

**(1994) 02 BOM CK 0052**

**In the Bombay High Court**

**Case No :** Criminal Writ Petition No. 1292 of 1993

Sadanand Alias Sadu Alias Sada Vasudeo Shetty

APPELLANT

Vs

A.S. Samra, Commissioner of Police, Greater Bombay and  
others

RESPONDENT

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**Date of Decision :** 09-02-1994

**Acts Referred:**

Constitution of India, 1950 — Article 22, 226, 240, 243

General Clauses Act, 1897 — Section 14, 2, 21

National Security Act, 1980 — Section 12, 13, 2, 3, 8

**Citation :** (1994) 4 BomCR 123

**Hon'ble Judges :** P.S. Patankar, J;A.C. Agarwal, J

**Bench :** Division Bench

**Advocate :** U.N. Tripathi, for the Appellant; S.G. Page, Public Prosecutor and  
H.V. Mehta, for the Respondent

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## **Judgement**

P.S. Patankar, J.—This Petition under Art. 226 of the Constitution of India has been filed by the detenu challenging the order dated 16th August, 1993 passed by the Commissioner of Police, Greater Bombay, u/s 3 sub-section (2) of the National Security Act, 1980. The order came to be passed against the detenu with a view to prevent him from acting in any manner prejudicial to the maintenance of public order. The grounds of detention were served on the detenu *pari passu*.

2. Considering the two points raised by the learned Advocate for the detenu, it is not necessary to state in detail the grounds on which the detenu came to be detained. However, in nutshell, they are as follows :-

3. The ground 2 shows that the detenu is a gang leader and a weapon wielding desperado, committed heinous crimes by using weapons like swords, revolver and choppers. He has created a reign of terror in the minds of the public in the localities of Ravalpada, S. N. Dube Marg, Maratha Colony and adjoining areas of Bombay. He has a criminal record which shows he is a person of violent character

and indulging in terrorist activities and in spite of various actions taken against him under the ordinary law of the land, he could not be prevented from committing such terrorising and criminal activities. It has also been stated that the detenu and his associates always move about armed with deadly weapons and do not hesitate to use the same while committing various offences like robberies, assault, extortion and criminal intimidation. Under clause 3(a) to (e), five instances of such criminal activities committed by the detenu are narrated. Clause 3(f) mentions that confidential enquiries about the detenu disclosed that the fear struck persons, who were victims of atrocities committed by the detenu, were afraid to lodge their complaints against him due to fear of ruthless retaliation at his hands. It has been mentioned that as the Police gave assurance that their names and identity particulars shall not be disclosed and they shall not be called to give evidence against the detenu in Court, four witnesses expressed their willingness to make statements depicting the atrocities committed by the detenu. Clause 3(f)(i) to (iv) a gist of in camera statements of the four persons is given.

4. The learned Advocate for the detenu raised various points in the petition. However, he has only urged two points.

5. The first point raised is that there was delay at different stages, such as transmitting etc. the representation made by the detenu leading to the violation of constitutional mandate enshrined in clause 5 of Article 22 of the Constitution of India and hence the order of detention is invalid and vitiated. Before dealing with the factual aspect, we shall first state the law on this point. In view of the various judgments delivered by the Apex Court it is well settled and the same can be summarised as follows :-

6. The representation should be transmitted, considered and disposed of with due or reasonable promptitude and diligence. There should be no amount of supine indifference, slackness or callous attitude in considering the representation. The delay should be explained and should not be unreasonable. There can be no hard and fast or absolute rule in that respect, and each case has to be considered on its own facts and circumstances.

7. The learned Advocate for the detenu cited four Judgments in support of his contention. They are :-

- (i) Gazi Khan alias; Chotia Vs. State of Rajasthan and another, .
- (ii) Aslam Ahmed Zahire Ahmed Shaik Vs. Union of India and Others,
- (iii) Mehrunissa Vs. State of Maharashtra, .
- (iv) Mahesh Kumar Chauhan alias Banti Vs. Union of India and others, .

