

(1996) 12 DEL CK 0068

In the Delhi High Court

Case No : Criminal Writ Appeal No. 330 of 1996 and C.M. Appeal No's. 3821 and 4088 of 1996

Vipin Sehgal

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 20-12-1996

Acts Referred:

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

Citation : (1997) 1 AD 473 : (1997) 65 DLT 270 : (1997) 40 DRJ 200 : (1997) 1 ILR Delhi 416 : (1997) 2 RCR(Criminal) 30

Hon'ble Judges : Manmohan Sarin, J;M. Jagannadha Rao, J;A.D. Singh, J

Bench : Full Bench

Advocate : R.M. Bagai, Deepak Gandhi, Harjinder Singh, amices Curiae, K.N. Bhat, A.K. Vali and Aditya Bhagat, for the Appellant;

Judgement

M. Jagannadha Rao, J.

(1) RULE.

(2) A Division Bench of this Court comprising of two of us referred two questions for consideration of this Full Bench. The referring order dated 8.10.1996 reads as follows:-

"LIST this matter before the Full Bench. The question for consideration in this writ petition is as to the meaning of the word "apply" occurring in sub-clause (2) of Section 9 of the Cofeposa - "In the case of any person detained under a detention order to which the provisions of sub-section (1) apply ..."

The question is what is the meaning of word "apply" ? Does it mean that a declaration u/s 9(1) actually made is sufficient or is it necessary that such a declaration should be a valid declaration ? This aspect has not been dealt with in detail in the Division Bench Judgment of this Court in Magudoom Meera

Hammeem vs. Joint Secretary to the Government and Others (Cr.W.P.No. 83/95 decided on 17.8.1995). Even in the Full Bench Judgment reported as Akhilesh Kumar Tyagi Vs. Union of India and Others, on which learned counsel for the petitioner relies, though it is stated in para 31 that the above said Division Bench Judgment is correctly decided, there is no discussion as to the meaning of the words above extracted in Section 9(2). In fact, a further question has been left open in the Full Bench Judgment which is set out in para 32 of the Judgment. That question also falls for consideration in this case.

THE matter will be listed before the Full Bench on 31.10.1996."

(3) The facts of the case are: The petitioner was detained pursuant to a detention order dated 25.4.1996 passed by the 2nd respondent (the Joint Secretary to the Government of India) u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter called as COFEPOSA). The detention order was served on the petitioner on 26.4.1996. Reference was made by the Government of India to the Central Advisory Board on 13.5.1996, within 5 weeks of the detention order. The first hearing before the Advisory Board was on 17.5.1996. A declaration u/s 9(1) was passed on 30.5.1996. Thereafter, the matter was heard before the Advisory Board on 12.7.1996 (which happens to be the 77th day from the date of detention). The Advisory Board sent up its report on 7.8.1996 (beyond 11 weeks). The Board took the view that this was not a fit case where the Section 9(1) declaration ought to have been issued. Accepting the recommendation of the Advisory Board, the Government of India passed a confirmation order u/s 8(f) of the Act read with Section 10 on 20.8.1996 restricting the detention to 1 year.

(4) On behalf of the petitioner submissions were made by learned counsel for the petitioner, Shri R.M. Bagai. Submissions for the Central Government were made by Shri K.N. Bhat, Additional Solicitor General. We issued notice to senior counsel, Shri Harjinder Singh, to make submission. He has raised certain contentions in support of the writ petitioner.

(5) Under the provisions of the Act, the concerned authority may, if satisfied with respect to any person (including a foreigner) that with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from indulging in the activities mentioned in the section, it is necessary to detain him, make an order directing that such person be detained.

