
(1996) 08 BOM CK 0028

In the Bombay High Court

Case No : Criminal Writ Petition No. 379 of 1995

Sandeep Atmaram Parwal

APPELLANT

Vs

The State of Maharashtra and others

RESPONDENT

Date of Decision : 31-08-1996

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 11, 3, 3(1), 3(2), 9
Constitution of India, 1950 — Article 22(5)

Citation : (1996) 4 BomCR 451 : (1997) CriLJ 111

Hon'ble Judges : P.S. Patankar, J;M.S. Rane, J;B.P. Saraf, J

Bench : Full Bench

Advocate : M.G. Karmali, for the Appellant; D.G. Bagwe and R.M. Agrawal, for the Respondent

Judgement

Dr. B.P. Saraf, J.—This Bench has been constituted by the learned Chief Justice at the instance of the Division Bench to decide the following issues arising under the Conservation of Foreign Exchange and prevention of Smuggling Activities Act, 1974 ("COFEPOSA Act") :

(1) Whether the detenu has a constitutional right to make a representation against the declaration u/s 9(1) of the COFEPOSA Act made by the officer specially empowered by the central Government ?

(2) In a case where the declaration is made by an officer specially empowered, in that behalf, u/s 9(1) of the COFEPOSA Act, whether it is incumbent on the part of such officer to inform the detenu of his right to make a representation before him in addition to a right to make representation before the other authorities including the Central Government ?

(3) Whether it is open for the State, after the decision of the Supreme Court in the case of Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, , to contend that the officer specially empowered by the Central Government can be construed as Central Government itself and hence an opportunity afforded to

the detenu to make a representation to the Central Government is sufficient compliance with Article 22(5) of the Constitution of India.

2. The material facts giving rise to the aforesaid question are as below. One Atmaram Madanlal Parwal was detained by the order dated 11th March 1988, of Mr. L. Hmigliana, Secretary (II) to the Government of Maharashtra, Home Department (Special), Mantralaya, Bombay u/s 3(1) of the COFEPOSA Act. Mr. L. Hmingliana was an officer specially empowered in that behalf by the Government of Maharashtra for the purposes of Section 3 of the COFEPOSA Act. The said detention order was served on the detenu only on 9th March, 1995, when he was taken in detention. On 6th April, 1995, a declaration u/s 9(1) of the COFEPOSA Act being Declaration No. 31 of 1995, was also made by Mr. N. N. Mookerjee, Additional Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi in his capacity as an officer specially empowered in that behalf by the Central Government. Both the order of detention u/s 3(1) and the declaration u/s 9(1) of the COFEPOSA Act are challenged on various grounds by the son of the detenu before this Court by filing a writ petition which is numbered as Writ Petition No. 379 of 1995. One of the grounds of challenge was that the declaration u/s 9(1) of the COFEPOSA Act made by the officer specially empowered by the Central Government was violative of Article 22(5) of the Constitution of India inasmuch as no opportunity was given to the petitioner to make a representation to the officer specially empowered by the Central Government to make a declaration against the said order. At the time of hearing of the writ petition before the Division Bench, it was contended by Mr. Karmali, learned counsel for the petitioner, that it was incumbent on the part of the officer specially empowered by the Central Government who made a declaration u/s 9(1) of the COFEPOSA Act in the instant case to inform the detenu of his right to make a representation before him in addition to a right to make representation before other authorities including the Central Government. It was contended on behalf of the detenu that the right to make representation before the officer making a declaration was a constitutional right and the failure on the part of the officer specially empowered by the Central Government to inform the detenu of his right to make a representation before him and not giving an opportunity to represent before him was fatal to the declaration u/s 9(1) of the COFEPOSA Act. The stand of Mr. R. M. Agarwal, the learned counsel appearing on behalf of the respondents, before the Division Bench was that the right to make representation against a declaration u/s 9(1) of the COFEPOSA Act was neither a constitutional right nor a statutory right and hence failure to give an opportunity to the detenu to make such a representation would not vitiate the declaration. Reliance was placed in support of this contention on a Division Bench decision of this Court in the case of Smt. Meena Jayendra Thakur Vs. The Union of India and others, , in particular to the concluding part of paragraph 76 of the said judgment which reads as follows :

"It would, therefore, follow that there is no right either constitutional or statutory to make a representation against a declaration issued u/s 9."