The learned Government Pleader cited the latest judgment of the Apex Court reported in State of Tamil Nadu and another Vs. C. Subramani and Others, . It also considered the judgments in the case of Gazi Khan and Aslam Ahmed

(mentioned above) cited by the learned Advocate for the detenu. The apex Court relied upon its judgment delivered by the Constitution Bench in K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others, and quoted para 12 of the said judgment which dealt with the phrase "as soon as may be" occurring in clause 5 of the Article 22 of the Constitution. The said para runs as follows :-

"The words "as soon as may be" occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement, however, is that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal."

Then it was observed as follows :-

Thus, the question of any period taken in dealing with the representation has to be decided in the particular facts and circumstances of each case and it cannot be determined on the basis of any rigid period of time uniformly applicable to all cases. A lee-way has to be given in considering such representation by the Government and no inference of delay leading to the violation of constitutional mandate enshrined in Clause (5) of Article 22 can be drawn unless it shows that the authorities dealing with the representation had adopted, an attitude of leisuress, supine indifference, slackness unduly protracted procrastination or callous attitude in considering such representation."

It also considered that in the case of Gazi Khan (cited supra) the Apex Court held that there was no explanation for delay from July 3 to July 9, 1989 though 7 days taken by the Assistant Secretary to the Government merely to put up a note on the basis of the comments of the District Magistrate. The Court was not satisfied in respect of such delay of 7 days which had occurred at the hands of the Assistant Secretary and in view thereof, continued detention was held to be invalid. Similarly, in the case of Aslam Ahmed (supra), the Superintendent of Central Prison, Bombay to whom the representation was handed over by the detenu on June 16, 1988 for mere onward transmission to the Central Government took a period of 7 days. The Apex Court in those circumstances held that the Superintendent of Central Prison, Bombay callously ignored and kept the representation in cold storage unattended for a period of 7 days and as a result of that the representation reached the Government 11 days after it was handed over to the Jail Superintendent. In the case of Mehrunissa (supra) the question of delay arose in the following circumstances. The order of detention was dated May 16, 1980 and the representation was made by the detenu against it from

Varanasi Jail which bore the date June 3, 1980. It was received by the State Government on June 4, 1980 but for 2 days no action was taken in connection with it. On June 6, 1980, comments were called for from the Customs Authorities with regard to the allegations made in the representation and such comments were received by the State Government on June 13, 1980. On June 17, 1980, the State Government referred the representation to the Law Department for its opinion which was furnished on June 19, 1980. The representation was rejected on June 24, 1980. In those circumstances, it was held that the manner in which the representation made by the detenu has been dealt with reveals a sorry state of affairs in the matter of consideration of representation made by the detenu and as there was no explanation furnished, it was held that the order of detention was vitiated. In Mahesh Kumar Chauhan alias Banti Vs. Union of India and others, , in the case of Mahesh Kumar Chauhan, the representation was forwarded to the concerned sponsoring authority on 25-8-89 and the comments from the sponsoring authority were received by the Department on 11-9-1989. Absolutely no explanation for the said delay was furnished. Therefore, the Apex Court held that the Constitutional obligation enshrined in Article 22(5) was breached and the detention order was liable to be set aside.

8. Now turning to the facts of the present case, we shall first give the chronology of dates and events which emerge from the different affidavits filed on record so as to appreciate the contention more properly.