(6) The grounds of detention have to be served normally within a period not later than 5 days from detention, as provided in sub-clause (iii) of Section 3. Section 8 deals with the constitution of the Advisory Board and the procedure to be followed by the Board for giving its opinion. Sub-clause (b) of Section 8 says that save as otherwise provided in Section 9, the appropriate Government shall, within 5 weeks from the date of detention of a person under a detention order make a reference in respect thereof to the Advisory Board constituted under

clause (a) to enable the Advisory Board to make report under sub-clause (a) of clause (4) of Article 22 of the Constitution. Under sub-clause (c) the Advisory Board would consider the reference, hear the detenu concerned and prepare its report as to the existence or otherwise of sufficient cause for detention and submit its report within 11 weeks from the date of detention. Sub-clause (f) provides for confirmation of the detention by the concerned authority on the basis of the opinion received from the Advisory Board. The Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit, and in every case where the Advisory Board has reported that there is no sufficient cause for detention, the Government shall have to revoke the detention and release the person concerned. It is necessary to reproduce sub-clauses (b), (c) and (f) of Section 8 of COFEPOSA:-

"8. Advisory Boards.-- For the purposes of sub-clause (a) of clause (4), and sub-clause (c) of clause (7), of Article 22 of the Constitution,--- (a) (b) save as otherwise provided in Section 9, the appropriate Government shall, within five weeks from the date of detention of a person under a detention order make a reference in respect thereof to the Advisory Board constituted under clause (a) to enable the Advisory Board to make report under sub-clause (a) of clause (4) of Article 22 of the Constitution; (c) the Advisory Board to which a reference is made under clause (b) shall after considering the reference and the materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if in any particular case, it considers it essential so to do or if the person concerned desires to be heard in person, after hearing him in person, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned; (d) (e) (f) in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith."

(7) Section 10 states that the maximum period of detention for which any person may be detained in pursuance of any detention order (to which Section 9 does not apply) and which has been confirmed under clause (f) of Section 8 shall be a period of one year from the date of detention or the specified period, whichever period expires later.

(8) Section 9 deals with the cases in which and circumstances under which persons may be detained for periods longer than three months without obtaining

the opinion of the Advisory Board. Such a declaration u/s 9(1) has to be made within 5 weeks of the detention. It says that in regard to any person (including a foreigner) in respect of whom an order of detention is made under this Act at any time before the 31st July,1999, he may be detained without obtaining, in accordance with the provisions of sub-clause (a) of clause (4) of Article 22 of the Constitution, the opinion of an Advisory Board for a period longer than three months but not exceeding six months from the date of his detention.

(9) Section 9 of Cofeposa reads as follows:-

"9.CASES in which and circumstances under which persons may be detained for periods longer than three months without obtaining the opinion of the Advisory Board.-- (1) Notwithstanding anything contained in this Act, any person (including a foreigner) in respect of whom an order of detention is made under this Act at any time before the 31st July,1999, may be detained without obtaining, in accordance with the provisions of sub-clause (a) of clause (4) of Article 22 of the Constitution, the opinion of an Advisory Board for a period longer than three months but not exceeding six months from the date of his detention, where the order of detention has been made against such person with a view to preventing him from smuggling goods or abetting the smuggling of goods or engaging in transporting or concealing or keeping smuggled goods and the Central Government or any officer of the Central Government, not below the rank of an Additional Secretary to that Government, specially empowered for the purposes of this section by that Government, is satisfied that such person -- (a)smuggles or is likely to smuggle goods into, out of or through any area highly vulnerable to smuggling; or (b)abets or is likely to abet the smuggling of goods into, out of or through any area highly vulnerable to smuggling; or (c)engages or is likely to engage in transporting or concealing or keeping smuggled goods in any area highly vulnerable to smuggling, and makes a declaration to that effect within five weeks of the detention of such person. Explanation 1 Explanation 2 (2) In the case of any person detained under a detention order to which the provisions of sub-section (1) apply, Section 8 shall have effect subject to the following modifications, namely -(i) in clause (b) for the words "shall within five weeks", the words "shall, within four months and two weeks" shall be substituted; (ii) in clause (c) , (1) for the words "the detention of the person concerned", the words "the continued detention of the person concerned" shall be substituted; (2) for the words "eleven weeks", the words "five months and three weeks" shall be substituted; (iii)in clause (f), for words "for the detention", at both the places where they occur, the words "for the continued detention" shall be substituted."

