PETITIONER:
ABDUL LATIF ABDUL WAHAB SHEIKH

Vs.

RESPONDENT:
B.K. JHA & ANR.

DATE OF JUDGMENT09/02/1987

BENCH:
REDDY, O. CHINNAPPA (J)
BENCH:
REDDY, O. CHINNAPPA (J)
KHALID, V. (J)

CITATION:
1987 AIR 725 1987 SCR (2) 203
1987 SCC (2) 22 JT 1987 (1) 397
1987 SCALE (1)275
CITATOR INFO :
F 1989 SC1234 (14)
R 1989 SC1812 (5)

ACT:
Gujarat Prevention of Anti Social Activities Act, 1985, section 15-- Preventive Detention providing for successive detentions-- Validity of--Whether the section be read down so that it does not offend the mandate of Article 22(4) of the Constitution--Procedural requirements stricts compliance of, reiterated.

HEADNOTE:
Section 11 of the Gujarat Prevention of Anti Social Activities Act, 1985 stipulates that in every case where a detention order has been made under the Act, the State Government shall, within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted under s. 10 the grounds on which the order has been made the representation if any made by the detenu and the report if any of the authorised officer. Under s. 15(2), the expiry or revocation of an earlier detention order shall not bar the making of a subsequent detention order under the Act against the same person, subject to the proviso that if there were no fresh facts, the maximum period for which a person may be detained shall not extend beyond the expiry of a period of 12 months from the date of detention under the earlier detention order.

While the appellant was in Jail from November 12, 1985 onwards awaiting trial on a charge of murder he was acquitted on May 26, 1986. He was due for release from prison on June 23, 1986. On that day, however, an order for his detention was made under the provisions of the Gujarat Prevention of Anti Social Activities Act, 1985. The period of three weeks stipulated by s. 11 of the Act expired on July 14, 1986. Since there was no Advisory Board in existence, the appellant was entitled to be released on July 14, 1986 itself. But he was not so released. However, during the pendency of the writ petition challenging the said detention order in the High Court, the order of detention dated 23rd June, 1986 was revoked on 7th August, 1986 and a fresh order of detention was made on the same facts on the same day with

the result the earlier writ petition was withdrawn and a fresh write petition came be filed. An Advisory Board was, however constituted on August 18, 1986. A reference under s. 11 was made to the Advisory Board on
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August 20, 1986 and the Advisory Board made its report on September 6, 1986. The report of the Advisory Board was more than three weeks after the detention which commenced on the making of the order of detention though it was within three months from the second order of the detention. The appellant contended, in the writ petition, that there has been a contravention of the constitutional protection afforded to him by Article 22(4). The writ petition having been dismissed, the Appellant has come in appeal by Special Leave.
Allowing the appeal, the Court,

HELD: 1. No law can be made providing for successive orders for detention in a manner so as to render the protection of Article 22(4) of the Constitution ineffective. Section 15 of the Gujarat Prevention of Anti Social Activities Act, 1985 which provides for the making of successive orders of detention must be read down so as to bring it in conformity with Article 22(4) of the Constitution. If there is to be a collision between Article 22(4) of the Constitution and s. 15 of the Act, s. 15 has to yield. But by reading down the provision, the collision may be avoided and s. 15 may be sustained. So, avoiding the collision course, It must be held that if the report of the Advisory Board is not made within three months of the date of detention, the detention becomes illegal notwithstanding that it is within three months from the date of he second order of detention. [207C-F]

Shibapada Mukherjee v. State of West Bengal, [1974] 3 SCC 50; A.K. Roy v. Union of India, [1982] 1 SCC 271 and Talib Hussain v. State of Jammu & Kashmir, [1971] 3 SCC 118, distinguished.

2. In a Habeas Corpus proceeding, it is not a sufficient answer to say that the procedural requirements of the Constitution and the Statute have been complied with before the date of hearing and therefore, the detention should be upheld. The procedural requirements are the only safeguards available to a detenu since the court is not ,expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard. If a reference to an Advisory Board is to be made within three weeks, it is no answer to say that the reference, though not made within three weeks, was made before the hearing of the case. If the report of the Advisory Board is to be obtained within three months, it is no answer to say that the report, though not obtained within three months, was obtained before the hearing of the
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case. If the representation made by the detenu is required to be disposed of within a stipulated period, it is no answer to say that the representation, though not disposed of within three months, was disposed of before the hearing of the case. [209B-F]

OBSERVATION

An order of detention should not have been made, knowing full well that there was no Advisory Board in existence to whom a reference could be made under the Act, and whose report could be obtained as required by the Constitution. Such a casual and indifferent approach betrays a disregard

for the rights of citizens.]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 72 of 1987.