| Events                                                                                                                                                               | Sr. | No.         | Dates |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|-------------|-------|
| 10-10-93 Date of representation (admitted not 7-10-93).                                                                                                              | 1.  | 11-10-93    |       |
| Representation received by the State Government (Home Department).                                                                                                   | 2.  | 15-10-93    |       |
| Report of the Advisory Board confirmed by the Minister of State (Home).                                                                                              | 3.  | 16-10-93    |       |
| Order of confirmation under Section 12(1) of the National Security Act by the State Minister.                                                                        | 4.  | 18-10-93    |       |
| State Government forwarded copy of the representation to the Central Government.                                                                                     | 5.  | 19-10-93    |       |
| Deputy Secretary scrutinised the representation and forwarded it to the Secretary (Preventive Detention) of the State Government.                                    | 6.  | 21-10-93    |       |
| The same was submitted by the said Secretary to the Minister of State for Home, Maharashtra Government.                                                              | 7.  | 23-24/10/93 |       |
| Public holidays.                                                                                                                                                     | 8.  | 21-10-93    |       |
| Minister of State (Home) was on tour of to Aurangabad and Nanded.                                                                                                    | 9.  | 25-10-93    |       |
| Representation received by the Ministry (Home) of Central Government.                                                                                                | 10. | 22-10-93    |       |
| Wireless message from the Government of India requesting the State Government to give parawise comments.                                                             | 11. | 26-10-93    |       |
| Minister of State for Home, Government of Maharashtra rejected the representation and order served on the detenu.                                                    | 12. | 27-10-93    |       |
| Office of P.C.B. C.I.D. of the Govt. of Maharashtra received copies representation and forwarded it to Dahisar Police Station on the same day for parawise comments. | 13. | 29-10-93    |       |
| Assistant Police Inspector of Dahisar Police Station contacted Senior Grade Police Prosecutor for preparation of parawise comments.                                  | 14. | 30-10-93    |       |
| Assistant Police Inspector was called by the Prosecutor.                                                                                                             | 15. | 3-11-93     |       |
| Parawise comments prepared.                                                                                                                                          | 16. | 3-11-93     |       |
|                                                                                                                                                                      | 17. |             |       |

4-11-93 Parawise comments sent to the Central Government, Home Ministry. 18. 9-11-93 Parawise comments received by the Central Government. 19. 10-11-93 Put up before the Deputy Secretary, Ministry of Home, Central Government for scrutiny. 20. 12-11-93 Put up before the Joint/Secretary (Home), Central Government. 21. 16-11-93 Placed before the Special Secretary, Home Ministry, Central Government. 22. 16-11-93 Placed before the Home Minister, Government of India. 23. 18-11-93 Considered by the Home Minister, Government of India and rejected the wireless message sent. 24. 19-11-93 Letter from the Home Ministry, Central Government conveying rejection. 25. 27-11-93 Received at Nasik Jail and served on the detenu.

9. It has been first contended that there is unexplained and unreasonable delay in placing the detenu's representation before the State Government. The representation was received on 11-10-1993 and placed before the Deputy Secretary on 19-10-93. The affidavit of M. D. Ambade, Desk Officer, Home Department (Special), Mantralaya, Bombay dated 12-11-93 explains that the file in respect of the detenu was before the Minister of State (Home) for consideration of the report submitted by the Advisory Board which was placed before him on 4-10-93. The Minister of State (Home) considered and confirmed it on 15-10-93 and accordingly the order of confirmation under S. 12(1) of the National Security Act, 1980 was issued on 16-10-1993. 17-10-93 was a holiday being Sunday and the said file was placed before the Deputy Superintendent, Home Department on 19-10-93 along with the representation for putting the same for consideration before the Minister of State for Home. In our opinion, this delay has been sufficiently explained and the same cannot be said to be unreasonable.

10. It has been next contended by the learned Advocate for the detenu that there was delay in forwarding the representation to the Central Government by the State Government. The representation was received by the State Government on 11-10-93 and was forwarded to the Central Government on 18-10-93. It is to be first noted that under S. 3 subsection (5) of the National Security Act, power is given to the State Government to communicate the order of detention along with the grounds to Central Government within 7 days.