(10) Section 10, to which we have already made reference deals with the maximum period of detention. If it is not a case u/s 9(1), the maximum period of detention is one year while if it is a case u/s 9(1), the maximum period is two years. The relevant portion of Section 10 is reproduced below:-

"10.Maximumm period of detention.-- The maximum period for which any person

may be detained in pursuance of any detention order to which the provisions of Section 9 do not apply and which has been confirmed under clause (f) of Section 8 shall be a period of one year from the date of detention or the specified period, whichever period expires later and the maximum period for which any person may be detained in pursuance of any detention order to which the provisions of Section 9 apply and which has been confirmed under clause (f) of Section 8 read with sub-section (2) of Section 9 shall be a period of two years from the date of detention or the specified period, whichever period expires later. Provided Explanation"

(11) We shall also refer to Clause (4),(5) and (7) of Article 22 of the Constitution of India:

"(4)No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless- (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention: Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (a) and (b) of clause (7); or (b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7). (5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. (7) Parliament may by law prescribe- (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4); (b) the maximum period of which any person may in any class or classes of cases be detained under any law providing for preventive detention; and (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

(12) The first point raised in the writ petition is based on the following facts. Though in this case a reference has been made to the Advisory Board on 13.5.1996 within the period of five weeks from the date of detention, namely, 26.4.1996, the matter was pending before the Advisory Board from 17.5.1996 to 7.8.1996 and during this interregnum a Section 99(1) declaration was issued by the Central Government on 30.5.1996. Thereafter, there was a further hearing before the Advisory Board on 12.7.1996 (apart from the one on 17.5.1996), and the Advisory Board sent up its report on 7.8.1996 opining that the circumstances mentioned in Section 9 for continued detention did not exist. In view of the said opinion, the Central Government passed an order of

confirmation of detention u/s 8(f) read with Section 10 on 20.8.1996 restricting the detention to one year. It is contended that once the Advisory Board opined that the circumstances mentioned in Section 9(1) did not exist, the benefit of enlarged periods given u/s 9(2) is no longer available, and that the report given on 7.8.1996 being beyond 11 weeks (for a non Section 9(1) case), there is a violation of the procedural guarantee mentioned in the Section. In that event, the confirmation dated 20.8.1996 would also be invalid.

(13) The second point is that once the Advisory Board holds that Section 9(1) can not be applied to the facts of the case, the detention cannot extend even for a period of one year.

(14) Under Article 22(4) of the Constitution of India, no law providing for preventive detention shall authorise the detention of a person for a longer period than three months, unless an Advisory Board has reported before the expiration of three months that there is, in its opinion, sufficient cause for detention. Even where the Board opines that the detention could exceed three months, still the detention cannot exceed the maximum period prescribed by any law made by Parliament u/s 7(b). It is also necessary that such person be detained in accordance with the law made by Parliament u/s 7(a) and (b).

(15) Article 22(7)(a) requires Parliament to prescribe the circumstances under which and the class or classes of persons in which, a person may be detained for a longer period than 3 months without obtaining the opinion of the Advisory Board in accordance with Article 22(4)(a). Article 22(7)(b) requires the law to specify the maximum period for which any person may, in any class or classes of cases, be detained. These are the fundamental requirements.

(16) Now, we are here concerned with a case where a declaration u/s 9(1) has been issued by the Central Government that the circumstances mentioned in Section 9(1) existed and then the matter is referred to the Advisory Board. So far as the reference to the Board is concerned, - in a case where Section 9(1) declaration is issued, - it could be made after 5 weeks of detention but within 4 months and 2 weeks. But the declaration by the Central Government must have been issued within 5 weeks of detention. Fortunately for the Government, in the case before us, the reference to the Advisory Board has been made within 5 weeks. If the report of the Board had been given within 11 weeks, then even if the Board thought that the circumstances mentioned in Section 9(1) did not exist, the present issues would indeed not have arisen. The members of the Advisory Board presumably appear to have felt that inasmuch as there was a declaration before them issued by the Government u/s 9(1), they could send their report within 5 months and 3 weeks even if their opinion was that the circumstances as visualised by the Government in the Section 9(1) order did not exist.

(17) It is argued for the petitioners that the opinion of the Board - rendered after 11 weeks but within 5 months and 3 weeks, - that the circumstances mentioned

in Section 9(1) did not exist is a declaration that such circumstances did not exist even when the Section 9(1) order was made. If that be so, though the reference in this case is within 5 weeks (sufficient for a non-Section 9(1) situation), the report it is argued ought to have been given within 11 weeks and the enlarged period of 5 months and 3 weeks does not apply.

