REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1251 OF 2015

(@ SPECIAL LEAVE PETITION (CRIMINAL) NO. 5890 OF 2014)

Union of India & Ors. ... Appellant(s)

Versus

Saleena ...Respondent(s)

SUPREME COURT OF INDIA

J U D G M E N T

Dipak Misra, J.

Calling in question the defensibility of the judgment and order dated 24.10.2015 passed by the High Court of Kerala by which the Division Bench has quashed the order of detention passed against Abdu Rahiman (detenu), the husband of the respondent, under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for brevity, 'the COFEPOSA Act'), the instant appeal, by special leave, has been preferred.

2. Shorn of unnecessary details, the facts which are essential to be stated for adjudication of this appeal are that an order of detention was issued on 08.02.2013 under Section 3(1) of the COFEPOSA Act. The said order, as the facts would uncurtain, came into existence on the basis of proposal of the Sponsoring Authority (Directorate of Enforcement) and the Empowered Officer of the Central Government (the Detaining Authority). The grounds of detention were communicated to the detenu vide communication dated 08.02.2013. By the said communication in compliance with Article 22(5) of the Constitution and Section 3(3) of the COFEPOSA Act, the detenu was informed of his right to make a representation against his detention to the Detaining Authority. Be it stated, pursuant to the order of detention, the detenu was detained on 25.02.2013 and lodged in the Central Prison, Thiruvananthapuram.

3. The detenu made a representation on 11.04.2013 which was received on 18.04.2013 by the Jail Superintendent which was forwarded to the competent authority and thereafter the Special Secretary-cum-Director

General, Central Economic Intelligence Bureau, Ministry of Finance, Department of Revenue, rejected the representation on behalf of the Central Government on 26.04.2013 after due consideration. The order of rejection was communicated to the detenu vide memorandum dated 29.04.2013 by the Under Secretary, Government of India. Keeping in view the prescription enshrined under Section 8(1) of the COFEPOSA Act, reference was made to the Advisory Board and the detenu was heard by the Advisory Board on 04.05.2013, and thereafter vide order dated 21.05.2013, he was informed that the Advisory Board was of the opinion that sufficient reasons existed for his detention. On the basis of the opinion of the Advisory Board, the Central Government confirmed the order of detention and directed that the detention of the detenu would remain in force for a period of one year commencing from the date of his detention.

4. Aggrieved by the aforesaid order, the wife of the detenu filed Writ Petition (Criminal) No. 406 of 2013 before the High Court seeking a writ of habeas corpus. It was urged before the High Court that the decision of the competent authority

was not communicated to the detenu; that there was inordinate and unexplained delay in passing the order of detention; that the report submitted by the sponsoring authority was not served on the detenu; that there was delay in considering his representation; that the translated copy of the order of detention was not served on him; that he was not served the order rejecting his representation; and that the order of rejection passed by the competent authority indicating the reasons was not communicated to the detenu.

5. Counter affidavit was filed by the respondents putting forth the stand that before rejecting the representation of the detenu, the requisite process was adhered to, and in support of the same it was asserted that after receipt of the representation of the detenu from the Jail Superintendent by the Deputy Director, Calicut, the same was sent to the Ministry with para-wise comments on 25.4.2013. On 26.4.2013, after examining the issue raised in the representation, the Under Secretary put up the file before the Joint Secretary who is the Competent Authority under Section 3(1) of the COFEPOSA Act. The said Authority

SUPREME COURT OF INDIA
JUDGMENT

recorded its comments and submitted the file to the Special Secretary and Director General, Central Economic Intelligence Bureau for consideration, who vide order dated 26.4.2013 rejected the same.