11. The learned Advocate appearing for the Government has pointed out that the detenu was specifically informed in the grounds of detention that he has a right to make representation to the Central Government and to the State Government. The address of the Secretary to the Government of India was also given and so also of the Additional Chief Secretary to the Government of Maharashtra. However, in spite of this, the detenu directed the representation to the State Government only with a request to forward the same to the Central Government. There is an affidavit filed on behalf of the State Government by Ambade, Desk Officer, Home Department (Special), Mantralaya, dated 12-11-93 and in that he has pointed out that the file was already before the Hon"ble Minister for State (Home) for consideration of the report received from the Advisory Board. It was

placed before him on 4-10-93 and the order of detention came to be confirmed on 15-10-93 and the confirmed order under S. 12(1) was issued on 16-10-93. 17-10-93 was a holiday being Sunday. It has been pointed out that it was necessary to ascertain and verify the details and without it, it was not possible to forward the said representation to the Central Government. We have perused the file which was placed before the Minister for State (Home) for consideration of confirmation of the order under S. 12(1). Obviously the State Government could not have forwarded without verifying the details. It is clear that after verifying all the details the representation was forwarded to the Central Government on 18-10-93. In our opinion, the delay has been properly explained and the same cannot be said to be unreasonable vitiating the order of detention.

12. It has been next contended that there was delay on the part of the Central Government in calling for parawise remarks after the representation was received and then on the part of the State Government to send the parawise comments to the Central Government. It is clear that the representation sent on 18-10-93 by the State Government was received by the Central Government on 22-10-93. The Central Government sent wireless message to the State Government to send the parawise comments/report on 26-10-93 and they were sent by the State Government on 4-11-93 after taking the necessary steps. 23rd and 24th October, 1993 were closed holidays. The affidavit filed on behalf of the State Government discloses that the first wireless message was sent by State Government to the Government of India on 30-10-1993 intimating the factual information which was called by the Central Government. The Commissioner of Police, Greater Bombay was requested to send the parawise report on the representation directly to the Government of India. The affidavit filed of the Assistant Inspector of Police, R. K. Shingade dated 12-11-93 shows that the copy of the representation was received in the office of P.C.B. C.I.D. on 29-10-93. It was forwarded to Dahisar Police Station on the same day and was received by the said Police Station on 30-10-93. The Assistant Police Inspector, Kamble, Dahisar Police Station contacted the Senior Grade Prosecutor for preparation of the parawise comments. However, the said Prosecutor was busy in preparation of other equally urgent parawise comments and, therefore, the said A.P.I. Kamble was called on 3-11-93 by him. On 3-11-93, those parawise comments were prepared and on 4-11-93 they were placed before the Assistant Commissioner of Police C.B., C.I.D. who is authorised to send the said parawise comments and on the same day they were despatched to the Central Government. Similarly, the affidavit of Ishwar Singh, Desk Officer, Ministry of Home Affairs, Government of India, New Delhi dated 23-11-93 discloses that the representation was received by the Central Government in the Ministry of Home Affairs on 22-10-93 from the State Government and the wireless message was sent on 26-10-93 to the State Government calling for certain vital information. 23rd and 24th October, 1993 were closed holidays. Parawise comments or report dated 4-11-93 was received by the Central Govt. in the Ministry of Home Affairs on 9-11-93. We are satisfied from this explanation that there cannot be said to be any unexplained delay. It

has been sufficiently explained.

13. Hence, in this case, we are clearly of the opinion that delay has been sufficiently explained by the concerned authorities in dealing with the representation made by the detenu. The same cannot be said to be unreasonable. It is, therefore, not possible to hold that constitutional imperative under Art. 22(5) was violated and continued detention of the detenu is illegal.

