

PETITIONER:

K.M. ABDULLA KUNHI AND B.L. ABDUL KHADER

Vs.

RESPONDENT:

UNION OF INDIA AND ORS., STATE OF KARNATAKA AND ORS.

DATE OF JUDGMENT 23/01/1991

BENCH:

SHETTY, K.J. (J)

BENCH:

SHETTY, K.J. (J)

RAY, B.C. (J)

KANIA, M.H.

SHARMA, L.M. (J)

VERMA, JAGDISH SARAN (J)

CITATION:

1991 AIR 574 1991 SCR (1) 102

1991 SCC (1) 476 JT 1991 (1) 216

1991 SCALE (1) 58

CITATOR INFO :

RF&E 1992 SC2161 (9)

ACT:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974--Sections 3, 8, 10 and 11--Detention order confirmed before consideration of representation of detenu--Whether valid--Representation received by considered by Government after receiving report of Advisory Board--Whether valid.

Constitution of India 1950: Articles 22(4) and (5)--Preventive detention--Rights of detenu--What are.

HEADNOTE:

A division Bench of this Court in V.J. Jain v. Shri Pradhan and Ors., [1979] 4 SCC 401 observed that the representation of the detenu should be considered by the detaining authority as early as possible before any order is made confirming the detention. The confirmation of the detention order without the consideration of representation would be invalid and the subsequent consideration of the representation would not cure the invalidity of the order of confirmation. This view was reiterated in the later case of Om Prakash Bahl v. Union of India, W.P.No. 845 of 1979 decided on 15.10.1979.

As the aforesaid view required reconsideration, the instant SLPs and WPs had been referred to and heard by a constitutional bench.

On December 1, 1988, the officers of the Directorate of Revenue Intelligence upon getting information that contraband gold has been secreted in the room of petitioner No. 1 searched the room in the presence of independent witnesses. Another person was also present inside the room. The officers recovered one Samsonite pouch, and some bundles of Indian currencies from the table drawer in that room. Inside the said pouch, there were five gold biscuits of 24 ct. purity and of foreign origin, and seized the same under a Mahazar.

On 24th February, 1989, that State Government passed

two separate orders of detention under section 3(1)(iv) of the Conservation of

103

Foreign Exchange and Prevention of Smuggling Activities Act 1974 and the petitioners were taken into custody and detained in the Central pension. On 17th April, 1989, the detenus made representation to the Government, which could not be immediately considered since they required translation, and collection of information and comments. In the meanwhile, the matter was referred to the Advisory Board, which had its meeting on 20th April, 1989 considered the case of the detenus, and reported that there was sufficient cause for detention. On 27th April, 1989, the Government accepted the report and confirmed the detention orders. On 6th and 7th May, 1989 the Government considered and rejected on representation of the detenus and they were informed of the same.

The detention orders were challenged in the High Court through a writ petition but the High Court dismissed the same.

In the appeals and writ petition to this Court, the main question for consideration was, whether the confirmation of detention order upon accepting the report of the Advisory Board renders itself invalid solely on the ground that the representation of the detenu was not considered, and the subsequent consideration of the representation would not cure that invalidity.

Disposing of the matters, the Court,

HELD: 1(a) With regard to liberty of citizens the Court stands guard over the facts and requirements of law, but Court cannot draw presumption against any authority without material. [115G]

(b) The confirmation of detention does not preclude the Government from revoking the order of detention upon considering the representation of the detenu. [115G]

(c) There may be cases where the Government has to consider the representation only after the confirmation of the detention. [115H]

2(a) There are two constitutional safeguards, viz: Clause (4) of Article 22, and Clause(5) of Article 22. The former requires that if a detenu is liable to be detained for a longer period than three months, his case shall be referred to the Advisory Board which, must report before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention. The latter provides that when any person is detained in pursuance of an order made under any

104

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. [108E-G]

2(b) The detenu has two rights under clause (5) of Article 22 of the Constitution: (i) to be informed, as soon as may be, of the grounds on which the order of detention is based, that is, the grounds which led to the subjective satisfaction of the detaining authority, and (ii) to afforded the earliest opportunity of making a representation against the order of detention. [108H; 109A]

3. The function of the Advisory Board is purely advisory and its report will enable the Government to detain the person beyond three months provided the detention is valid on its merits and does not otherwise offend the Constitution. [108F]