6. The High Court noting the submissions of the learned counsel for the parties adverted to the decisions in ***Devji Vallabhbhai Tandel v. The Administrator of Goa, Daman and Diu and Anr.***[1], ***Lekha Nandakumar v. Government of India***[2], ***A.C. Razia v. Government of Kerala and others***[3], ***Saliyal Beevi and others v. State of Kerala and others***[4] and some other authorities and eventually came to hold as follows:-

> "As we have already stated, a detenu, who makes a representation availing of his constitutional rights under Article 22(5) of the Constitution of India is entitled to have proper consideration of his representation and that process of consideration is completed, only when a decision on his representation is also communicated to him. That constitutional requirement will not be satisfied if an authority subordinate to the competent authority informs the detenu that his representation is rejected. Admittedly, in this case, the decision of the competent authority was not communicated to the detenu and on the other hand, the only communication that was

[1] AIR 1982 SC 1029
[2] 2004 (2) KLT 1094
[3] AIR 2004 SC 2504
[4] 2011 (4) KHC 422

> issued to the detenu is that of the Under Secretary to the Government of India, where, it was laconically stated that his representation is rejected. In our view, this is a case where the right of the detenu under Article 22(5) of the Constitution of India is violated and the issue canvassed by the petitioner is fully covered in her favour by the principles laid down by the Division Bench of this Court in Lekha Nandakumar's case (supra)."

Be it stated, all other grounds urged before the High Court did not find favour and were regarded as unacceptable. Thus, the only ground that impressed the High Court is the one that is mentioned in the aforequoted passage.

7. Criticizing the aforesaid analysis and the ultimate view expressed by the High Court, Mr. N.K. Kaul, learned Additional Solicitor General appearing for the Union of India has submitted that the High Court has fallen into error by opining that in the obtaining factual matrix, Article 22(5) of the Constitution of India has been violated. It is urged by him that the decision of the Division Bench of the High Court in ***Lekha Nandakumar*** (supra) had already been diluted in ***Babu v. State of Kerala***[5], but the High Court by

SUPREME COURT OF INDIA
JUDGMENT

[5] 2010 (1) KLT 230

the impugned order placed reliance on the earlier view. It is his further submission that the detenu has no vested right neither under Article 22(5) of the Constitution nor under Section 3(1) and (3) of the COFEPOSA Act to assert that unless the order rejecting the representation itself is communicated there is a procedural irregularity which invalidates the detention. It has been further canvassed by him that there has been no abuse of discretion but on the contrary a complete application of mind, for all relevant materials have been taken into consideration which is reflective from the file and in such a situation, the order of detention is not vulnerable in law. Elaborating further, it is put forth by him that once a subjective satisfaction has been arrived at on consideration of the relevant materials placed before the detaining authority by the sponsoring authority, the order is absolutely legally sustainable and there was no warrant for any interference by the High Court. It is argued by him that the High Court has been wholly misguided by the aspect that the order rejecting the representation was not communicated by the detaining authority, for there is no requirement in law that it has to

be communicated by the said authority. Emphasis has to be on the satisfaction of the competent authority which is demonstrable from the file and that would suffice the legal requirement. To bolster the aforesaid submissions, Mr. Kaul has placed reliance on ***Haradhan Saha v. State of West Bengal***[6], ***Ashok Narain v. Union of India***[7], ***Gurdev Singh v. Union of India***[8] and ***Ujagar Singh v. State of Punjab***[9].

8. Mr. R. Basant, learned senior counsel appearing for the respondent, per contra, would contend that right to represent as provided under Article 22(5) includes the right to fair and proper consideration and the said position in law has been settled by the Constitution Bench in ***K.M. Abdulla Kunhi v. Union of India***[10]. It is urged by him that the right for proper consideration, has been taken a step forward by the High Court of Kerala in ***Lekha Nandakumar*** (supra) by holding that detenu has a right to be communicated the order rejecting his representation and the non-compliance explicitly shows non- application of mind. It is put forth by