14. The second point raised is that the order of detention dated 16-8-1993 passed by the Commissioner of Police, Greater Bombay came to be served upon the detenu on 17-8-1983. It was approved by the State Government under S. 3(4) of the National Security Act on 26-8-1993. It has been contended that the detenu was not informed or made aware that he was having a right to make representation to the detaining authority and this has violated the constitutional mandate contained in Art. 22(5) of the Constitution and S. 8 of the National Security Act. Hence the order of detention is illegal and requires to be set aside. The learned Advocate for the detenu relied upon certain observations made by the Apex Court in the judgment in the case of Navalshankar Ishwarlal Dave and another Vs. State of Gujarat and others, in support of his proposition. While the learned Advocates appearing for the respondents contended that the point now agitated did not arise in the judgment before the Apex Court in Navalshankar Ishwarlal Dave and another Vs. State of Gujarat and others, and further contended that it arose directly before the Apex Court in Raj Kishore Prasad Vs. State of Bihar and Others, and the two Division Benches judgments of this Court and the view has been taken that the duty to afford earliest opportunity to the detenu to make representation is not to the detaining authority but to the appropriate Government in view of S. 8 of the National Security Act. It has been pointed out that the detenu was informed along with the grounds of detention that he can make representation to the Advisory Board, State Government and the Central Government.

15. We shall first state the relevant provisions. Art. 22(5) of the Constitution speaks about a person who is detained under any law providing for preventive detention and imposes an obligation upon the detaining authority to communicate the grounds of detention and afford a detenu an earliest opportunity to make a representation against that order. Thus, it does not prescribe any authority to whom representation is to be made or who should consider it. In our case, the detenu was informed clearly, along with the grounds that he can make representation to (i) State Government, (ii) Central Government and (iii) Advisory Board. S. 3(1) and (2) of National Security Act give power to the State Government or the Central Government to pass orders of detention and circumscribe the said power by indicating the circumstances in which the order can be passed. S. 3(3) permits delegation of power by State Government. It says that the State Government, if satisfied, that it is necessary so to do, may by order in writing, direct that during specified period mentioned District Magistrate or the Commissioner of Police may exercise the said power for

like reasons as mentioned in S. 3(2). Thus, under S. 3(3), the District Magistrate or the Commissioner of Police is the detaining authority. The proviso to S. 3(3) speaks about duration of the said order shall be three months maximum for the first time and thereafter it may be extended from time to time for any period not exceeding three months. Under S. 3(4), if the officer mentioned in S. 3(3) passes the order, then he has to report it to the State Government along with the grounds and relevant material and his order is to remain in force for twelve days. It is required to be approved by the State Government in the meantime. If it is not approved then the order gets exhausted automatically. The proviso gives one circumstance in which the period of approval may be extended to fifteen days. S. 3(5) provides that if the order is made or approved by the State Government then it has to be reported to the Central Government together with the grounds of detention and relevant material within seven days. S. 8 says that as soon as not later than five days and in exceptional circumstances, for reasons to be recorded, within ten days of the date of detention, communicate the grounds on which the order is passed and shall afford the earliest opportunity to the detenu of making a representation against the order to the appropriate Government. S. 2(a) defines "appropriate Government" as follows :-

"2(a) "appropriate Government" means, as respects a detention order made by the Central Government or a person detained under such order, the Central Government, and as respects a detention order made by a State Government or by an officer subordinate to a State Government or as respects a person detained under such order, the State Government;"

Section 14 confers power of revocation. S. 14(1) is as follows :-

"14(1) Without prejudice to the provisions of S. 21 of the General Clauses Act, 1897 (10 of 1897), a detention order may, at any time, be revoked or modified, -

(a) notwithstanding that the order has been made by an officer mentioned in sub-section (3) of S. 3, by the State Government to which that officer is subordinate or by the Central Government;

(b) notwithstanding that the order has been made by a State Government, by the Central Government."

Section 13 gives maximum period of detention as 12 months and further gives power to appropriate Government to revoke or modify the detention order earlier.

16. The learned Advocate for the detenu relied upon the following observations from para 8 of the judgment reported in *Navalshankar Ishwarlal Dave and another Vs. State of Gujarat and others*, . It was a case which arose under Gujarat Prevention of Anti-Social Activities Act, 1985.