Relying on the above decision, it was contended before the Division Bench which was hearing the above writ petition that the question whether the right to make a representation to the authority making a declaration was a constitutional right or a statutory right or not stood concluded by the above judgment of the Division Bench of this Court and it was no more open to another Division Bench to go into that aspect of the matter. It was further contended on behalf of the respondents that the Division Bench of this Court in the above decision has also held that the declaration issued by the officer specially empowered by the Central Government was a declaration made by the Central Government and hence an opportunity afforded to the detenu to make a representation to the Central Government was sufficient compliance with Article 22(5) of the Constitution of India.

3. In reply to the above contentions of the respondents, Mr. Karmali, learned counsel for the petitioner, referred to the decision of the Supreme Court in the case of Jagprit Singh v. Union of India, reported in JT(1990) 3 (SC) 293, and submitted that the decisions in Smt. Meena Jayendra Thakur Vs. The Union of India and others, was contrary to the decision of the Supreme Court in Jagprit Singh (supra). It was submitted by Mr. Karmali that the judgment of the Supreme Court in Jagprit Singh (supra) was an authority for the proposition that the detenu has a constitutional right under Article 22(5) of the Constitution to make a representation against the declaration made u/s 9(1) of the COFEPOSA Act. Attention of the Division Bench was drawn to the fact that in the above case, the Supreme Court had quashed the declaration u/s 9(1) of the COFEPOSA Act on the ground of unreasonable delay in making the detenu aware of his right to make an effective representation against the declaration. It was further submitted by Mr. Karmali that the controversy whether the detenu has a right to make a representation to the officer specially empowered by the Central Government who makes a declaration u/s 9(1) of the COFEPOSA Act in addition to the Central Government, which was left open by the Supreme Court in Jagprit Singh (supra), also stands concluded now by a recent decision of the Supreme Court in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, , wherein the Constitutional Bench of the Supreme Court has clearly held that a person detained has a right to make a representation to the officer specially empowered for that purpose in case an order has been made by such officer and the said officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person to make a representation against the order made by such officer.

4. On consideration of the rival submissions of the counsel for the parties and perusal of the decision of the Supreme Court in Jagprit Singh JT 1990 (3) (SC) 293, (supra), the Division Bench was of the prima facie opinion that the decision of the Division Bench of this Court in the case of Smt. Meena Jayendra Thakur Vs. The Union of India and others, , to the effect that there is no right either constitutional or statutory to make a representation against a declaration issued u/s 9 of the COFEPOSA Act required reconsideration. The Division Bench was also of the opinion that in view of the decision of the Supreme Court in

Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, , the decision of this Court in Meena Jayendra Thakur (supra) to the effect that the officer specially empowered by the Central Government can be construed as Central Government itself also required reconsideration. The Division Bench, however, felt that for the sake of judicial propriety such reconsideration should be done only by larger Bench. The Division Bench, therefore, directed this matter to be placed before the Hon"ble the Chief Justice for constituting a larger Bench to decide the issues set out above. Accordingly, this Full Bench has been constituted by the Hon"ble the Chief Justice to decide the issues referred to by the Division Bench.

5. We have heard the learned counsel for the parties. The submission of Mr. Karmali, learned counsel for the petitioner, is that the declaration u/s 9(1) of the COFEPOSA Act in the instant case was made by Mr. N. N. Mookerjee, Additional Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi in his capacity as an officer specially empowered to act in that behalf by the Central Government. He, therefore, contended that the declaring authority in the present case, obviously, was an officer specially empowered by the Central Government. According to Mr. Karmali, it was, therefore, incumbent on the part of the declaring authority to inform the detenu that he had a right to make a representation against the declaration to him in addition to a right to make the representation to the Central Government. The uncontroverted factual position in this case is that nothing of this sort was done by the declaring authority. This omission, according to the learned counsel, is ipso facto fatal to the declaration because, as a result thereof, the detenu could not make representation to the declaring authority. The detenu was thus denied the opportunity to make a representation against the declaration to the declaring authority himself who had the power to revoke the same. As a result thereof, the declaration u/s 9(1) of the COFEPOSA Act in the present case and the continued detention of the detenu on the basis thereof, according to Mr. Karmali, are both illegal and unconstitutional. Mr. Karmali further submits that the detenu has a constitutional right under Article 22(5) of the Constitution of India to make a representation against the declaration u/s 9(1) of the COFEPOSA Act and the denial of the same is violative of Article 22(5) of the constitution of India. In support of the submission that right to make a representation u/s 9(1) of the COFEPOSA Act is a constitutional right of the detenu, reliance is placed on the decision of the Supreme Court in Jagprit Singh JT1990 (3) (SC) 293 (supra). The question whether the officer specially empowered by the Central Government and Central Government are two different authorities or not, according to the learned counsel, stands concluded by the recent decision of the Supreme Court in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, . According to Mr. Karmali, the Division Bench of this Court in Smt. Meena Jayendra Thakur Vs. The Union of India and others, went wrong in holding that the detenu has no constitutional or statutory right to make a representation against the declaration u/s 9(1) of the COFEPOSA Act. Mr. Karmali further