4(a) The constitution right to make representation under clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. The obligation of the Government to afford to the detenu an opportunity to make representation and to consider such representation is distinct from the Government's obligation to refer the case of detenu along with the representation to the Advisory Board to enable it to form its opinion and send a report to the Government. [110B-C]

4(b) It is implicit in clause (4) and (5) of Article 22 that the Government while discharging its duty to consider the representation, cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. The obligation of the Government to consider the representation is different from the obligation of the Board to consider the representation at the time of hearing the reference. The Government consider the representation to ascertain essentially whether the order is in conformity with the power under the law. [110C-D]

4(c) The Board, on the other hand, considers the representation and the case of the detenu to examine whether there is sufficient case for detention. The consideration by the Board is an additional safeguard and not a substitute for consideration of the representation by the Government. [110E]

4(d) The right to have the representation considered by the

105

Government, is safeguarded by clause (5) of Article 22, and it is independent of the consideration of the detenu's case and his representation by the Advisory Board under clause (4) of Article 22 read with section 8(c) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. [110F]

SK. Abdul Karim & Ors. v. State of West Bengal, [1969] 1 SCC 433, Pankaj Kumar Chakrabarty & Ors. v. State of West Bengal, [1970] 1 SCR 543; Shayamal Chakraborty v. The Commissioner of Police Calcutta and Anr., [1969] 2 SCC 426; B. Sundar Rao & Ors. v. State of Orissa, [1972] 3 SCC 11; John Martin v. State of West Bengal, [1975] 3 SCR 211; S.K. Sekawat v. State of West Bengal, [1983] 2 SCR 161 and Haradhan Saha & Anr. v. State of West Bengal & Ors., [1975] 1 SCR 778, referred to.

5(a) The representation relates to the liberty of the individual, the highly cherished right enshrined in Article 21 of our Constitution. Clause (5) of Article 22 therefore, casts a legal obligation on the Government to consider the representation as early as possible. It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. [110H;111A]

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

the representation. Any unexplained delay in the disposal of the representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal. [11B-D]

Jayanarayan Sukul v. State of West Bengal, [1970] 1 SCC 219; Frances Coralie Mullin v. W.C. Khambra and Ors., [1980] 2 SCC 275; Rama Dhondu Borade v. V.K. Saraf, Commissioner of Police & Ors., [1989] 3 SCC 173; and Aslam Ahmed Zaire Ahmed Shaik v. Union of India & Ors., [1989] 3 SCC 277, referred to.

6(a) There is no constitutional mandate under clause (5) of Arti-

106

cle 22, much less any statutory requirement to consider the representation before confirming the order of detention. As long as the Government without delay considers the representation with an unbiased mind there is no basis for concluding that the absence of independent consideration is the obvious result if the representation is not considered before the confirmation of detention. indeed there is no justification for imposing the restriction on the power of the Government. [115C-D]

6(b) Clause 5) of Article 22 suggests that the representation could be received even after confirmation of the order of detention. The words "shall afford him the earliest opportunity of making a representation against the order" in clause (5) of Article 22 suggest that the obligation of the Government is to offer the detenu an opportunity of making a representation against the order, before it is confirmed according to the procedure laid down under section 8 of the Act. But if the detenu does not exercise his right to make representation at that stage, but presents it to the Government after the Government has confirmed the order of detention, the Government still has to consider such representation and release the detenu if the detention is not within the power conferred under the statute. The confirmation of the order of detention is not conclusive as against the detenu. It can be revoked suo motu under Section 11 or upon a representation of the detenu. [116A-B]

6(c) So long as the representation is independently considered by the government and if there is no delay in considering the representation, the fact that it is considered after the confirmation of detention makes little difference on the validity of the detention or confirmation of the detention. The confirmation cannot be invalidated solely on the ground that the representation is considered subsequent to confirmation of the detention. Nor it could be presumed that such consideration is not an independent consideration. [116C-D]

V.J. Jain v. Shri Pradhan & Ors., [1979] 4 SCC 401; Om Prakash Bahl v. Union of India & Ors., W.P. No. 845 of 1979 decided on 15.10.1979 and Khairul Haque v. State of West Bengal W.P.No. 246/69 decided on 10.9.1969, over ruled; Khudiram Das v. State of West Bengal & Ors., [1975] 2 SCC 81, distinguished.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Writ Petition (Crl.) No. 508 of 1989 etc. etc.

(Under Article 32 of the Constitution of India).