"..... In other words, the effect would be that the authorised officer should report as early as possible from the date of the execution of the order of detention to the Govt. and the order remains valid and in force for 12 days from the date of execution. If the order is not approved by the State Govt. within 12 days, the



order of detention shall stand lapsed. For continuance after 12 days approval is mandatory and remains as fence till it is approved by the Advisory Board. If the Board disapproves, the State Govt. shall release the detenu forthwith. It is a condition precedent ..... The detaining authority has no express power under PASA to revoke the order of detention after the approval given by the State Govt. under sub-section (3) of S. 3 of PASA. The power to rescind the detention order, therefore would be available to the authorised officer under S. 21 of the General Clauses Act only during its operation for 12 days, from the date of execution of the detention order or approval by the State Government whichever is later. The general power of revocation was conferred only on the State Govt. that too in writing for reasons to be recorded in that behalf. By necessary implication flowing from S. 3(3) and concomitant result is that the authorised officer has no express power or general power under S. 21 of the General Clauses Act to revoke or rescind or modify the order after the State Govt. approved of it under sub-section (3) of S. 3 read with S. 3(1). The State Govt. alone, thereafter has power to revoke or rescind the order of detention either on representation under Art. 22(5) or under S. 15 of PASA. The representation should be disposed of accordingly ..... The State Govt. has been expressly conferred with powers under S. 15 to revoke, rescind or modify the order of detention at any time during one year from the date of making the order of detention. Therefore, the right of representation guaranteed under Art. 22(5) would, thereafter, i.e. approval under S. 3(3) be available to the detenu for consideration by the State Govt."

The learned Advocate contended that these observations support his contention that immediately after the order is passed, there is power in detaining authority to revoke it until it is approved by the State Government and, therefore, the detenu ought to have been informed about this right and as it was not done, there was violation of Art. 22(5). It is not possible to accept this contention for more than one reason. First, before the Apex Court the point or question which is agitated now did not arise at all. In that case, the following questions arose :-

- (1) effect of delay in consideration of the detenu's representation,
- (2) whether the petitioner in the said case could be called as "property grabber" under S. 2(h) of PASA,
- (3) the meaning of the phrase "forthwith" in S. 3(3) of PASA which casts duty on the authorised officer to forthwith report the order of detention along with grounds to the State Government, and
- (4) whether the order of delegation to pass order of detention made by the State Government was without application of mind. S. 3(2) of PASA empowered the State Government to issue order directing District Magistrate or Commissioner of Police to exercise the power of State Government and as this permitted blanket power of delegation whether the order of delegation by State was invalid and illegal.

Therefore, the point which is canvassed before us did not arise in *Raj Kishore Prasad Vs. State of Bihar and Others*, was not cited and considered. The observations were clearly in a different context. Secondly, whether such power of revocation or rescinding exists or not with the detaining authority within 12 days was not for consideration and was not agitated at all. The said question was not considered. It was only observed that in view of S. 3(3) of P.A.S.A., the authorised officer has no express power or general power under S. 21 of the General Clauses Act to revoke or rescind or modify the order after the State Government approves it.

17. As against this, the question arose directly before the Apex Court under N.S.A. in *Raj Kishore Prasad Vs. State of Bihar and Others*, it was held as follows :-