SUPREME COURT OF INDIA
JUDGMENT

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6 (1975) 3 SCC 198
7 (1982) 2 SCC 437
8 (2002) 1 SCC 545
9 1952 SCR 756
10 (1991) 1 SCC 476

the learned senior counsel that when the order passed rejecting the representation is communicated, the detenu would have been apprised of the fact that there had been a consideration of his representation in a fair and impartial manner indicating application of mind, but when the communication, as the fact situation in the present case would show, is fundamentally a non-communication to sustain an order of such nature, would be contrary to high values relating to life, freedom and liberty, inasmuch as such procedural violation vitiates the order of detention. Learned senior counsel would argue with vehemence that the order must be self-evident that the representation has been considered in an impartial and dispassionate manner and, therefore, the communication of the order passed by the competent authority is imperative, for it would clearly convey that there has been real and proper consideration. Lastly it is propounded by Mr. Basant that if this Court would be inclined to set aside the judgment of the High Court, it may not send back the accused to undergo the remaining period of detention as there exists no proximate temporal nexus between the period of detention and today.

SUPREME COURT OF INDIA JUDGMENT

That apart, submits the learned senior counsel, nothing has been brought on record to indicate the desirability of further or continued detention. In support of the order of the High Court, learned senior counsel has placed reliance on ***Haradhan Saha*** (supra), ***Lekha Nandakumar*** (supra), ***K.M. Abdulla Kunhi*** (supra) and ***Bhut Nath Mete v. State of West Bengal***[11] and for the second limb of submission, he has drawn inspiration from ***Sunil Fulchand Shah v. Union of India***[12], ***State of Tamil Nadu v. Kethiyan Perumal***[13], ***State of Tamil Nadu v. Alagar***[14] and ***Chandrakant Baddi v. ADM & Police Commr***[15].

9. When the matter was taken up for hearing on 12.3.2015, Mr. Basant, learned senior counsel appearing for the respondent had pleaded for sustenance of the order impugned on the foundation of the principles stated in ***Haradhan Saha*** (supra) and ***Lekha Nandakumar*** (supra). His singular submission was that unless the order itself is communicated, there is a procedural illegality which

[11] (1974) 1 SCC 645
[12] (2000) 3 SCC 409
[13] (2004) 8 SCC 780
[14] (2006) 7 SCC 540
[15] (2008) 17 SCC 290

invalidates the detention. When the matter was taken up on 26.3.2015, the following order came to be passed:-

> "Mr. Neeraj Kishan Kaul, learned Additional Solicitor General commended us to the Division Bench decision of the Kerala High Court in Babu Vs. State of Kerala [(2010) (1) KLT 230] wherein paragraph 13 it has been held thus:
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> > "Of course a reading of the portions emphasized above in the passage might suggest that communication by another of the order passed by the authority may not be sufficient. The portions emphasized above might create confusion as to whether that is the law. But we find it difficult to accept such understanding of the law based on the above observations. The order passed by the authority may be extracted in extensor or completely by a subordinate officer and that may be communicated to the detenu. In such a case it cannot possibly be contended that there is no communication for the reason that the order was not communicated by the authority which passed the order or that the order as such has not been communicated. The observations extracted above understood properly in the context, according to us, can only means and insist that the order must be communicated effectively and not that the order as such must be communicated or that the authority which passed the order must himself communicate the order."
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> Mr. Basant, learned senior counsel, explaining the aforesaid judgment, submitted that effective communication of the order would tantamount to substantial compliance and in the said case the order passed by the competent authority was extracted. Mr. Kaul, learned Additional Solicitor

SUPREME COURT OF INDIA
JUDGMENT

> General, submitted that the order need not be a speaking one and what is to be seen is that there is recording of subjective satisfaction by the competent authority. The communication by the lower authority putting the order in indirect speech would not affect the order of detention. In addition, he would submit that the court can, for its own satisfaction, peruse the record to find out whether procedural safeguards have been taken care of or not."

10. The purpose of referring to the aforesaid order is that the sole contention raised in the case, whether non-communication of the order rejecting the representation in an effective manner would invalidate or vitiate the order of detention. To appreciate the said submission, we had permitted the learned Additional Solicitor General to produce the file for our perusal.