107

Harjinder singh R.N. Joshi, A. Acharjee, Navin

Malhotra, Jagan M. Rao and Raju Ramchandran for the Petitioners.

V.C. Mahajan, B. Parthasarthy. P. Parmeswaran and M. Veerappa for the Respondents.

The Judgment of the Court was delivered by

K. JAGANNATHA SHETTY, J. A Division Bench of this Court while expressing the view that the decisions in J.V. Jain v. Shri Pradhan and Ors., [1979] 4 SCC 401 and Om Prakash Bahl v. Union of India and Ors, W.P. No. 845 of 1979 decided on 15.10.1979 (Unreported) require re-consideration has referred these matters to the Constitution Bench.

It is convenient at this point to refer to the statement of law laid down in the aforesaid two cases. In both the cases, as in present case the persons were detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ('the Act'). The detenu made representation to the appropriate government. By then the Advisory Board was already constituted and it was scheduled to meet to consider the case of the detenu. The Government forwarded the detenu's representation to the Advisory Board. The Advisory Board considered the case of the detenu and also the representation and submitted report expressing the opinion that there was sufficient cause for the detention of the person. The Government after considering that report confirmed the order of detention. It appears that the representation of the detenu was not considered before confirming the detention order and it came to be considered and rejected only thereafter in v.J. Jain case this Court observed that the representation of the detenu should be considered by the detaining authority as early as possible before any order is made confirming the detention. The confirmation of the detention order without the consideration of representation would be invalid and the subsequent consideration of the representation would not cure the invalidity of the order of confirmation. This view has been reiterated in the unreported judgement in Om Prakash Bahl case.

The relevant facts of the present case may now be narrated: On 1 December, 1988, the officers of the Directorate of Revenue Intelligence upon getting information that the contraband gold has been secreted in the room occupied by K.M. Abdulla Kunhi, searched the room in the presence of independent witnesses. Another person called

108

Mohammed Ali was also present inside the room. The officers recovered one Samsonite pouch and some bundles of the Indian currencies amounting to Rs. 34,800 from the table drawer in the room. Inside the said pouch, there were five gold biscuits of 24 ct. purity and of foreign origin. under the Mahazar, the officer seized the gold biscuits along with the Indian currency. On 24 February 1989, the State Government passed two separate orders of detention under Section 3(1)(iv) of the Act, directing the detention of K.M. Abdulla Kunhi, the common petitioner in W.P. (CrI.) No. 508 of 1989 and SLP (CrI.) 2009 of 1989, and B.L. Mohammed Ali, the common petitioner in W.P. (CrI.) No. 542 of 1989 and SLP (CrI) No 2117 of 1989. On 9 March 1989, Mohammed Ali was taken into custody. both of them were detained in Central Prison, Banglaore. On 17 April, 1989, the detenus made representations to the Government. The representations could not be immediately considered since they required translation and collection of information and comments from different authorities. In the meantime, the case was referred to the Advisory Board which had its meeting on 20 April 1989. The Board considered the case of the detenus

and reported that there was sufficient cause for their was unexplained delay in considering the representation of the detenu. Indeed, counsel for the petitioners very fairly submitted that they are not raising the question of delay. They also did not argue that the rejection of the representation after the confirmation of detention was not an independent consideration.

There are two constitutional safeguards, namely, clause (4) of Article 22, and clause (5) of Article 22. the former requires that if a detenu is liable to be detained for a longer period than three months, his case shall be referred to the Advisory Board which must report before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention. The function of the Board is purely advisory and its report will enable the Government to detain the person beyond three months provided the detention is valid on its merits and does not otherwise offend the Constitution. Clause (5) of Article 22 provides that 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.

The detenu has two rights under clause (5) of Article 22 of the constitution: (i) to be informed, as soon as may be, of the grounds on

109

which the order of detention is based, that is, the grounds which led to the subjective satisfaction of the detaining authority, and (ii) to be afforded the earliest opportunity of making a representation against the order of detention.

There are also statutory safeguards with regard to detention of persons under the Act in tune with the Constitutional requirements. Section 3 of the Act provides power to make detention orders. Sub-Section (1) speaks of authorities who are competent to make detention orders. Sub-section (2) states that when an order of detention is made by the State Government or by an officer empowered by the State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of that order. Sub-section (3) thereof provides that a person detained in pursuance of a detention order shall be furnished with the grounds of detention order as soon as may be, but ordinarily not later than five days after the detention. But in exceptional circumstances and for reasons to be recorded in writing, the grounds shall be furnished not later than fifteen days from the date of detention.