"6. .... Section 8 prescribes a time schedule within which a copy of the grounds has to be furnished to the detenu and further enjoins a duty to afford the detenu the earliest opportunity of making a representation against the order, not to the detaining authority but to the appropriate Government. Constitutional mandate was that the detaining authority must afford a reasonable opportunity to the detenu to make a representation. This Court in several decisions spelt out a duty of the detaining authority to consider the representation as expeditiously as possible. But the scheme of the Act shows that Parliament desired to confer this drastic power of deprivation of liberty without a trial or an opportunity to be heard before being detained on high authority like the Central or the State Govt. When Parliament permitted the Central or State Government to permit exercise of power by the officers like the District Magistrate or Commissioner of Police, it thought it prudent to provide that even if the officers like District Magistrate or Commissioner of Police exercise this power, the detenu must have an opportunity to make representation to Central or State Government as the case may be so that the functionary on whom Parliament chose to confer power must apply its mind to the representation of the detenu. Therefore, S. 8 made a statutory departure and provided for making representation to the appropriate Government. The contention is that constitutionally speaking a duty is cast on the detaining authority to consider the representation. That is of course true. But in view of the scheme of the Act, Parliament has now made it obligatory on the appropriate Government to consider the representation. This is done presumably to provide an effective check by the appropriate Government on the exercise of power by subordinate officers like the District Magistrate or the Commissioner of Police. Therefore, if the appropriate Government has considered the representation of the detenu it cannot be said that there is contravention of Art. 22(5) or there is failure to consider the representation by the detaining authority."

In the result it was held that it was not possible to accept the contention that the failure of the detaining authority to consider the representation would invalidate the order.

Two Division Benches of this Court followed the said judgment. The first one is the Criminal Writ Petition No. 1222 of 1986 decided on 24th April, 1987 (Jahagirdar and Mehta, JJ.). In the said case, it was contended that the constitutional right of the detenu to make a representation means necessarily a right to make representation to the detaining authority (Commissioner of Police, Pune in that case) and, therefore, it was necessary that the detenu should have been informed that he was having a right to make representation not only to the State Government and the Central Government, but also to the Commissioner of Police - detaining authority. Relying upon the judgment of the Apex Court in Raj Kishore Prasad Vs. State of Bihar and Others, , it was held "In our opinion, therefore, it is wholly unnecessary for a detaining authority, such as the Commissioner of Police, exercising powers by virtue of the directions given in sub-sec. (3) of S. 3 of the National Security Act, to mention in the communication to the detenu that he has a right to make a representation to himself." Similarly, in Criminal Writ Petition No. 1514 of 1992 decided on 28th April, 1993 (V. A. Mohta and A. P. Shah, JJ.) similar question under the National Security Act arose. In the said case, it was contended that the detaining authority had failed to make a detenu aware about his right to make representation to the detaining authority itself. Again relying upon the judgment of the Apex Court in Raj Kishore Prasad Vs. State of Bihar and Others, and the Division Bench judgment in the case of Bhim alias Pangya Vithal Kamble (cited supra), the said contention was negated.

18. Similar question arose under COFEPOSA before the Apex Court in State of Maharashtra and Another Vs. Sushila Mafatlal Shah and Others, The Apex Court in turn inter alia relied upon Raj Kishore Prasad Vs. State of Bihar and Others, and negated similar contention. This was also quoted by the two Division Bench judgments of this Court -

(1) Hiralal Ganeshmal Jain Vs. The State of Maharashtra and others, .

(2) Criminal Writ Petition No. 1103 of 1993 decided on 17th December, 1993 (by G. D. Kamat and P. S. Patankar, JJ.)

However, we are just mentioning this and not examining those judgments and the scheme of COFEPOSA and burdening this judgment inasmuch as there are direct rulings under N.S.A. as mentioned above. Further, we are really doubtful whether the observations of the Apex Court in Navalshankar Ishwarlal Dave and another Vs. State of Gujarat and others, are of the nature of Obiter Dicta. What is "Obiter Dicta ? Halsbury Vol. 26 Fourth Edition, para 574 Mere passing remarks of a Judge are known as "obiter dicta", whilst considered enunciations of the Judge's opinion on a point not arising for decision, and so not part of the ratio decidendi, have been termed as "judicial dicta."