11. We have already stated about the date of detention, date of submission of representation and rejection of representation. There is no dispute that the order of rejecting the representation has been communicated by the Under Secretary on 29.4.2013. The said order reads as follows:-

> "With reference to his representation dated 11.04.2013 (in regional language) received through the Jail Superintendent, Central Prison, Thiruvananthapuram on 18.04.2013 in the

SUPREME COURT OF INDIA
यतो धर्मस्ततो जयः
JUDGMENT

> Ministry, Shri Abdu Rahiman @ Atheeq, a COFEPOSA detenu is hereby informed that the aforesaid representation has been carefully considered by the Special Secretary & Director General, Central Economic Intelligence Bureau, Ministry of Finance, Department of Revenue, New Delhi on behalf of the Central Government, but it is regretted that the same has been rejected."

12. The gravamen of the submission is whether non-communication of the order by the competent authority or absence of an effective communication would vitiate the order of detention. To appreciate the controversy in proper perspective, we may refer to Article 22(5) of the Constitution which reads as follows:-

> "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."

13. Section 3 of the COFEPOSA Act reads as follows:-

> "**Section 3. Power to make orders detaining certain persons.-** (1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of the State Government, not below the rank of a Secretary to

SUPREME COURT OF INDIA
JUDGMENT

that Government, specially empowered for the purposes of this section by that Government, 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-

(i) smuggling goods, or

(ii) abetting the smuggling of goods, or

(iii) engaging in transporting or concealing or keeping smuggled goods, or

(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or

(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,

it is necessary so to do, make an order directing that such person be detained:

Provided that no order of detention shall be made on any of the grounds specified in this sub-section on which an order of detention may be made under section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 or under section 3 of the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988 (J&K Ordinance 1 of 1988).

(2) When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order.

> (3) For the purposes of clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention."

14. We shall analyse what the Division Bench of the High Court of Kerala in ***Lekha Nandakumar*** (supra) has laid down in the backdrop of the constitutional mandate, the statutory command and the view expressed by this Court. In the said case the Division Bench stated that it was not considering the correctness of application of mind pertaining to the satisfaction of the authority or merits of the case, but addressing to the aspect whether constitutional safeguards prescribed by law were complied with or not. It noted the four contentions raised by the petitioner therein. One of the contention was that the representation was not properly disposed of by the appropriate authority and it was not sent to him by the competent authority but the rejection order was communicated by another authority without stating any reason. The High Court referred to the nature of

allegations, the protection granted under Article 22(5) of the Constitution and Section 11 of the COFEPOSA Act, the duty of the authority who deals with the representation, took note of the fact that the representation addressed to the Secretary was considered by the Joint Secretary and in that context proceeded to state as follows:-

> "Even though various contentions including non-supply of necessary documents etc. were mentioned in the representation, there is no application of mind by the Secretary to Government. The Secretary has just rejected the representation. It does not show that he has applied his mind. When the Authority disposes a representation, which is a constitutional right of the detenu, it cannot be disposed of like this in a casual manner. Further, the Secretary has not communicated his order to the detenu, but only the Under Secretary has communicated the order. It is true that even though making of representation is a constitutional right, there is no obligation for the Central Government to grant a hearing. It is also not necessary that an elaborate speaking order should be passed. But from the order it should appear that the authority has applied its mind while disposing of the representation. The order should be sent to the detenu. Here the order passed by the Secretary was not sent to the detenu, but only the factum of rejection of his representation was intimated by the Under Secretary keeping the detenu in dark regarding the way in which his representation was disposed of. There is nothing on record to show that the concerned authority has applied its mind. Even if the Under Secretary informed him that Secretary has disposed of his

SUPREME COURT OF INDIA
JUDGMENT

> representation, this is not the way a constitutional obligation is to be discharged by the Government Secretary. Therefore, there is no proper disposal of the representation. We are of the view that on this ground alone the detention order will not stand as there is procedural violation."
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> [underlining is by us]

15. In ***Babu*** (supra), a subsequent Division Bench posed the question which reads as follows:-

> "Does the communication by anyone other than the authority passing the order of the fate of the representation made by the detenu (and not the order as such) infringe such fundamental right of the detenu?"