Section 8 of the Act provides for reference of the detenu's case to the Advisory Board, the Chairman and members of which shall possess the qualification specified in sub-clause (a) of clause (4) of Article 22 of the Constitution. They must be persons who are, or have been, or are qualified to be appointed as, Judges of a High Court. Clause (b) of Section 8 makes it obligatory for the Government to refer the case of the detenu to Advisory Board within five weeks from the date of detention. Clause (c) of Section 8 provides that the Board shall after considering the reference and other material place before it and after hearing the detenu if he desires to be heard in person, give its report as to whether or not there is sufficient cause for the detention of the person concerned. The Board shall submit the report within eleven week from the date of detention of the person concerned. Clause (f) of Section 8

states that in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the Government may confirm the detention order and continue his detention for such period as the Government deems fit subject to the maximum period permissible under the Act. In every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person, the Government shall revoke the detention order and release the person forthwith. This provision, of course, is subject to Section 9 with which we are not concerned.

110

Section 10 prescribes the maximum period for which any person may be detained. Section 11 provides power to the State Government or the Central Government to revoke the detention order without prejudice to the provisions of Section 21 of the General Clauses Act. This revocation shall not bar the making of another detention order under section 3 against the same person.

It is now beyond the pale of controversy that the constitutional right to make representation under clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. Secondly, the obligation of the Government to afford to the detenu an opportunity to make representation and to consider such representation is distinct from the Government's obligation to refer the case of detenu along with the representation to the Advisory Board to enable it to form its opinion and send a report to the Government. It is implicit in clauses (4) and (5) of Article 22 that the Government while discharging its duty to consider the representation, cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. The obligation of the Government to consider the representation is different from the obligation of the Board to consider the representation at the time of hearing the references. The Government considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, considers the representation and the case of the detenu to examine whether there is sufficient case for detention. The consideration by the Board is an additional safeguard and not a substitute for consideration of the representation by the Government. The right to have the representation considered by the Government, is, safeguarded by cl. (5) of Article 22 and it is independent of the consideration of the detenu's case and his representation by the Advisory Board under cl. (4) of Art. 22 read with section 8(c) of the Act. (See: *Sk. Abdul Karim & Ors. v. State of West Bengal*, [1969] 1 SCC 433; *Pankaj Kumar Chakrabarty & Ors. v. State of West Bengal*, [1970] 1 SCR 543; *Shayamal Chakraborty v. The Commissioner of Police Calcutta and Anr.*, [1969] 2 SCC 426; *B. Sundar Rao and Ors. v. State of Orissa*, [1972] 3 SCC 11; *John Matrin v. State of West Bengal*, [1975] 3SCR 211; *S.K. Sekawat v. State of West Bengal*, [1983] 2 SCR 161 and *haradhan Saha & Anr. v. State of West Bengal and Ors.*, [1975] 1 SCR 778.

The representation relates to the liberty of the individual, the highly cherished right enshrined in Article 21 of our Constitution.

111

Clause (5) of Article 22 therefore, casts a legal obligation on the Government to consider the representation as early as possible. it is a constitutional mandate commanding the

concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard it depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal. This has been emphasised and re-emphasised by a series of decisions of the Court. (See: Jayanarayan Sukul v. State of West Bengal, [1970] 1 SCC 219; Frances Coralie Mullin v. W.C. Kambra and Ors., [1980] 2 SCC 275; Rama Dhondu Borade v. V.K. Saraf, Commissioner of Police and Ors., [1989] 3 SCC 173 and Aslam Ahmed Zaire Ahmed Shaik v. Union of India and Ors., [1989] 3 SCC 277.

In Jayanarayan Sukul case, A.N. Ray, J., as he then was, speaking for the Constitution Bench has laid down four principles which should govern the consideration of representation of detenues (at p.224):

"First the appropriate authority is bound to give an opportunity to the detenu to make a representation and to consider the representation of the detenu as early as possible. Secondly, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detenu by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in the governance of the citizens. A citizen's right raised a correlative duty of the state. fourthly, the appropriate

112

Government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board. If the appropriate Government will release the detenu the Government will not send the matter to the Advisory Board. If, however, the Government will not release the detenu the Government will send the case along with the detenu's representation to the Advisory Board. If thereafter the Advisory Board will express an opinion in favour of release of the detenu the Government will release the detenu. If the the Advisory Board will express any opinion against the release of the detenu the Government may still exercise the power to release the detenu."