submits that the Division Bench was also wrong in its conclusion that the declaration u/s 9(1) made by the officer specially empowered by the Central Government is a declaration issued by the Central Government itself. This controversy, according to the learned counsel, now stands concluded by the decision of the Supreme Court in Kamleshkumar (supra) where it has been held that where an order of detention is made by an officer specially empowered by the Central Government to make the order of detention, such officer continues to be the detaining authority and is not displaced by the concerned Government after he has made the order. Therefore, by virtue of his being the detaining authority, he is required to consider the representation of the person detained against the order of detention. According to Mr. Karmali, the ratio of the above decision applies with equal force to a declaration made u/s 9(1) of the COFEPOSA Act by an officer specially empowered in that behalf by the Central Government.

6. Mr. R. M. Agarwal, learned counsel for the Union of India, on the other hand, submits that the Division Bench of this Court, in Smt. Meena Jayendra Thakur Vs. The Union of India and others, , was correct in holding that the detenu has no right to make any representation against the declaration u/s 9(1) of the COFEPOSA Act. He relies in support of the contention on the decisions of the Supreme Court in Smt. Azra Fatima Vs. Union of India (UOI) and Others, , and Smt. Hawabi Sayed Arif Sayed Hanif Vs. L. Hmingliana and others, . The decision of the Supreme Court in Jagprit Singh, JT 1990 (3) (SC) 293 (supra), according to Mr. Agarwal, is inconsistent with the above decisions and hence the ratio of the same should not be followed by this Court. Learned counsel further submits that at any rate the observation of the Supreme Court in Jagprit Singh (supra), to the effect that the right to make a representation u/s 9(1) of the COFEPOSA Act is a constitutional right under Article 22(5) of the constitution of India are obiter dicta and have no binding effect. Learned counsel for Union of India, Mr. Agarwal, therefore, submits that the validity of the declaration u/s 9(1) of the COFEPOSA Act will not be affected in any way by the failure of the declaring authority to inform the detenu of his right to make a representation against the said declaration. Counsel submits that the declaring authority in his capacity of any officer duly empowered in that behalf by the Central Government exercises a limited function of extending the period of detention only in certain contingencies mentioned in Section 9 of the COFEPOSA Act and, therefore, it cannot be said that by virtue of such a declaration, the declaring authority gets any right to consider any representation made against such a declaration. Learned counsel of the Union of India further submits that it is the Central Government only which is empowered to consider any representation against the detention, order as well as the declaration. Reliance is also placed on the decision of this Court in Hiralal Ganeshmal Jain Vs. The State of Maharashtra and others, , in support of the contention that an officer specially empowered by the Central Government to make a declaration u/s 9(1) of the COFEPOSA Act merely acts as an agent of the Central Government and hence it has no independent status of its own which may enable it to revoke the declaration made by it.