(18) On the other hand, the respondents contend that once the Government of India passed an order u/s 9(1) upon being satisfied that the circumstances mentioned in Section 9(1) existed, that fact itself extends the period within which the report is given even if the opinion could be that the circumstances mentioned in Section 9(1) did not exist, to 5 months and 3 weeks. Emphasis is laid on the words in Section 8(c), "whether or not" the circumstances exist.

(19) It is true, as contended by the respondents, that in a case in which there is a declaration u/s (1), Section 8(c) says that the report can be given by the Board within 5 months and 3 weeks "as to whether or not" there is sufficient cause for the "continued detention". In other words, it is possible to contend that if the Board gave its opinion within 5 months and 3 weeks that the circumstances mentioned in Section 9(1) did not exist, it is valid. It is also true that the words in Section 9(2):

"IN the case of any person detained under a detention order to which the provisions of sub-section (1) apply" could be interpreted as referring to persons in regard to whom the Union Government had opined that the circumstances stated in Section 9(1) existed, whatever may be the view of the Board.

(20) In a case where the Advisory Board thought otherwise, it may be as already stated, that Section 8(c) permits the opinion even as to non-existence of the circumstances, being given within 5 weeks and 3 months. But, if the Board declares that the circumstances stated in Section 9(1) order did not exist, the position, in our opinion, is that the enlarged period mentioned in Section (2) cannot apply. We proceed to give detailed reasons for the above conclusion.

(21) Now in a case where there is no declaration by the Central Government u/s 9(1), the reference is to be made in 5 weeks and the Board has to give its opinion in 11 weeks. In a case where the Government thinks that the circumstances mentioned in Section 9(1) did not exist - rather, did not exist even at the time the declaration was made u/s 9(1), the case, in our opinion, could not be put on a different pedestal merely because the Government had initially felt that the circumstances did exist. Otherwise, in our opinion, Article 14 of the Constitution will be clearly attracted. If in a case where there is no declaration u/s 9(1), the report has to be given in 11 weeks, then the position cannot be different in a case where the Central Government wrongly opined non-existent circumstances to exist and the Advisory Board correctly held that that circumstances did not exist. Or else, we will be guilty of treating cases where the Government and the Board felt the circumstances did not exist and cases where the Government felt they existed but the Advisory Board found that they did not

exist, on an equal footing, we have to construe the provisions of Section 8(c) and 9(2) meaningfully and so as not to violate Article 14. This is so notwithstanding the fact that in a case where Section 9(1) declaration is given - Section 8(c) literally read, permits the opinion to be given within 5 months and 3 weeks that the circumstances did not exist even initially when the Government passed the orders u/s 9(1).

(22) There is another good reason based upon Article 22 itself as to why the above interpretation is to be accepted. Now under Article 22(4), a detention cannot exceed 3 months. If it has to exceed 3 months, then there must be a reference to an Advisory Board and the report of the Board must be given within the 3 months period (i.e. 12 weeks). That is why Section 8(c) requires the report to be given in 11 weeks (i.e. 12 weeks minus one week) that there is sufficient cause for the detention. Article 22(7) permits a law being made prescribing the circumstances under which and the class or classes of cases in which, a person may be detained for longer than three months without obtaining the opinion of the Board in accordance with Article 22(4)(a). Section 9 no doubt permits such detention for 6 months without a Board's opinion, provided the declaration is made within 5 weeks. (In fact, 5 weeks is otherwise normal period for a reference in a non- Section 9(1) case). Under Article 22(7)(b), the law could prescribe the maximum period for detention in any class or class of cases for such detention. Section 10 prescribes, - in a non Section 9(1) case - maximum of 1 year and in a Section 9(1) situation, up to 2 years. Now, in a case where the Section 9(1) declaration is given by the Central Government stating that the circumstances stated therein existed, a declaration has to be made within 5 weeks of detention and in case the Board also agrees with the Government that the circumstances existed on the date when Section 9(i) order was issued, there is no difficulty and the report could be given within 5 months and 3 weeks ((short of 6 months minus one week). But where the Advisory Board declares that the circumstances did not exist even when the Section 9(1) order was issued, the case does not fall within the law made under Article 22(7)(a). The mere prescription of a procedure as envisaged under Article 22(7)(a) is, in our opinion, not sufficient. The prescription is not an empty formality to be treated as effective merely because of the opinion of the Central Government. The opinion of the Government has to be tested before the Board. The purpose of Article 22(4)(b) is not served unless the detention is in accordance with the law made under Article 22(7)(a) and (b). For purposes of the law made under Article 22(7)(a), detention beyond 3 months is permissible only if the existence of the circumstances as visualised by the Government is affirmed by the Advisory Board. The report of the Advisory Board that the circumstances never existed, takes the case out of the procedure permitted under Article 22(7)(a) and brings the case back into Article 22(4)(a) whereunder the detention without the Board's opinion cannot exceed 3 months and if it exceeds 3 months, the Board's opinion is to be rendered in 11 weeks (one week short of 3 months) rather than in 5 months, 3 weeks (one week short of 6 months). Again, the enlarged period of 6