The Division Bench presided over by Chagla, C.J. reported in Mohandas Issardas and Others Vs. A.N. Sattanathan and Others, considered what is "obiter dicta" and it was held as follows (at page 428 of Cri LJ) :-

"Therefore it would be incorrect to say that every opinion of the Supreme Court

would be binding upon the High Courts in India. The only opinion which would be binding would be an opinion expressed on a question that arose for the determination of the Supreme Court, and even though ultimately it might be found that the particular question was not necessary for the decision of the case, even so, if an opinion was expressed by the Supreme Court on that question, then the opinion would be binding upon us."

This in turn has been followed by another Division Bench judgment of this Court presided over by Mrs. Sujata Manohar, J. in *Hiralal Ganeshmal Jain Vs. The State of Maharashtra and others*, Even assuming that the observations of the Supreme Court in *Navalshankar Ishwarlal Dave and another Vs. State of Gujarat and others*, are in the nature of obiter dicta and would be ordinarily binding upon this Court, what would be the effect of direct authority on the said point of the Supreme Court ? The Division Bench in *Hiralal Ganeshmal Jain Vs. The State of Maharashtra and others*, , has expressed as follows :-

"..... In view of a direct authority of the Supreme Court on the point at issue, which holds contrary to what the obiter dicta state, we cannot give to these obiter dicta an overriding effect over the direct findings of the Supreme Court itself."

19. The learned Advocate for the detenu invited our attention to S. 21 of the General Clauses Act and it was contended that this aspect was not considered by the Apex Court in AIR 1993 SC 320 : (1983 Cri LJ 629) (cited supra). However, that would make no difference. S. 21 of the General Clauses Act, 1897 is as follows :-

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

Similar is the S. 21 of the Bombay General Clauses Act, 1904. They speak of conferment of power by Central Act or State Act or by regulation to issue notification, order etc. which would include the power to rescind, modify, add to, amend, etc. The said notification or order etc. which can be exercised in the like manner and subject to the like sanction and conditions. In the present case, power is not conferred upon the detaining authority i.e. the District Magistrate or the Commissioner of Police by National Security Act, but by Notification issued in favour of such authority by the State Government under S. 3(3) thereof. Therefore, S. 21 of the General Clauses Act is not attracted. This finds support from the Division Bench judgment of this Court reported in *Hiralal Ganeshmal Jain Vs. The State of Maharashtra and others*, wherein it was observed as follows :-

"31. .... Section 3 of the COFEPOSA Act merely authorises the State

Government or the Central Government to empower an officer not below the rank set out in that section to issue orders of detention. It is only after such conferment by the State Government that the officer acquires the power to issue an order of detention. Hence, the power of such an officer to issue a detention order does not flow directly from the COFEPOSA Act. It flows from the COFEPOSA Act coupled with empowerment by the State Government or the Central Government. Hence, S. 21 of the General Clauses Act, which, in terms, applies only to a power which is conferred by the Central Act itself, or, a Regulation, would not apply to an order passed by an officer specially under S. 2(50) of the General Clauses Act. "Regulation" is defined to mean, "a Regulation made by the President under Art. 240 of the Constitution and shall include a Regulation made by the President under Art. 243 thereof and a Regulation made by the Central Government under the Government of India Act, 1870, or the Government of India Act, 1915, 1919 or the Government of India Act, 1935." A resolution of the State Government or the Central Government empowering an officer under S. 3(1) of the COFEPOSA Act to issue an order of detention does not fall within the definition of "Regulation" under S. 2(50) of the General Clauses Act. There is considerable force in this submission also."

20. Relying upon the direct ruling of the Apex Court in *Raj Kishore Prasad Vs. State of Bihar and Others*, and agreeing with the two Division Bench judgments (cited *supra*), which considered the provisions of the National Security Act, we hold that there is no power with the detaining authority - District Magistrate or the Commissioner of Police to revoke or rescind the order and hence there is no question of making a representation to him. So it cannot be said that there was any violation of Art. 22(5) because the detenu was not informed or made aware that he can make a representation to the detaining authority himself, and, therefore, we reject this contention.

21. Hence the following order :-

The petition is dismissed. Rule discharged.

22. Petition dismissed.