was granted an emergency commission in the Accountant Branch of that Force, on 1st February 1944. He was granted a permanent Commission In 1947 and after receiving promotion he was acting in the rank of Group Captain on 12th November 1947. It appears that towards the end of October 1963 he was called to the Air Headquarters by Air Vice-Marshal Raja Ram. He was questioned about "his contacts" and was also asked to submit a reply in writing. According to the return, It was after a full consideration of his reply and the facts and circumstances of the case that he was summarily dismissed from service on 29th November 1963 (vide order Annexure "A").

3. On 4th December 1963 the following order was made u/s 3(1)(a) (1) of the Act which must be reproduced in its entirety (Annexure "B")

GOVERNMENT OF INDIA MINISTRY OF HOME AFFAIRS New Delhi-11, the 4th December, 1963. ORDER

WHEREAS the Central Government is satisfied with respect to the person known as Parkash Chandra son of Chowdhury Radha Krishan Chhabra at present ordinarily residing at 4, Satya Marg, New Delhi, that with a view to preventing him from acting in any manner prejudicial to the relations of India with foreign powers and to the security of India, it is necessary to make an order directing that the said Parkash Chandra be detained:

NOW THEREFORE In exercise of the powers conferred by Sub-clause (I) of clause (a) of Sub-section (i) of Section 3 of the Preventive Detention Act, 1950 (IV of 1950), the Central Government hereby directs that the said Parkash Chandra be detained.

(G. Mukharji) Joint Secretary to the Govt of India FOR AND ON BEHALF OF THE PRESIDENT OF INDIA.

This was followed by another order made In the same manner directing that the petitioner be detained In the Central Jail, Tehar, New Delhi, and treated as Class B detenu (Annexure "C"). On 6th December 1863 Shri G. Mukharjl, Joint Secretary to the Government of India, sent the following communication to the petitioner (Annexure "D"):

In pursuance of the provisions of Section 7 of the Preventive Detention Act, 1950 (4 of 1950), you, Parkash Chandra son of Chowdhury Radha Krishan Chhabra, are hereby Informed that the grounds on which the order of your detention dated the 4th December, 1963 has been made are as follows:

(I) That you, while serving under the Government of India as an officer in the Air Headquarters in the Ministry of Defence come into possession of official secrets connected with the security of India and having a bearing on relations of India with foreign powers.

(II) That during the period March to October 1963 you established and maintained secret contacts with an agent of a foreign power and were, from time to time, in unauthorised and clandestine communication with him with a view to disclosing vital secret information connected with the security of India and having a bearing on relation of India with foreign powers which came into your possession in your official capacity as aforesaid,

(III) That you continue to be in possession of secret information connected with the security of India and having a bearing on relations of India with foreign powers and there are reasonable grounds to believe that you will communicate such information to agents of foreign powers, and

(iv) That your aforesaid activities are prejudicial to the relations of India with foreign powers and also prejudicial to the security of India.

2. That the Central Government is satisfied from your aforesaid activities that

you are likely to act further in a manner prejudicial to the relations of India with foreign powers and to the security of India and has accordingly, made the aforesaid order of your detention with a view to preventing you from so acting.

3. The Central Government considers that it is against the public Interest to disclose to you any facts or particulars as to dates, persons, places, foreign powers, nature of information received, procured and conveyed other than those which have been mentioned above.

The petitioner was also Informed by the same communication that he had a right to make a representation against the order of his detention to the Central Government and "further that he had a right of personally appearing before the Central Advisory Board if he wished to do so. The petitioner addressed a fairly lengthy letter (Annexure "E") to Shri G. Mukharji, Joint Secretary, making a detailed enquiry about various facts and particulars which, according to him, were essential to be supplied before he could make a proper representation to the Advisory Board. This was followed by a representation dated 30th December 1963 (Annexure "F") to the Advisory Board. The present petition was filed in January 1964. The petition was originally heard by my learned brother Gurdev Singh, J. on 29th January 1984 but since certain important points were argued he considered that the petition should be decided by a Division Bench. It may be mentioned that according to the supplementary affidavit filed on behalf of the respondent No. (1), the case of detention of the petitioner was placed before the Advisory Board on 31st January 1964 which after giving a personal hearing to the petitioner submitted a report dated 31st January 1964 u/s 10 of the Act to the effect that there was sufficient cause for the detention of the petitioner (Annexure "R").