months without an opinion can be allowed only if the circumstances mentioned in Section 9(1) existed on the date of the order and the reference was made to the Advisory Board within 4 months and 2 weeks (rather than 5 weeks) and the report that the circumstances did exist was given by the Board within 5 months and 3 weeks (rather than 11 weeks). In other words, the Advisory Board's opinion that circumstances did not exist even on the date of Section 9(1) order brings back the case into the net of Article 22(4)(a) prescribing 3 months and out of the enlarged period of 6 months provided in the law made under Article 22(7)(a). Therefore if the opinion of the Board is that the view of the Government was, to start with, wrong, then the report given beyond 11 weeks would render the detention from the date of expiry of 3 months, void of Article 22(4)(a).

(23) The above discussion Therefore answers both the points before us simultaneously. Where the Union Government feels Section 9(1) circumstances are in existence and the Advisory Board feels they are in existence and if the report is given beyond 11 weeks but within 5 months, 3 weeks it will satisfy both Article 22(4)(a) and the law made under Article 22(7)(a). The words in Section 9(2), "in the case of any person detained under a detention order to which the provisions of sub-section (1) apply" would mean that not merely the Union Government applied Section 9(1) but the Advisory Board also felt that the circumstances existed. This is clear from Article 22(4)(a) inasmuch as the opinion of the Board that the circumstances did not exist brings the case into the fold of Article 22(4)(a). That, in our view, is the proper interpretation of the word "apply" in Section 9(1).

(24) On the second point, once the circumstances do not exist as per the Board and the case falls into the prohibition u/s 22(4)(a), the detention beyond 3 months - even there the opinion was given beyond 3 months and within 5 months and 3 weeks - will be invalid. In other words, it is not possible to contend that the detention though not good for 2 years is good for 1 year. Indeed, one year is the maximum period of detention permissible in a non-Section 9(1) situation provided reference is made in 5 weeks and opinion regarding sufficiency of Section 3(1) conditions is given in 11 weeks. In that case it can go up to 3 months without any report and up to 1 year with a report that Section 3(1) conditions existed. But where it is a non Section 9(1) situation - (I) there being no declaration u/s 9(1) or (II) there being a Section 9(1) order but an opinion rendered after 11 weeks (but within 5 months, 3 weeks) that the circumstances as stated by Government did not exist even on the date of Section 9(1) order - then the maximum period without approval of the Board could be only 3 months. The six months period mentioned in Section 9(1) without reference to a Board can apply only in a case where Section 9(1) order is passed in 5 weeks, opinion is sought for within 4 months and 2 weeks and the Board opined that the circumstances existed even when the Section 9(1) order was passed and gave its opinion within 5 months and 3 weeks. If the Board opined that the circumstances did not exist, as stated above, the detention up to 1 year could be sustained only

in a situation where - in spite of a Section 9(1) declaration given within 5 weeks - the reference was also fortuitously made within 5 weeks, the opinion that the circumstances did not exist was also given within 11 weeks. Otherwise, there will be clear violation of Article 22(4)(a) as stated above.