From the Judgment and order dated 21.10.1986 of the Gujarat High Court in Spl. Crl. Appeal No. 889 of 1986.

Ram Jethmalani, Ms. Rani Jethmalani and A.K. Sharma for the Appellant.

T.U. Mehta, M.N. Shroff and K.M.M. Khan for the Respondents.

The Judgment of the Court was delivered by

CHINNAPPA REDDY, J. We grant special leave and proced to hear the apeal.

The appellant, Abdul Latif Wahab Sheikh, was in jail from November 12, 1985 onwards awaiting trial on a charge of murder. He was acquitted on May 26, 1986. Though acquitted, he was not straightaway released from prison. The reasons are not clear to us from the record. Presumably he was required in connection with some other case. He was due for release from prison on June 23, 1986. On that day, however, an order for his detention was made under the provisions of the Gujarat Prevention of Anti Social Activities Act, 1985. The mandate of Art. 22(4) of the Constitution is that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless 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
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period of three months that there is in its opinion sufficient cause for such detention. Section 10 of the Gujarat Prevention of Anti Social Activities Act, 1985 provides for the constitution of an Advisory Board, sec. 11 provides for reference to the Advisory Board and sec. 12 prescribes the procedure to be followed by the Advisory Board. What is important for the purposes of this case is that sec. 11 stipulates that in every case where a detention order has been made under the Act, the State Government shall, within three weeks from the date of detention of a person under the order, place before the Advisory Board the grounds on which the order has been made, the representation, if any, made by the detenu and the report, if any, of the authorised officer. What is intriguing in the case is that on the date when the detention order was made, there was no Advisory Board in existence to which a reference could be made under sec. 11 of the Act and whose report of its opinion regarding sufficient cause for the detention was required to be obtained within three months of the detention under Art. 22(4) of the Constitution. The period of three weeks stipulated by sec. 11 of the Act expired on July 14, 1986. The petitioner was entitled to be released on July 14, 1986 as no reference had been made to the Advisory Board within the period contemplated by sec. 11 of the Act. But he was not so released. This state of affairs continued till August 7, 1986 when the order of detention dated June 23, 1986 was revoked and a fresh order of detention was made on the same facts on the same day. In the meanwhile, the order of detention dated June 23, 1986 had been challenged by filing a writ petition in the High Court. Consequent on the revocation of that order that writ petition was withdrawn as having become infructuous and another writ petition, out of which the present appeal arises, was filed questioning the second

order of detention dated August 7, 1986. The Advisory Board was constituted on August 18, 1986. Reference to the Advisory Board was made on August 20, 1986. The Advisory Board made its report on September 26, 1986. It will be seen that the report of the Advisory Board was more than three weeks after the detention which commenced on the making of the order of detention, though it was within three months from the date of the second order of detention. The learned counsel for the appellant contends that there has been a contravention of the constitutional protection afforded by Art. 22(4) and therefore, the appellant is entitled to be set at liberty. He does not dispute that under sec. 15(2) of the Gujarat Prevention of Anti Social Activities Act the expiry or revocation of an earlier detention order shall not bar the making of a subsequent detention order under the Act against the same person, subject to the proviso that if there were no fresh facts, the maximum period for which a person may be detained shall not extend beyond the expiry of 207
a period of 12 months from the date of detention under the earlier detention order. He submits that this provision, if to be sustained, as constitutionally valid, must be read down so that it does not offend the mandate of Art. 22(4) of the Constitution that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless the Advisory Board has reported within the period of three months that there is in its opinion sufficient cause for such detention. On the other hand, the learned counsel for the State of Gujarat submits that it is enough if the report of the Advisory Board is obtained within three months of the subsequent order of detention, where the earlier order is revoked and a subsequent order is made.