4. Mr. I. M. Lall, who appears for the petitioner, has firstly contended that the order of detention dated 4th December 1963 was invalid because It was not an order as contemplated by Section 3 of the Act. According to Mr. Lall, the order itself must contain the grounds of detention. Sub-section (1) of Section 3 is as follows:

(1) The central Government or the State Government may:

(a) If satisfied with respect to any person that with a View to preventing him from acting in any manner prejudicial to

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services-essential to the community, or

(b) if satisfied with respect to any person who is a foreigner within the meaning of the Foreigners Act, 1946 (XXXI of 1946), that with a view to regulating his continued presence in India or with a view to making arrangements for his

expulsion from India,

It is necessary so to do, make an order directing that such person be detained.

Mr. Lall says that the order of detention dated 4th December 1963 (Annexure "B") is a mere reproduction of the legal provision and does not contain any grounds on which the satisfaction of the Central Government was based. Reliance has been placed on certain observations made in paragraph 11 of the Judgment in Naresh Chandra Ganguli Vs. The State of West Bengal and Others, The material part of the these observations may be set out:

Thus, on a consideration of the provisions of Sections 3 and 7 of the Act, it may be observed that the detenu has to be served with a copy of the order passed by the authority contemplated by Sub-section (2) of Section 3, containing, firstly, recitals in terms of one or more of the sub-clauses of clauses (a) and (b) of Section 3(1), which we may call the "preamble", and secondly, the grounds contemplated by Section 7, namely the conclusions of fact which have led to the passing of the order of detention, informing the detenu as to why he was being detained. If the grounds do not contain all the particulars necessary for enabling the detenu to make his representation against the order of his detention, he may ask for further particulars of the facts, and the authority which passed the order of detention is expected to furnish all that information, subject, of course, to the provisions of Sub-section (2) of Section 7; that is to say, the person detained shall not be entitled to the disclosure of such facts as the authority making the order considers against public interest to disclose. Thus, the order of detention to be served upon the person detained would usually consist of the first two parts, namely, the preamble and the grounds, but it may also consist of the third part, namely, the particulars, if and when they are required or found to be necessary. But it has to be noted that the particulars referred to in Sub-sections (3) and (4) of Section 3, would not be identical with the particulars which we have called the third part of the order.

It is, however, noteworthy that in that case also an order had been made on 7th October 1958 in almost the same form as the order dated 4th December 1963 and on the 8th October 1958 a communication was sent to the detenu which was headed as "Grounds for detention under clause (ii) of clause (a) of Sub-section (1) of Section 3 of the Preventive Detention Act, 1950 (Act IV of 1950)". It was further mentioned that the detenu was being detained in pursuance of a detention order made in exercise of the power conferred by Section 3 (2) (c) of the Act on the ground that he was acting in a manner prejudicial to the maintenance of the public order as evidenced by the particulars which were set out in detail. The validity of the detention order was upheld both by the High Court and the Supreme Court. The decision of their Lordships does not support the contention which Mr. Lall has pressed before us because the observations contained in paragraph 11 have to be read in the light of the arguments which appear to have been advanced in that case and which were apparently directed more towards what was stated in the subsequent communication dated 8th

October 1958 though that communication was called an order but in which the ground on which the detention order had been previously made, had been communicated, it having been added "as evidenced by the particulars given below,"

Mr. Lall has also urged that the warrant of arrest had not been executed in the manner laid down in Section 3 (a) of the Act, that is to say in the manner as a warrant of arrest is executed under the Criminal Procedure Code. It is alleged in paragraph 8 (1) (a) of the petition that the relevant provisions are contained in Chapter VI-B of the Criminal Procedure Code and the orders (Annexures "B" and "C") do not show on their face that they were so executed and if there was any warrant whether the petitioner was aware of it. The order of detention (Annexure ""B") was duly served on the petitioner vide paragraph 4 of the return and Mr. Lall has not been able to show us how the detention order was not executed in accordance with Section 3 (a) of the Act read with the "Chapter relating to execution of warrants of arrest in the Code of Criminal Procedure.

5. The next submission of Mr. Lall requires a closer examination. It has been strenuously contended by him that the grounds and particulars supplied to the petitioner by means of the order of communication dated 6th December 1963 were altogether vague and indefinite and the petitioner was denied the right of making an effective representation. It is said that owing to the absence of the necessary and essential facts and particulars on which the conclusions of fact, namely, the grounds for detention were based, the petitioner asked for information relating to those facts and particulars in his letter addressed to Shri Mukharji, the Joint Secretary in the Ministry of Home Affairs, but that the same were not supplied. Although privilege was claimed u/s 7 (2) in respect of all the facts and particulars other than those which had been mentioned in the communication dated 6th December 1963, this right was not properly and validly exercised.