7. In reply to the above submissions of Mr. Agrawal made on behalf of the Union of India, Mr. Karmali, learned counsel for the petitioner, submits that the decision of the Supreme Court in Jagprit Singh's, JT(1990 (3) (SC) 293), case is a clear authority on the point that the right to make a representation to the declaring authority is a constitutional right under Article 22(5) of the Constitution of India and any failure on the part of the declaring authority to apprise the detenu of his right to make a representation against the declaration is violative of Article 22(5) of the Constitutional of India. The submission of Mr. Agarwal that the decision in Jagprit Singh (supra), is per incuriam and not a binding decision is vehemently opposed by Mr. Karmali. Mr. Karmali submits that the specific point in issue before the Supreme Court in Jagprit Singh (supra), was the effect of belated appraisal to the detenu of his right to a make a representation against the declaration u/s 9(1) of the COFEPOSA Act and no being satisfied that there was an unexplained delay in informing the detenu of his right to make such a representation, the declaration u/s 9(1) of the COFEPOSA Act was held by the Supreme Court to be violative of Article 22(5) of the Constitution of India. The observations of the Supreme Court in Smt. Azra Fatima Vs. Union of India (UOI) and Others, and Smt. Hawabi Sayed Arif Sayed Hanif Vs. L. Hmingliana and others, , according to the learned counsel, are observations made by way of passing reference which cannot be construed to be the ratio of those decisions. In any event, according to Mr. Karmali, the issue regarding the effect of the failure to apprise the detenu of his right to make the representation against the declaration u/s 9(1) of the COFEPOSA Act being a specific issue in Jagprit Singh's case, the decision of the Supreme Court in that case is a binding authority on that question. In regard to the submission of the learned for the Union of India that for the purpose of Section 9(1) of the COFEPOSA Act, the officer specially empowered by the Central Government is no different than the Central Government and hence the detenu has no right to make a representation to the declaring authority, it was submitted by Mr. Karmali that the said controversy now stands concluded by the decision of the Supreme Court in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, , and it is too late in the day to say that the ratio of the decision of the Supreme Court in the above case will not be applicable to a declaration u/s 9(1).

8. Our attention was drawn by Mr. Karmali to the declaration u/s 9(1) of the COFEPOSA Act made in this case by Mr. N. N. Mookerjee who was an officer specially empowered in that behalf by the Central Government to show that in the said declaration the detenu was apprised of his right to make a representation to the Central Government as well as the Advisory Board against the declaration in the manner specified in the grounds of detention. Our attention was also drawn to declarations in some other cases made subsequent to the above declaration by an officer specially empowered in that behalf by the Central Government wherein the detenu was specifically informed that he had a right to make a representation to the declaring authority. Central Government, as well as the Chairman of the Advisory Board, and that he can make representation to

these three authorities in the manner indicated therein. Mr. Karmali submitted that the submissions of the learned counsel for the Union of India that the detenu has no right to make a representation to the Central Government against the declaration u/s 9(1) of the COFEPOSA Act runs counter to their own stand in the declaration in the instant case itself where the detenu was informed that he had a right to make a representation against the same to the Central Government and the Advisory Board. Counsel further submits that having realised that in cases where the declaration was made by the officer specially empowered in that behalf, the declaration authority itself started informing the detenus that they have a right to make a representation to the declaring authority in addition to the representation to the Central Government and the Advisory Board.

9. We have carefully considered the rival submissions of the learned counsel for the parties and perused the decision of this Court in Smt. Meena Jayendra Thakur Vs. The Union of India and others, , and the decisions of the Supreme Court in Jagprit Singh JT(1990 (3) (SC) 293) (supra), and Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, . We have also considered the submissions of Mr. Agarwal, learned counsel for the Union of India, to the effect that the decision of the Supreme Court in Jagprit Singh (supra), is not a binding authority on the question of right of the detenu to make a representation u/s 9(1) of the COFEPOSA Act and that the said decision is obiter and also that the decision of the Supreme Court in Kamleshkumar (supra) to the effect that the officer specially empowered by the Central Government and the Central Government are two different authorities for the purpose of representation have no application to a declaration u/s 9(1) of the COFEPOSA Act. However, on a careful consideration of the scheme of the COFEPOSA Act and the object and effect of a declaration made u/s 9 thereof and on a careful consideration of the decisions of the Supreme Court in Jagprit Singh, (supra), and Kamleshkumar (supra), we do not find any merit in the above submissions of Mr. Agarwal.