In Frances Coralie Mullin v. W.C. Kambra and Ors., Chinappa Reddy, J., while dealing with the time imperative for consideration of the representation has emphasised (at

279):

"We, however, hasten to add that the time imperative can never be absolute or obsessive. The Court's observations are not to be so understood. There has to be lee-way, depending on the necessities (we refrain from using the word 'circumstances') of the case. One may well imagine a case where a detenu does not make representation before the Board makes its report making it impossible for the detaining authority either to consider it or to forward it to the Board in time or a case where a detenu makes a representation to the detaining authority so shortly before the Advisory Board takes up the reference that the detaining authority cannot consider the representation before then but may merely forward it to the Board without himself considering it. Several such situations may arise compelling departure from the time-imperative. But no allowance can be made for lethargic indifference. No allowance can be made for needless procrastination. But allowance must surely be made for necessary consultation where legal intricacies and factual ramifications are involved. The burden of explaining the necessity for the slightest departure from the time-imperative is on the detaining authority."

In Frances Coralie Mullin's case the detenu's representation was received by the detaining authority on December 26, 1979. Without any loss of time copy of the representation was sent to the customs-

113

authorities for their remarks which was obviously necessary because the information leading to the order of detention was collected by the customs authorities. The fact were undoubtedly complex since allegation against the detenu revealed an involvement with an international gang of dope smugglers. The comments of the customs authorities were received on January 4, 1980. The Advisory Board was meeting on January 4, 1980 and so there could be no question of the detaining authority considering the representation of detenu before the board met, unless it was done in a great and undue haste. After obtaining the comments of the customs authorities, it was found necessary to take legal advice as the representation posed many legal and constitutional question, so, after consultation with the Secretary (Law and Judicial) Delhi Administration, the representation was finally rejected by the Administrator on January 15, 1980. it was held that if there appeared to be any delay it was not due to any want of care but because the representation required a thorough examination in consultation with investigation agencies and advisers of law

We agree with the observations in Frances Coralie Mullin case. The time imperative for consideration of representation can never be absolute or obsessive. it depends upon the necessities and the time at which the representation is made. The representation may be received before the case is referred to the Advisory Board, but there may not be time to dispose of the representation before referring the case to the Advisory Board. In that situation the representation must also be forwarded to the Advisory Board along with the case of the detenu. The representation may be received after the case of the detenu is referred to the Board. Even in this situation the representation should be forwarded to the Advisory Board provided the Board has

not concluded the proceedings. In both the situations there is no question of consideration of the representation before the receipt of report of the Advisory Board. Nor it could be said that the government has delayed consideration of the representation, unnecessarily awaiting the report of the Board. It is proper for the Government in such situations to await the report of the Board. If the Board finds no material for detention on the merits and reports accordingly, the Government is bound to revoke the order of detention. Secondly, even if the Board expresses the view that there is sufficient cause for detention, the Government after considering the representation could revoke the detention. The Board has to submit its report within eleven weeks from the date of detention. The Advisory Board may hear the detenu at his request. The Constitution of the Board shows that it consists of eminent persons who are Judges or person qualified to be Judges of

114

The High Court. It is therefore, proper that the Government considers the representation in the aforesaid two situations only after the receipt of the report of the Board. If the representation is received by the Government after the Advisory Board has made its report, there could then of course be no question of sending the representation to the Advisory Board. It will have to be dealt with and disposed of by the Government as early as possible.

The crucial question that remains for consideration is whether the Government should consider and dispose of the representation before confirming the detention. This Court in V.J. Jain case has observed (at 405) that it is a constitutional obligation under clause (5) of Article 22 to consider the representation before confirming the order of detention. if it is not so considered, the confirmation becomes invalid and the subsequent consideration and rejection of the representation could not cure the invalidity of the order of confirmation.

To reach this conclusion, the Court has relied upon two earlier judgments of this Court: (i) Khudiram Das v. State of West Bengal and Ors., [1975] 2 SCC 81 and (ii) Khairul Haque v. State of West Bengal, W.P. No.246/69 decided on 10.9.1969(Unreported).