6. Now, according to Mr. Shiv Narain Shanker, who appeals for the respondents, the so-called grounds "(i) and (ii) and the first part of (iii) as appearing in Annexure "D" were merely facts on which a conclusion was drawn contained in the second part of ground (iii), namely, there are reasonable grounds to believe that you will communicate such information to agents of foreign powers". He further says that in (iv) the necessary conclusion of fact has been stated that the aforesaid activities of the petitioner are prejudicial to the relations of India with foreign powers and also pre-judicial to the security of India. Paragraph 2 states the factum of the satisfaction of the Central Government that the petitioner was likely to act further in a manner prejudicial to the relations of India with foreign powers etc., and paragraphs relates -to the privilege with regard to disclosing any more facts or particulars as to dates, persons, places, foreign powers etc.

The main grievance of Mr. Lall on this point is that the petitioner was never told how he came into possession of official secrets mentioned in (i) and that no information was given either in the communication dated 6th December 1983 or

in the reply to the letter sent by the petitioner from jail asking for further particulars as to how the petitioner was alleged to have established secret contacts with an agent of a foreign power whether it was by means of written communications, personal meeting) secret radio communications or in certain other ways. The petitioner was also not told as to how the contact was maintained-whether it was through a messenger or an intermediary. Mr. Lall says that although the name of the foreign power need not have been mentioned in view of the provisions contained in Section 7 (2), the petitioner ought to have been told what was the exact bearing of the alleged contact between the petitioner and the agent of a foreign power on the relations of India with foreign powers. Mr. Lall then points out that no particulars as to how the petitioner continued to remain in possession of the secret information as alleged in (iii) had been given. Mr. Lall also says that some indication as to the source from where the so-called vital secrets came into possession of the petitioner should have been given i. e., whether it was contained in charts, plans, diagrams or in some other office files. We were taken through the entire letter addressed by the petitioner through Jail asking for detailed particulars and facts but ultimately Mr. Lall confined himself to what has been stated above as the minimum requirement of the petitioner for making an effective representation. A great deal of emphasis has been laid on the exposition of the law relating to this branch by Kania C. J. in *The State of Bombay Vs. Atma Ram Sridhar Vaidya*, which has become locus classicus on the subject. It was observed at p. 178 (of SCK) : (at p. 161 of AIR):

The first part of Article 22, clause (5), gives a right to the detained person to be furnished with "the grounds on which the order has been made" and that has to be done "as soon as may be". The second right given to such persons is of being afforded the earliest opportunity of making a representation against the order." It is obvious that the grounds for making the order as mentioned above, are the grounds on which the detaining authority was satisfied that it was necessary to make the order. These grounds therefore must be in existence when the order is made. By their very nature the grounds are conclusions of facts and not a complete detailed recital of all the facts. The conclusions drawn from the available facts will show in which of the three categories of prejudicial acts the suspected activity of the particular person is considered to fall. These conclusions are the "grounds" and they must be supplied. No part of such ground can be held back nor can any more "grounds" be added thereto. What must be supplied are the "grounds on which the order has been made" and nothing less. The second right of "being afforded the earliest opportunity of making a representation against the order" is not confined to only a physical opportunity by supplying paper and pen only. In order that a representation can be made the person detained must first have knowledge of the grounds on which the authorities conveyed that they were satisfied about the necessity of making the detention order. It is therefore clear that if the representation has to be intelligible to meet the charges contained in the grounds the information conveyed to the detained person must be sufficient to attain that object.

At page 187 (of S C R) : (at p. 165 of A I R) the learned Chief Justice deplored the attitude of the authorities about supplying vague and unsatisfactory grounds and it was emphasised by him that while the Constitution gave the Government the privilege of not disclosing in public interest facts which it considered undesirable to disclose but by the words used in Article 22(5) there was a clear obligation to convey to the detained person materials (and the disclosure of which was not necessary to be withheld) which would enable him to make a representation. In two later decisions of their Lordships which are directly in point, the question came up with regard to the scope and ambit of clauses (5) and (0) of Article 22 of the Constitution pursuant to which Section 1 of the Act has been enacted. In *Lawrence Joachim Joseph D'souza Vs. The State of Bombay*, the detenu had been detained u/s 3(1)(a)(i) on the following grounds:

With the financial help given by the Portuguese authorities you are carrying on espionage on behalf of the Portuguese Government with the help of underground workers. You are also collecting intelligence about the security arrangements on the border area and you make such intelligence available to the Portuguese authorities, These activities which are being carried on by you with the object of causing further deterioration in the relations between the Portuguese Government and the Indian government over the question of Goan National Movement, are prejudicial to the security of India and to the relations of India with Portugal.