10. There is no dispute in this case that the detenu Mr. Atmaram Parwal was detained on 9th March 1995, in pursuance of the detention order dated 11th March 1988, passed by the officer specially empowered by the Government of Maharashtra u/s 3(1) of the COFEPOSA Act. After his detention, a declaration u/s 9(1) of the COFEPOSA Act was made on 6th April 1995 by Mr. N. N. Mookerjee, Additional Secretary to the Government of India, in his capacity as an officer specially empowered in that behalf by the Central Government. By the said declaration, the detenu was also apprised of his right to make a representation to the Central Government as well as the Advisory Board against the declaration in the manner specified in the grounds of detention. Admittedly, the detenu was not apprised of his right to make a representation to the declaring authority itself. The material portions of the declaration read as below :

"AND WHEREAS, I the undersigned specially empowered in this behalf by the Central Government, have carefully considered the grounds of detention and the

material served on the detenu.

Now, therefore, I, the undersigned, hereby declare that I am satisfied that the aforesaid Shri Atmaram Parwal is likely to smuggle goods into Bombay which is an area highly vulnerable to smuggling as defined in Explanation I to Section 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974;

Shri Atmaram Parwal has right to represent to the Central Government as well as to the Advisory Board against this declaration in the manner specified in the grounds of detention."

have also perused the declarations made by the very same officer subsequent to the issuance of the above declaration whereunder he has informed the detenu of his right to make a representation to the declaring authority himself in addition to the Central Government and the Advisory Board. Mr. Karmali has filed three declarations before us which support the above position. In a declaration made on 5th December 1995, being Declaration No. 62 of 1995, by the same officer as the officer specially empowered by the Central Government, the detenu was informed as below:

"..... has a right to make a representation to the declaring authority, Central Government as well as to the Chairman, COFEPOSA Advisory Board, High Court of Bombay against this declaration through Jail authorities in the manner indicated below :-

(i) Representation meant for the declaring authority should be addressed to the Additional Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi.

(ii) Representation meant for the Central Government, should be addressed to the Secretary, Ministry of Finance, Department of Revenue, New Delhi.

(iii) Representation meant for the Advisory Board should be addressed to the Chairman, COFEPOSA Advisory Board, High Court of Bombay."

the declaration made on 19th May 1995, being Declaration No. 8 of 1995, the detenu was informed as below :

"..... has a right to represent to the undersigned, the Central Govt. as well as to the State Advisory Board against the declaration in the manner specified in the grounds of detention."

11. We have, therefore, to decide as to a whether failure of the declaring authority to inform the detenu of his right to make a representation to the declaring authority itself is violative of Article 22(5) of the Constitution of India. We find that similar controversy arose before the Supreme Court in Jagprit Singh's case. JT(1990 (3) (SC 293). In that case, a declaration u/s 9 of the COFEPOSA Act had been made by the officer specially empowered by the Central Government on 4-10-1988. A copy of the declaration was endorsed to the

detenu. The declaration, however, did not make the detenu aware of his right to make representation against the declaration. The issue before the Supreme Court was whether the declaration was violative of Article 22(5) of the Constitution of India and whether the continued detention beyond the period of one year from the date of detention on the basis of the above declaration was unjustified. On consideration of the facts of the case, the Supreme Court noted that the detenu had not been made aware, either in the order of declaration or within a reasonable time thereafter, that he had a right to make a representation against the declaration to the appropriate authorities. From the papers placed on record, the Supreme Court found that it was not until the detenu wrote to the declaring authority on 10th November, 1988 seeking clarification as to whether he had a right of representation against the declaration and if so, to which authority, that a clarification on that matter was furnished to him on 17th November 1988 that he had such a right. There was, thus, a delay of one month and 13 days before the detenu was made aware of his right under the Constitution to make an effective representation against the declaration. The Supreme Court held :

"This delay, in our opinion, is quite unreasonable and inconsistent with the provisions of Article 22(5) of the Constitution of India."

The detention of the detenu beyond the original period of one year, in the circumstances, was held by the Supreme Court to be unjustified and the Supreme Court, therefore, set aside the detention of the detenu beyond one year from the date of detention. The above decision, in our opinion, is a clear authority for the proposition that the detenu has a constitutional right to make a representation u/s 9(1) of the COFEPOSA Act to the concerned authorities and failure to inform the detenu of his right under the Constitution to make a representation against the declaration is violative of the provisions of Article 22(5) of the Constitution of India.