The decision in Khudiram case is of title assistance to the principle stated in V.J. Jain case. It was a case of belated consideration of the representation without acceptable explanation. The decision in Khairul Haque case, however, relevant. It is also unreported decision. The facts of the case and the principles stated therein may be furnished. There the petitioner was detained by an order dated 5 June 1969 of the District Magistrate, 24 Parganas, West Bengal, under Section 3(2) of the Preventive Detention Act, 1950. He was arrested and detained in Dum Dum Central Jail on 6 June 1969. The District magistrate informed the State Government of his said order on 9 June 1969. On 14 June 1969, the Governor gave his approval and reported the case of the Central Government. On or about 23 June 1969, the Government received the representation of the petitioner. On 30 June 1969 the Governor referred the case of the petitioner to the Advisory Board. The Advisory Board made its report on 11 August 1969 to the effect that there was sufficient cause for the detention of the petitioner. Thereafter, on 12 August 1969, the Governor confirmed the order of detention. On 29 August 1969, the Governor rejected the petitioner's representation. The Court while referring these facts said that there was unaccounted delay of little more than two months in the consideration of the

representation . Doubtless the detention was invalid on this delay alone and the Court could have quashed the

115

detention on that ground. But the Court, however, observed that it is doubtful whether the Government's consideration of the representation was independent as implicit in the language of Article 22(5). If the confirmation by the Government of the order of the District magistrate is made first and the Government rejects the representation thereafter, such rejection is not an independent consideration but as the result of its decision to confirm the order of detention. It was also observed that the process of decision-making has to be the other way about, that is to say, the Government must first consider the representation and only later decide whether it should confirm the order of the District magistrate on the basis of the report of the Advisory Board. The decision in Khairul Haque case has been followed in V.J. Jain case which in turn was followed in Om Prakash Bahl case.

There is no constitutional mandate under cl. (5) of Article 22, much less any statutory requirement to consider the representation before confirming the order of detention. As long as the Government without delay considers the representation with an unbiased mind there is no basis for concluding that the absence of independent consideration is the obvious result if the representation is not considered before the confirmation of detention. Indeed, there is no justification for imposing this restriction on the power of the Government. As observed earlier, the Government's consideration of the representation is for a different purpose, namely to find out whether the detention is in conformity with the power under the statute. This has been explained in Haradhan Saha case, where Ray, C.J., speaking for the Constitution Bench observed that the consideration of the representation by the Government is only to ascertain whether the detention order is in conformity with the power under the law. There need not be a speaking order in disposing such representation. There is also no failure of justice by the order not being a speaking order. All that is necessary is that there should be real and proper consideration by the Government.

It is necessary to mention that with regard to liberty of citizen the Court stands guard over the facts and requirement of law, but Court cannot draw presumption against any authority without material. It may be borne in mind that the confirmation of detention does not preclude the Government from revoking the order of detention upon considering the representation. Secondly, there may be cases where the Government has to consider the representation only after confirmation of detention. Clause (5) of Article 22 suggests that the representation could be received even after confirmation of the order

116

of detention. The words 'shall afford him the earliest opportunity of making a representation against the order' in clause (5) of Article 22 suggest that the obligation of the Government is to offer the detenu an opportunity of making a representation against the order, before it is confirmed according to the procedure laid down under Section 8 of the Act. But if the detenu does not exercise his right to make representation at that stage, but presents it to the government after the Government has confirmed the order of detention, the Government still has to consider such representation and release the detenu if the detention is not within the power conferred under the statute. The

confirmation of the order of detention is not conclusive as against the detenu. It can be revoked suo motu under Section 11 or upon a representation of the detenu. It seems to us therefore, that so long as the representation is independently considered by the Government and if there is no delay in considering the representation, the fact that it is considered after the confirmation of detention makes little difference on the validity of the detention or confirmation of the detention. The confirmation cannot be invalidated solely on the ground that the representation is considered subsequent to confirmation of the detention. Nor it could be presumed that such consideration is not an independent consideration. With all respect, we are not inclined to subscribe to the views expressed in V.J. Jain. Om Prakash Bahl and Khairul Haque cases. They cannot be considered to be good law and hence stand overruled.

Counsel however, submitted that the representation of the detenu was not sent to the Advisory Board for consideration. This question was not raised before the High Court, nor in the Writ Petitions before us and hence rejected.

These petitions will now be placed before the Division Bench for final disposal.

N.V.K.

Petitions disposed of.

117