After referring to the decision in *The State of Bombay Vs. Atma Ram Sridhar Vaidya, Jagannadhadas, J.*, speaking for the Court, observed that the allegations against the detenu were not as precise and specific as might have been desired. But having regard to the nature of the alleged activities of the detenu it was not unlikely that no more could be gathered or furnished. The matter was examined even on the assumption that the grounds furnished were open to the challenge of vagueness. After holding that the detaining authority was under a constitutional obligation to furnish reasonably definite grounds as well as adequate particulars then and there or shortly afterwards, it was observed:

But the right of the detenu to be furnished particulars, is subject to the limitation under Article 22(6) whereby disclosure of facts considered to be against public interest cannot be required. It is however to be observed that under Article 22(6) the facts which cannot be required to be disclosed are those "which such authority considers to be against public interest to disclose" it follows that both the obligation to furnish particulars and the duty to consider whether the disclosure of any facts involved therein is against public interest, are vested in the detaining authority, not in any other.

Before their Lordships in that case a suggestion was made that the decision not to disclose particulars was mala fide and that such mala fides were imputed in a case where no particulars were at all furnished. It was suggested that the power not to disclose facts considered against public interest could not be so exercised as to nullify the constitutional right of the detenu for being afforded a proper

opportunity of representation. It was held that such a contention as to the mala fide exercise of power was untenable having regard to the nature of activities imputed to the detenu. Their Lordships considered it unnecessary to deal with the theoretical contention as to whether or not Article 22(6) overrides the constitutional right to be furnished particulars under Article 22(5) to the extent of denying all particulars and leaving the grounds absolutely vague. In *Puranlal Lakhanpal Vs. Union of India (UOI)*, one of the principal arguments addressed on behalf of the detenu was that by refusing to disclose any facts or particulars as to the dates, persons and places, the detaining authority had really deprived the detenu of the valuable right guaranteed to him under clause (5) of Article 22. S. K. Das, J., who delivered the judgment of the Court, observed that this matter was concluded by the decision in *Lawrence Joachim Joseph D'souza Vs. The State of Bombay*, The following observations at pages 477-478 (of SCR) : at p. 171 of AIR are noteworthy:

It was held therein that the right of the detenu to be furnished with facts or particulars was subject to the limitation mentioned in clause (6) and even if the grounds communicated were not as precise and specific as might have been desired, the appropriate authority had the right to withhold such facts or particulars, the disclosure of which it considered to be against the public interest. Such a privilege having been exercised in the present case the appellant cannot be heard to say, apart from the question of mala fides that the grounds did not disclose the necessary facts or particulars, or that in the absence of such facts or particulars, he was not in a position to make an effective representation.

After referring to the decision in *The State of Bombay Vs. Atma Ram Sridhar Vaidya*, it was laid down that the second right conferred by clause (5) of Article 22 was subject to the right of privilege given by clause (6) and the obligation to furnish grounds and the duty to consider whether the disclosure of any facts involved therein was against public interest were both vested in the detaining authority and not in any other, as had been pointed out in *Lawrence Joachim Joseph D'souza Vs. The State of Bombay*, In this case also it was considered unnecessary to go into the theoretical contention as to whether or not Article 22(6) of the Constitution had overriding effect on the constitutional right to be furnished grounds under Article 22(5) to the extent of denying all the particulars and leaving the grounds absolutely vague, as their Lordships were of the opinion that the grounds furnished to the detenu in that case though not as precise and definite as might be desired gave him a sufficient opportunity of exercising his right under clause (5) of Article 22.

7. Mr. Lal has sought to argue before us the question of the effect of Article 22(6) on Article 22(5) but it would seem that any discussion on that matter would be purely academic and theoretical as we are of the opinion that in the present case the grounds furnished to the petitioner though not as precise and definite as might be desired (to borrow the language of their Lordships) gave him sufficient opportunity of making a representation and exercising his right under clause (5)

of Article 22 of the Constitution. It is significant and must be remembered that the detaining authority has exercised the privilege conferred by Article 22(6) and the petitioner cannot be heard to say, apart from the question of mala fides that the grounds did not disclose the necessary facts or particulars or that in the absence of such facts or particulars he was not in a position to make an effective representation (we have drawn once again on the language employed by their Lordships). On the material placed before us by the parties, it is difficult to hold that the necessary facts or particulars have been withheld on mala fide considerations,

It is apparent from Annexure "D" containing the grounds and the facts or particulars that the petitioner had been clearly told that he had come into possession of certain official secrets connected with the security of India and having a bearing on relations of India with foreign powers while he was serving under the Government of India as an officer in the Air Headquarters in the Ministry of Defence and that during the period March to October 1983 he had established and maintained secret contacts with an agent of a foreign power and had been in unauthorised and clandestine communication with him with a view to disclosing vital secret information connected with the security of India and further that he continued to be in possession of that secret information which justified a belief that he would communicate the same to the agents of foreign powers. If any more facts and particulars were to be supplied to the petitioners relating to the nature of the official secrets, the name or names of the agent or the foreign power, that would necessarily have meant disclosure of such information as would not have been in public interest. At any rate, 8s has been laid down in the two decisions of the Supreme Court it is for the detaining authority and for no other to consider whether the disclosure of any facts would be against public interest.