12. We have also considered the decisions of the Supreme Court in Smt. Hawabi Sayed Arif Sayed Hanif Vs. L. Hmingliana and others, , and Smt. Azra Fatima Vs. Union of India (UOI) and Others, , on which reliance was placed by the learned counsel for the Union of India in support of his contention that the detenu has no right to make a representation against the declaration u/s 9(1) of the COFEPOSA Act., either constitutional or statutory. In Hawabi Syed Arif, (supra), the Supreme Court did not consider the question whether the constitutional safeguard under Article 22(5) of the Constitution of India should be extended in case of a declaration also as in case of detention order. This question was left open by the Supreme Court which is evident from para 14 of the said judgment which reads as below :

"In view of the above finding there is no need to elaborately deal with the question as to whether constitutional safeguards, under Art. 22(5) should be extended in the case of declaration also as in the case of detention order."

We have also given out careful consideration to the decision of the Supreme Court in *Smt. Azra Fatima Vs. Union of India (UOI) and Others*, . That was a case under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act ("PITNDPS Act"). Section 3 of the PITNDPS Act provides for preventive detention and Section 10 thereof empowers the Central Government and the officer specially empowered by the Central Government to make a declaration, as in a case u/s 9 of the COFEPOSA Act, to (sic) be applied in respect of declaration issued u/s 10 of that Act. The said decision is not an authority for the proposition that the detenu has no right, either constitutional or statutory, to make a representation against the declaration to the concerned authorities. From the above discussion, it is clear that the detenu has a constitutional right to make a representation against the declaration u/s 9(1) of the COFEPOSA Act.

13. We may now turn to the next question whether in a case where the declaration is made not by the Central Government but by an officer specially empowered by the Central Government, it is necessary to apprise the detenu of his right to make a representation against the same to such officer also in addition to the Central Government and the Advisory Board. This question also came up for consideration before the Supreme Court in *Jagprit Singh JT1990 (3) (SC) 293*. The Supreme Court, however, left this question open in that case as it was found that the detenu was not originally apprised even of his right to make a representation and that there was unreasonable and unexplained delay in apprising the detenu of his right to make a representation against such declaration and on that ground itself the continued detention was held to be illegal. This question, however, came up for consideration before a Five Judges Constitutional Bench of the Supreme Court in *Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others*, .

14. In that case, the Supreme Court considered the following question in the context of orders for preventive detention passed by officers specifically empowered to do so by the Central Government under the COFEPOSA Act and the PITNDPS Act :

"When an order for preventive detention is passed by an officer especially empowered to do so by the Central Government or the State Government;" is the said officer required to consider the representation submitted by the detenu."

The Supreme Court noted the divergence in its earlier decisions in *Amir Shad Khan and another Vs. L. Hmingliana and others*, and *State of Maharashtra and Another Vs. Sushila Mafatlal Shah and Others*, . Referring to the provisions of Article 22(5) of the Constitution, the Supreme Court observed as below :

"Article 22(5) imposes a dual obligation on the authority making the order of preventive detention : (i) to communicate to the person detained as soon as may be the grounds on which the order of detention has been made; and (ii) to afford the person detained the earliest opportunity of making a representation against

the order of detention. Article 22(5) thus proceeds on the basis that the person detained has a right to make a representation against the order of detention and the aforementioned two obligations are imposed on the authority making the order of detention with a view to ensure that right of the person detained to make a representation is a real right and he is able to take steps for redress of a wrong which he thinks has been committed. Article 22(5) does not, however, indicate the authority to whom the representation is to be made. Since the object and purpose of the representation that is to be made by the person detained is to enable him to obtain relief at the earliest opportunity, the said representation has to be made to the authority which can grant such relief. i.e., the authority which can revoke the order of detention and set him at liberty. The authority that has made the order of detention can also revoke it. This right is inherent in the power to make the order. It is recognised by Section 21 of the General Clauses Act, 1897, though it does not flow from it. It can, therefore, be said that Article 22(5) postulates that the person detained has a right to make a representation against the order of detention to the authority making the order. In addition, such a representation can be made to any other authority who is empowered by law to revoke the order of detention."

15. The true import of Article 22(5) was summed up by the Supreme Court in the following words (at pp. 648, 649) :

"Article : 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, who is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation."