(25) Learned Additional Solicitor General referred to Wade, Administrative Law (7th Ed) (pp. 341-344) to contend that unless the necessary proceedings are taken at law to establish the cause of invalidity of an order and the order is got quashed or otherwise upset, it still remains in force as effective for its ostensible purposes as in the case of the most impeccable of orders (Smith vs. East Elloe Rural District Council 1956 A.C. 736). He also referred to State of Kerala Vs. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) and others, and to Jay Laxmi Salt Works (P) Ltd. Vs. State of Gujarat, , Panjak Bhargava and another Vs. Mohinder Nath and another, , London & Clydeside Estates Ltd. vs. Aberdeen District Council and another 1980 (1) Wlr 182 to support the contention that the opinion of the Central Government that the circumstances mentioned in Section 9(1) exist, continues to hold the field till the opinion to the contrary, if given by the Board is accepted by the Government upon receipt of the report. In our view, the intention of the provisions in Article 22(4)(b) read with Article 22(7)(a) is that the circumstances referred to therein - as elaborated in Section 9 of the Act - are to exist on the date of the declaration and it is for the Advisory Board either to accept or not to accept whether the circumstances existed. Having regard to the nature and the constitution of the Board, the consultation with the Board is not only mandatory but its opinion as to non-existence of the circumstances is liable to be accepted without demur by the Government. The reference to the Board may no doubt be a direct reference flowing from the declaration. It may also be that it is not in the nature of any collateral attack. But that does not mean that whenever there is a direct attack, the order under attack is to be treated as surviving till the attack results in setting aside the proceedings. Even in a direct attack situation, there could be a declaration by the Board that the circumstances referred to in the order passed u/s 9 never existed to start with. Suppose in a suit, a declaratory relief as to the existence of a state of affairs, e.g., as to the nature of property or to the status of a person is in issue and a trial court gives a declaration in favor of the plaintiff and then there is a direct attack in an appeal and the appeal is allowed, the appellate decision refers to the non-existence of the affairs relates as on the date of suit. It is not as if that - being a case of direct attack - the state of affairs are to be deemed to be in existence till the appellate court gave its judgment. The position before the Board are declaratory in nature and are, in our opinion, akin to such a situation.

(26) Learned Additional Solicitor General referred us to Bennion's Statutory Interpretation (p. 255,279,28) as to procedure and substantive limitations and also as to the dictionary meaning of the word "applied" in Section 9(2) of the Act. The word "applied" according to him would mean the invocation of Section 9(1) on the purported existence of the circumstances as opined by the Government. As already stated, we are unable to agree. In our view, the word

"applied" in Section 9(1) is used in the context that the Section 9(1) was validly invoked because the circumstances did exist as on the date of Section 9(1) order and as affirmed by the Advisory Board. A putative state of circumstances alone or a mere opinion of the Government that the circumstances existed does not mean Section 9(1) applied.

(27) It is argued by the learned Additional Solicitor General that if the view we have taken as above is to be accepted it will render the enlarged periods referred to Section 9(2) otiose in cases where the Advisory Board thought the circumstances did not exist. It would also render the words in Section 8(c) "whether or not" the circumstances existed, irrelevant. It would virtually compel Government - even in a Section 9(1) case - to make a reference within 5 weeks (rather than in 4 months and 2 weeks) and compel the Board to give their report in 11 weeks (rather than 5 months and 3 weeks) to say that the circumstances mentioned in Section 9(1) did not exist. It is argued that it may Therefore require the declaration u/s 9(1) and a reference be made within 5 weeks.

(28) It is true that it virtually leads to such a situation. But if it is necessary to comply with Article 22(4)(a) in a case where the Board thinks that the circumstances referred to in Section 9(1) did not exist, we would rather prefer to hold that the statutory provisions of the Act have to be sacrificed at the altar of the Constitutional provisions. This of course does not mean that we are striking down the extended limits provided in Section 9(2) of the Act.

(29) For the aforesaid reasons, we hold that though the reference has been made to the Board in 5 weeks and the declaration u/s 9(1) has also been made in 5 weeks, still the report of the Board that the circumstances mentioned in Section 9(1) did not exist i.e. even on the date of Section 9(1) order, having been given beyond 11 weeks, makes the detention beyond 3 months illegal in view of Article 22(4)(a). The detention cannot be sustained even for 1 year. A one year detention will be possible only if in a Section 9(1) case, the reference and the declaration u/s 9(1) are within 5 weeks of detention and the report is given by the Board in 11 weeks of detention.

(30) The writ petition is allowed and the detenu is directed to be released forthwith if not required in any other case.