It may be mentioned that in *Chararjit Singh v. Union of India* Criminal Writ No. 3-D of 1961, D/-31-7-1961 (Punj) by S. S. Dulat J., a detention order had been made on grounds very similar to those on which the detention order has been based in the present case. The argument of vagueness of the grounds was rejected by the learned Judge and the detention order was upheld. We cannot, therefore, accede to the contention of Mr. Lall that the detention of the petitioner should be declared illegal and void because of the denial of the right conferred by clause (5) of Article 22 of the Constitution.

8. It is next contended that Sections 9 and 10 of the Act are vague and no proper procedure has been laid down to be followed by the Advisory Board in the matter of disposing of a representation made by a detenu. It is said that it is not clear as to what is meant by the word "grounds" in Section 9. Will it mean the conclusion of fact alone on which the detention has been ordered or whether it would include particulars and facts on which that conclusion is based? Mr. Lall could not enlighten us further on the basis of his challenge to the validity of Section 9, apart from what has been stated above. As regards Section 10, he

says that in a matter of this nature where the liberty of a subject is involved, a proper procedure should have been prescribed which the Advisory Board was bound to follow before submitting its report containing its opinion as to whether or not there is sufficient cause for the detention of the person concerned.

According to Article 22(4) of the Constitution the Advisory Board has merely to report that there is in its opinion a sufficient cause for such detention. It cannot be said that the Advisory Board is exercising such functions of a Court or a Tribunal for which an elaborate procedure conforming to the pattern of the relevant provisions of the Code of Criminal Procedure has to be prescribed, At any rate, Section 10 ensures that the case of the detenu shall be fully considered by the Advisory Board and that if he so wishes, he is to be heard in person. This fully satisfies the requirements of the rule of natural justice and it is not possible to see any such infirmity in the section which would render it invalid.

9. Mr. Lall submits that there is a complete lack of good faith in the action of the respondent No. 1 in passing the order of detention. It is said that the petitioner was in the Air Force and was subject to the discipline of the Force and if it was believed that he had committed the offences with which he had been charged for purposes of detention, he could have been placed for trial before a court-martial under the Air Force Act, 1950 or he could have been tried under the Official Secrets Act, 1923. It is pointed out that he could have been tried for an offence u/s 34(d) of the Air Force Act which makes the following an offence "treacherously holds correspondence with, or communicates intelligence to, the enemy or any person in arms against the Union". The petitioner could also be tried u/s 35(b) which says that if any person subject to the Act

without due authority holds correspondence with or communicates intelligence to the enemy; or having come by the knowledge of any such correspondence or communication wilfully omits to discover it immediately to his commanding or other superior officer.

Section 5(1) of the Official Secrets Act is in the following terms:

5. (1) If any person having in his possession or control any secret official code or pass word or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place, or relates to anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under Government, or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Government, or as a person who holds or has held a contract made on behalf of Government, or as a person who is or has been employed under a person who holds or has held such an office or contract:

(a) wilfully communicates the code or pass word, sketch, plan, model) article, note, document or information to any person other than a parson to whom he is authorised to communicate it, or a Court of Justice or a person to whom it is, in

the interests of the State, his duty to communicate it; or

(b) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State; or

(c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or wilfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or

(d) fails to take reasonable care of, or so conducts himself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official code or pass word or information;

he shall be guilty of an offence under this section.

According to Mr. Lall, the device of detaining the petitioner under the Act was adopted instead of taking action against him under the aforesaid provisions of the Air Force Act and the Official Secrets Act and this establishes mala fides and lack of good faith on the part of the respondents. Reliance has been placed by the learned Counsel on *In Re: Devata Lakshminarayana*, In that case the detenu had been arrested for having committed an offence punishable under the Explosive Substances Act, 1908, by transporting certain explosive substances from Bezwada to Jeggayyapet, but instead of being brought to trial for this offence an order of detention under the Madras Maintenance of Public Order Act I of 1947 was served on him a month after. The grounds of detention supplied to the detenu merely stated that the detenu was clandestinely transporting certain explosive substances to Communist camps in Hyderabad State but they did not show how the supply of the explosives to Communists in Hyderabad State would endanger the tranquillity of the Madras Province. It was held by Horwill and Satyanarayana Rao, JJ. (Bilakrishna Ayyar J. dissenting) that as the ground mentioned was entirely outside the purview of the Act, the order of detention was not justified and further that the conduct of the Government in not prosecuting the detenu for an offence under the Explosive Substances Act afforded a basis for inferring lack of good faith on its part as the Madras Maintenance of Public Order Act was not intended to enable the Government to deprive the liberty of a subject by first putting forward a case which they knew fully well could not be substantiated in a Court of law and then take advantage of the provisions of the Act and detain the person in jail.