It is clear from the above that the person detained has a right to make a representation also to the authority that has made the order of detention or the order for continuance of such detention, i.e., a declaration u/s 9(1) of the COFEPOSA Act. This part of the decision of the Supreme Court is also an authority for the proposition that the detenu has constitutional right to make a representation against a declaration u/s 9(1) of the COFEPOSA Act to the authority that has made the declaration for continuance of the declaration. The ratio of the decision of the Supreme Court in Jagprit Singh, JT(1990) (3) (SC) 293 (supra), thus gets affirmed by the above decision of the five judge Bench of the Supreme Court in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, . The Supreme Court also referred to the provisions of Section 3 of the COFEPOSA Act and PITNDPS under which an order of detention can be made

by (i) the Central Government, or (ii) an officer specially empowered by the Central Government; or (iii) the State Government; or (iv) an officer specially empowered by the State Government provisions of Section 21 of the General Clauses Act which provides that the authority which has made the order of detention would be competent to revoke the said order, and its various earlier decisions in regard to the right of a detenu to make representation and observed (at p. 654) :

"Construing the provisions of Article 22(5) we have explained that the right of the persons detained to make a representation against the order of detention comprehends the right to make such a representation to the authority which can grant such relief, i.e. the authority which can revoke the order of detention and set him at liberty and since the officer who has made the order of detention is competent to revoke it, the person detained has the right to make representation to the officer who made the order of detention."

It was further observed (at pp. 655, 656) :

"Merely because the order of detention has been made by the officer who has been specially empowered for that purpose would not, in our opinion, justify the inference that the said order acquires deemed approval of the Government that has so empowered him, from the date of the issue of the order so as to make the said Government the detaining authority. By specially empowering a particular officer u/s 3(2) of the COFEPOSA Act and the PITNDPS Act the Central Government or the State Government confers an independent power on the said officer to make an order of detention after arriving at his own satisfaction about the activities of the person sought to be detained. Since the detention of the person detained draws its legal sanction from the order passed by such officer, the officer is the detaining authority in respect of the said person. He continues to be the detaining authority so long as the order of detention remains operative. He ceases to be the detaining authority only when the order of detention ceases to operate. This would be on the expiry of the period of detention as prescribed by law or on the order being revoked by the officer himself or by the authority mentioned in Section 11 of the COFEPOSA Act and Section 12 of the PITNDPS Act. There is nothing in the provisions of these enactments to show that the role of the officer comes to an end after he has made the order of detention and that thereafter he ceases to be the detaining authority and the concerned Government which had empowered him assumes the role of the detaining authority. We are unable to construe the provisions of the said enactments as providing for such a limited entrustment of power on the officer who is specially empowered to pass the order."

The law in this regard was summed up by the Supreme Court thus (at p. 656) :

"It must, therefore, be held that the officer specially empowered for that purpose continues to be the detaining authority and is not displaced by the concerned Government after he has made the order of detention. Therefore, by virtue of his

being the detaining authority he is required to consider the representation of the person detained against the order of detention."

Referring to its earlier decision in *State of Maharashtra and Another Vs. Sushila Mafatlal Shah and Others*, , the Supreme Court observed that the said decision in so far as it holds that where an order of detention is made by an officer specially empowered for the purpose representation against the order detention is not required to be considered by such officer and it is only to be considered by the appropriate Government empowering such officer, does not lay down the correct law. The legal position in regard to the right of representation to the officer specially empowered by the Government in case where the order has been made by such officer was summed up by the Supreme Court as follows (at p. 657):

"Having regard to the provisions of Article 22(5) of the Constitution and the provisions of the COFEPOSA Act and the PITNDPS Act the question posed is thus answered : Where the detention order has been made u/s 3 of the COFEPOSA Act and the PITNDPS Act by an officer specially empowered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person detained to make a representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the State Government and Central Government where the detention order has been made by an officer specially authorised by State Government and the Central Government where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation."

The above decision is a clear authority for the proposition that where a detention order is made by the officer specially empowered by the Central Government, the detenu has a right to make a representation to the said officer and the said officer is obliged to consider such representation and that such a right is in addition to the right to make the representation to the State Government or the Central Government. The ratio of the said decision, in our opinion, applies proprio vigore to a declaration u/s 9 of the COFEPOSA Act which has the effect of continuing the detention beyond the period of one year as contemplated by the detention order. This is so also because of the fact that the right to make a representation against a declaration u/s 9, as in case of order of detention u/s 3, is a constitutional right under Article 22(5) of the Constitution as held by the Supreme Court in *Jagprit Singh*, JT1990 (3) (SC) 293 (supra) and in the above case in paragraph 14.