The real question for consideration is whether a law may be made providing for successive orders for detention in a manner as to render the protection of Art. 22(4) of the Constitution ineffective? For example, can a fresh order of detention be made every 89th day making it unnecessary to obtain the report of the Advisory Board within three months of the detention? That is what it will amount to if the submission of he learned counsel for the State is accepted. It, therefore, becomes imperative to read down sec. 15 of the Gujarat Prevention of Anti Social Activities Act, 1985 which provides for the making of successive of order of detention so as to bring it in conformity with Art. 22(4) of the Constitution. If there is to be a collision between Art. 22(4) of the Constitution and sec. 15 of the Act, sec. 15 has to yield. But by reading down the provision, the collision may be avoided and sec. 15 may be sustained. So, avoiding the collision course, we held that if the report of the Advisory Board is not made within three months of the date of detention, the detention becomes illegal notwithstanding that it is within three months from the date of the second order of detention.

The learned counsel for the petitioner invited our attention to the decision of the court in Shibapada Mukherjee v. State of West Bengal, [1974] 3 SCC 50, where the court referring to clauses 4 and 7 of Art. 22 observed.

> "It is clear from clauses (4) and (7) of Article 22 that the policy of Article 22 is, except where there is a Central Act to the contrary passed under clause (7) (a), to permit detention for a period of three months only, and detention in excess of that period is permissible only in those cases where an

> Advisory Board set up under the relevant statute,
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> has reported as to the sufficiency of the cause for such detention. Obviously, the Constitution looks upon preventive detention with disfavour and has permitted it only for a limited period of three months without the intervention of an independent body with persons on it of judicial qualifications of a high order. The facts that the report of such an Advisory Board has to be obtained before the expiry of three months from the date of detention shows that the maximum period within which the detaining authority can on its own satisfaction detain a person is three months

The observation of the court to the extent that they go to support the contention of the learned counsel for the appellant, but we must say that in that case, the court was not confronted with the present situation at all. The learned counsel for the State referred us to A.K. Roy v. Union of India, [1982] 1 SCC 271, where the court referring to an argument based on sec. 11(2) of the National Security Act said:

> "Section 11(2) of the Act provides specifically that the report of the Advisory Board shall specify its opinion "as to whether or not there is sufficient cause for the detention of the person concerned". This implies that the question to which the Advisory Board has to apply its mind is whether on the date of its report there is sufficient cause for the detention of the person. That inquiry necessary involves the consideration of the question as to whether there was sufficient cause for the detention of the person when the order of the detention was passed, but we see no justification for extending the jurisdiction of the Advisory Board to the consideration of the question as to whether it is necessary to continue the detention of the person beyond the date on which its report or beyond the period of three months after the date of detention."
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> The learned counsel for the State also invited our attention to the decision of a learned single Judge of this Court, rendered during the vacation, in Talib Hussain v. State of Jummu & Kashmir, [1971] 3 SCC 118, where he observed:
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> "In regard to the submission that the petitioner was arrested and deprived of his person liberty long before the order of his arrest and this invalidated his detention, it is
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> sufficient to point out that in habeas corpus proceeding the Court has to consider the legality of the detention on the date of hearing. 'If on the date of hearing it cannot be said that the aggrieved party has been wrongfully deprived of his personal liberty and his detention is contrary to law a writ of habeas corpus cannot issue."

Neither of the cases cited by the learned counsel for the State deal with the question now at issue even in a

remote way. They do not have any application. We only desire to add that in a habeas corpus proceeding, it is not a sufficient answer to say that the procedural requirements of the Constitution and the statute have been complied with before the date of hearing and therefore, the detention should be upheld. The procedural requirements are the only safeguards available to a detenu since the court is not expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard. If a reference to an Advisory Board is to be made within three weeks, it is no answer to say that the reference, though not made within three weeks, was made before the hearing of the case. If the report of the advisory Board is to be obtained within three months, it is no answer to say that the report though not obtained within three months, was obtained before the hearing of the case. If the representation made by the detenu is required to be disposed of within a stipulated period, it is not answer to say that the representation, though not disposed of within three months, was disposed of before the hearing of the case. We mentioned that we were intrigued that an order of detention should have been made, knowing full well that there was no Advisory Board in existence to whom a reference could be made under the Act and whose report could be obtained as required by the Constitution. Such a casual and indifferent approach betrays a disregard for the rights of citizens and this has to be deprecated. We have no option but to allow the appeal and quash the order of detention dated August 7, 1986. The petitioner is now on parole. He need not surrender to his parole. In the view that we have taken, we have refrained from referring to the other submissions of the learned counsel for the appellant.

S.R. Appeal allowed.

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