It is quite obvious that the facts in that case were wholly different and that the detenu had in fact been arrested at first for being tried under the Explosive Substances Act but later on the order of detention was made. In the present case the position is altogether different inasmuch as the main and basic indication in the grounds embodied in Annexure "D" is that the petitioner is being detained as a preventive measure since it is apprehended that he would disclose some vital information or secrets of which he is in possession to the agent of some foreign power which would be prejudicial to the security of India as also to

the relations of this country with foreign powers The very object of the Act is preventive and it is for that purpose that the order in the present case has been made. It is not possible to say in these circumstances that there is any lack of good faith on the part of the respondents in the matter.

10. The last contention of Mr. Lall is based on what is stated in paragraphs 7, 8 and 9 of the petition. The objections raised and pressed are as follows:

1. The order of detention as contained in Annexure "B" does not show on its face that it was the President who was satisfied or that he had made the order. The words " Central Government" used in Section 3(1) of the Act would mean the President when the definition given in Section 3(8) of the General Clauses Act, 1897, is taken into consideration.

2. The authentication of the order is by a Joint Secretary to the Government of India in the Ministry of Home Affairs who may be able to authenticate orders and instruments executed in the name of the President but he cannot authenticate orders which the law requires should be passed by the President himself.

3. The executive action of the Government of India has to be expressed in the name of the President under Article 77(1) of the Constitution. This Article is not applicable to the "Central Government" or the "President".

4. The president's executive action has to be in his name and is authenticated by his own signature or if there be any rules on the point by his Secretary as he has got a number of Secretaries in his own Secretariat,

5. The term "Central Government" is not synonymous with the Government of India and, therefore, the order passed by the Government of India in the Ministry of Home Affairs and authenticated by its Joint Secretary is not a valid order.

It appears that in the return the reply to the paragraphs in which these objections were taken was mainly one of denial. In reply to paragraph 5 of the petition, however, it was stated as follows:

With reference to para 5, I admit that the Memo (Annexure D) was served on the petitioner on 6th December 1963 and it set out in detail the grounds on which the detention order had been made and informed the petitioner that he had a right to make a representation to the Central Government against the order of detention passed against him and that he also had the right to personally appear before the Advisory Board for representing his case if he so desired. I admit that this order was signed by Shri G. Mukharji, Joint Secretary to the Government of India. Apart from the legal aspect of the question and the submissions to be made at the hearing on it I say that Shri G. Mukharji had the authority to pass and sign the order on behalf of the Central Government. I crave leave to refer to the Authentication (Orders and other Instruments) Rules, 1958 framed by the President under Article 77 Sub-clause (2) of the Constitution, The submission that Annexure D should have been differently expressed and/or authenticated or that the same is not in accordance with law has no merits.

Thus, although Mr. Lall at first sought to press the objections seriatim in the manner set out above but ultimately he confined his argument to the questions firstly whether the order of detention was properly authenticated as an order which by Section 3 of the Act was required to be made by the Central Government which meant the President u/s 3(8) of the General Clauses Act and secondly whether in view of the statement contained in paragraph 5 of the return Shri G. Mukharji had the power not merely to authenticate the order but also to pass it himself.

11. Now, u/s 3(1) of the Act it is the Central Government or the State Government that has to make an order relating to detention, if it is satisfied with respect to the matters stated in that Section. In Annexure "B", which is the order of detention, the authority, who is stated to be satisfied as also who has to make the order of detention, is the Central Government. Shri G. Mukharji, however, signed as Joint Secretary to the Government of India, for and on behalf of the President of India. The submission of Mr. Lall has been that, the Central Government is defined by Section 3(8) of the General Clauses Act to mean the president and, therefore, the order should have been made in the name of the President. It does not seem to us that merely because the order is stated to be in the name of the Central Government and not the President, it would cease to be an order of the authority mentioned in Section 3 of the Act.

Mr. Lall then says that the manner in which Shri G. Mukharji has signed the order (Annexure "B") shows that he was making the order himself for and on behalf of the President of India. This again appears to be based on a misapprehension. What Shri G. Mukharji has done is to describe his rank or designation and then make it clear that he was signing the order for and on behalf of the President of India which simply means that he was authenticating it as contemplated by Article 77(2) of the Constitution. In exercise of the powers conferred by that Article the President was pleased to promulgate the Authentication (Orders and other Instruments) Rules, 1958 by means of S. O. 2297 dated 3rd November 1958. It was provided by Rule 2 that orders and other instruments made and executed in the name of the President shall be authenticated "(a) by the signatures of the Secretary, Special Secretary, Additional Secretary, Joint Secretary, Deputy Secretary, Under Secretary or Assistant Secretary to the Government of India". There can be no manner of doubt that Shri G. Mukharji was authorised under the aforesaid rule to authenticate an order made in the name of the President. If an order is duly authenticated in accordance with the rules made by the President, the validity of such an order shall not be called in question on the ground that it is not an order or instrument made or executed by the President (Art. 77(2)).