16. In view of the above decision of the Supreme Court, we do not find any merit in the submission of the counsel for the Union of India that the officer specially empowered by the Central Government merely acts for and on behalf of the Central Government and an opportunity given to the detenu to make a representation to the Central Government is sufficient compliance with the requirements of Article 22(5) of the Constitution of India. The reliance by Mr. Agarwal, the learned counsel for the Union of India, on the decision of this Court in *Hiralal Ganeshmal Jain Vs. The State of Maharashtra and others*, , in support of his contention that no representation to the officer empowered by the Central Government is necessary is wholly erroneous in view of the decision of the Five Judge Bench of the Supreme Court in *Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others*, . In view of the above decision of the Supreme Court, the decision of this Court in *Hiralal Ganeshmal Jain (supra)*, is no more a good law.

17. In view of the above, we are of the clear opinion that where a declaration u/s 9(1) of the COFEPOSA Act is made by the officer specially empowered in that behalf by the Central Government, it is incumbent on the part of such officer to inform the detenu of his right to make a representation before him in addition to the right to make representation before the Central Government and the Advisory Board. In our view it is not open for the Union of India to contend that the officer specially empowered by the Central Government can be construed as Central Government itself and an opportunity to the detenu to make a representation against a declaration made by such specially empowered officer to the Central Government is a sufficient compliance of Article 22(5) of the Constitution of India.

18. In the light of the foregoing discussion, we answer the three questions referred to us by the Division Bench as follows :

(i) The detenu has a constitutional right to make a representation against the declaration u/s 9(1) of the COFEPOSA Act.

(ii) There the declaration has been made u/s 9 of the COFEPOSA Act by an officer specially empowered by the Central Government, the person detained had the right to make a representation to the said officer and the said officer is obliged to consider the said representation and failure on his part to do so results in the denial of the right conferred on the person detained to make a representation against the declaration. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation against the declaration u/s 9(1) of the COFEPOSA Act to the authority that has made the declaration within a reasonable time so as to enable him to make such a representation and failure to do so results in denial of the right of the person detained to make a representation which is violative of Article 22(5) of the Constitution of India.

(iii) The person specially empowered to make a declaration u/s 9(1) of the

COFEPOSA Act and the Central Government are two different persons.

It is not open for the State, particularly after the decision of the Supreme Court in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, , to contend that the officer specially empowered by the Central Government can be construed as the Central Government itself and that an opportunity afforded to the detenu to make a representation to the Central Government is sufficient compliance with Article 22(5) of the Constitution of India.

19. This reference made to us by the Division Bench stands disposed of accordingly.

20. This writ petition may be placed before the concerned Division Bench for deciding the same on merits in the light of the above opinion given by us.

Patankar, J.

21. I fully concur with the judgment delivered by my brother Saraf, J. I, however, like to add the following paragraph :

Further, serious consequences ensue due to the declaration u/s 9. The first and foremost is u/s 10, the period of detention gets extended from one year to two years. Next in case when a declaration u/s 9 has not been made, then under 9 a reference to the Advisory Board must be made within five weeks and the Advisory Board must submit its report on the sufficiency of the material within 12 weeks. But where a declaration u/s 9 is made within 5 weeks of detention, the above time limit gets extended and the Government can make a reference to the Advisory Board within 4 months and 2 weeks of the detention and the Board can submit its report within 5 months and 3 weeks of the detention. Thus, the detention is continued and hence Section 9(2)(ii) and (iii) substitutes the words "for the continued detention" for the words "for the detention". In view of this position, we feel that there should be available to the detenu a right to make representation to the declaring authority itself against the declaration to seek immediate relief. I also find this has been considered by the Full Bench of Delhi High Court in 1996 Cri LJ 695, Akhilesh Kumar Tyagi v. Union of India, and has come to the same conclusion as we have arrived at.

Rane, J.

22. I fully concur with the reasoning and conclusion of my brother Saraf.

23. Reference answered.