Mr. Lall agrees that if the order dated 4th December 1963 is held to be an order made and executed in the name of the President, then the validity of this order cannot be called in question on the ground that it is not an order made or executed by the President but he says that the power to authenticate which may

be given as has indeed been done by the rules mentioned above to the various Secretaries is quite different from the power or authority to make the order which would depend on the rules made for the more convenient transaction of the business of the Government of India under Article 77(3). Under the Government of India (Allocation of Business) Rules, 1961, the subject of preventive detention has been assigned to the Home Ministry but it is the Minister who could actually pass the order of detention after satisfying himself with regard to the various matters stated in Section 3 of the Act, It is further open to the Minister to delegate that authority to the Secretary or the Joint Secretary but in the present case no such delegation of authority has been established. The contention, therefore, is that although the order of detention (Annexure ""B") must be regarded once authentication has been proved to be an order made and executed by the president, it has not been proved that it was the proper authority who was satisfied with regard to those matters on which detention could be ordered u/s 3.

12. It is necessary at this stage to refer to some of the decided cases. In *The State of Bombay Vs. Purushottam Jog Naik*, the order of detention had been made in the name of the Government of Bombay and was signed by the Secretary to the Government, although it was stated before the signature ""By order of the Governor of Bombay". Their Lordships pointed out that although laxity of expression be not encouraged but what had to be seen was the substance of Article 166. In their Lordships' opinion, the Constitution did not require a magic incantation which could only be expressed in a set formula of words and what had to be seen was whether the substance of the requirements was there. It was held that the order was a good and valid one. It may be mentioned that the argument of Mr. Lall with regard to the order being in the name of the Central Government although signed by Shri G. Mukharji for and on behalf of the President of India is met by the observations made in this case.

In *P. Joseph John Vs. The State of Travancore-Cochin*, it has been held, following *Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others*, that clauses (1) and (2) of Article 168 (which contains similar provisions as are to be found in Article 77) are merely directory and non-compliance with them does not result in the order being invalid. In *Ghaio Mall and Sons Vs. The State of Delhi and Others*, it was found that although the Under Secretary was a person competent to authenticate an order or instrument of the Government of Delhi but the letter containing that order which was produced was regarded to be an inter-departmental communication and ex-facie the letter purported to be a reply to the Excise Commissioner letter of an earlier date. Moreover, the writer of the letter has stated that he had been "directed to say" something ~ by whom, it was not stated. On these grounds it was held that the document was not the order of the Chief Commissioner but only a communication - at the direction of some unknown person - of the order which the Chief Commissioner had made. In *Major E.G. Barsay Vs. The State of Bombay*, , the case law was reviewed with reference to the true interpretation of the provisions of Article 166 of the

Constitution. Subba Rao, J. speaking for the Court summarised the conclusions as follows:

Article 166(1) is only directory. Though an impugned order was not issued in strict compliance with the provisions of Article 166(1) , it can be established by evidence aliunde that the order was made by the appropriate authority. If an order is issued in the name of the Governor and is duly authenticated in the manner prescribed in R. (2) of the said Article, there is an irrebuttable presumption that the order or instrument is made or executed by the Governor. Any non compliance with the provisions of the said rule does not invalidate the order, but it precludes the drawing of any such irrebuttable presumption. This does not prevent any party from proving by other evidence that as a matter of fact the order has been made by the appropriate authority. Article 77 which relates to conduct of business of the Government of India is couched in terms similar to those in Article 166 and the same principles must govern the interpretation of that provision.

In view of the law laid down by the Supreme Court, there can be no manner of doubt that since the order of detention is duly authenticated in the manner prescribed by Article 77(2) there is an irrebuttable presumption that the order was made or executed by the President.

13. The next question that has to be answered is whether it was the Central Government or the President who was satisfied with regard to the matters stated in Section 3 of the Act, it being an essential pre-requisite of an order made under that section that the Government should be satisfied about the matters stated therein. This point was not raised in this manner in paragraphs 7, 8 and 9 of the petition but Mr. Lall founded an argument on the statements contained in reply to paragraph 5 of the petition set out in extenso before in which it was asserted that Shri G. Mukharji had the authority to pass and sign the order on behalf of the Central Government. This, according to Mr. Lall, would mean that Mr. Mukharji had the authority not only to authenticate but also to make the order after satisfying himself with regard to the matters contained in section of the Act.

In *Shambhu Nath Ghosh and Others Vs. Bejoy Lakshmi Cotton Mills Ltd. and Others*, a distinction was made between the presumption which arises under Article 168(2), the provisions of which are similar to Article 77(2) and the satisfaction of the authority in respect of a certain matter which is a condition pre-requisite for the making of an order. It was held that under Article 166(2) what the, authentication made conclusive was that the order had been made by the Governor. Whether in making the order the Governor had acted in accordance with law remained open, There, the authentication order stated that the Governor was satisfied of a certain matter. The presumption was that the Governor had been so satisfied but that was only a presumption which could be rebutted. It was further held that the duty of according sanction or being satisfied, could be delegated by the Minister to whom the relevant business of the Government of the State had been allocated by the Governor by the Rules of

Business, provided such delegation was in pursuance of authority given by the Rules of Business. Reliance in this connection was placed on *Emperor v. Sibnath Benerji* AIR 1945 PC 150 which is the leading case on the subject. In that case the Privy Council had an occasion to consider the provisions of Section 59(2) of the Government of India Act, 1935, and their Lordships agreed with the statement by the learned Chief Justice of the Federal Court viz.:

It is quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of what I regard as a condition necessary to the valid-making of that; order. In the normal case the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a *prima facie* case that the recital is not accurate.

It was also laid down that the Governor need not be personally satisfied as to the matters set out in Rule 26 of the Defence of India Rules under which the respondents in that case had been detained. Matters which fell to be dealt with by the Governor under Rule 26 could be dealt with by him in the normal manner in which the executive business of the Provincial Government was carried on under the provisions of Chapter 2 of Part 3 of the Act of 1935, and, in particular, under the provisions of section 49 and the Rules of business made u/s 59 of the Government of India Act. The case of the detenu there had been considered by Mr. Porter, the Additional Home Secretary to the Bengal Government and those orders which had been dealt with in a routine manner in conformity with the Home Minister's direction were held to be invalid. As regards the cases of those detenus which had been disposed of before the routine order, it was observed that there was no evidence sufficient to rebut the presumption as to their regularity. The following observations at page 164 are pertinent:

In the case of Nibarendu Dutt Majumdar, present respondent 6, Mr. Porter, in para. 6 of his affidavit, does "not say by whom the case was considered. The order of detention is signed by S. B. Bapat, Deputy Secretary to the Government of Bengal. This is a case typical of the application of the presumption, and, if the respondents had wished to probe the matter, in case the consideration might have been by some one not qualified as an officer subordinate to the Governor within the terms of Section 49 of the Act of 1935, they should not have let the matter rest there, but proceeded, either by counter affidavit or by Cross-examination of Mr. Porter on his affidavit. As they did not take such a course, the presumption remains undisturbed.

14. It is quite clear from the discussion of all the cases referred to above that once it is proved that the order in the present case was authenticated in a proper manner, an irrebuttable presumption would arise that it was made or executed by the President. Equally there would be a presumption though not irrebuttable,

about the validity of the order and the recital contained therein that the president was satisfied with regard to the various matters stated in the order. In the return which has been filed in paragraph 5 it has been stated in categorical terms that Mr. Mukharji, the Joint Secretary in the Ministry of Home Affairs, had the authority to pass and sign the order. In these circumstances it was for the petitioner not to let the matter rest there but proceed either by counter affidavit or by making a prayer for the cross-examination of Shri B. S. Raghavan, Deputy Secretary to the Government of India, whose affidavit has been filed by way of return for the purpose of rebutting the presumption. This was never done.

It is also significant that the question of invalidity of the order of detention on the ground that the proper detaining authority was never satisfied within the meaning of Section 3 of the Act was never raised in the manner it has been argued in the petition. If it had been so raised, it would have been open to respondent No. 1 to produce evidence by affidavit or otherwise to show the order of detention had been made after the satisfaction of the authority competent under the Government of India (Allocation of Business) Rules, 1991, or the Government of India (Transaction of Business) Rules, 1961. Indeed, the counsel for the respondents stated at the Bar that the approval of the Minister had been obtained before the order was made. If that be so the challenge to the validity of the order as canvassed by Mr. Lall at the stage of arguments would be futile, But since this matter was not sought to be probed, by an counter affidavit etc. by the petitioner, it is wholly unnecessary to decide whether the order had been made after the Minister had indicated satisfaction and approval of the action in the matter. It would suffice to say that the petitioner has failed to discharge the burden which lay upon him of rebutting the presumption about the validity of the order of detention.

15. In the result, the petition fails and it is dismissed.

Gurdev Singh, J.

16. I agree.