16. Dealing with the said issue, the Court opined that the order must be communicated effectively and not that the order as such must be communicated or that the authority which passed the order must himself communicate the order. Thereafter, the Division Bench proceeded to lay down the principle relating to effective communication and in that regard came to hold as follows:-

> "… The order passed by the authority may be extracted in extenso or completely by a subordinate officer and that may be communicated to the detenu. In such a case it cannot possibly be contended that there is no communication for the reason that the order was

SUPREME COURT OF INDIA
JUDGMENT

> not communicated by the authority which passed the order or that the order as such has not been communicated. The observations extracted above understood properly in the context, according to us, can only mean and insist that the order must be communicated effectively and not that the order as such must be communicated or that the authority which passed the order must himself communicate the order."

17. Thus, the decision in ***Lekha Nandakumar*** (supra) lays down that there has to be a communication by the competent authority failing which the order of detention is invalid. The second Division Bench explains the first one and goes by the concept of "effective communication". It states that the order passed by the competent authority should be properly extracted in the order of communication and it must indicate subjective satisfaction. The question is whether the principles stated in both the decisions are correct or to put it differently, whether non-communication of the order by the competent authority or for that matter non-extraction of the order of the competent authority by the communicating authority would straightaway invalidate the order of detention. In this regard, we may usefully refer to the authority in ***Haradhan Saha*** (supra). In the said case, the Constitution Bench was dealing with the

constitutional validity of the Maintenance of Internal Security Act, 1971. While dealing with the consideration of representation, the larger Bench opined thus:-

> "24. The representation of a detenu is to be considered. There is an obligation on the State to consider the representation. The Advisory Board has adequate power to examine the entire material. The Board can also call for more materials. The Board may call the detenu at his request. The constitution of the Board shows that it is to consist of Judges or persons qualified to be Judges of the High Court. The constitution of the Board observes the fundamental of fair play and principles of natural justice. It is not the requirement of principles of natural justice that there must be an oral hearing. Section 8 of the Act which casts an obligation on the State to consider the representation affords the detenu all the rights which are guaranteed by Article 22(5). 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 whether in the light of the representation there is sufficient cause for detention.
>
> xxxxx xxxxx
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> 26. The opinion of the Board as well as the order of the Government rejecting the representation of the detenu must be after proper consideration. There need not be a speaking order. 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 and the Advisory Board."
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> [Emphasis added]

SUPREME COURT OF INDIA JUDGMENT

The Court elucidating the said aspect in the backdrop of natural justice expressed thus:-

> "30. Elaborate rules of natural justice are excluded either expressly or by necessary implication where procedural provisions are made in the statute or where disclosure of relevant information to an interested party would be contrary to the public interest. If a statutory provision excludes the application of any or all the principles of natural justice then the court does not completely ignore the mandate of the legislature. The court notices the distinction between the duty to act fairly and a duty to act judicially in accordance with natural justice. The detaining authority is under a duty to give fair consideration to the representation made by the detenu but it is not under a duty to disclose to the detenu any evidence or information. The duty to act fairly is discharged even if there is not an oral hearing. Fairness denotes abstention from abuse of discretion.
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> 31. Article 22 which provides for preventive detention lays down substantive limitations as well as procedural safeguards. The principles of natural justice insofar as they are compatible with detention laws find place in Article 22 itself and also in the Act. Even if Article 19 be examined in regard to preventive detention, it does not increase the content of reasonableness required to be observed in respect of orders of preventive detention. The procedure in the Act provides for fair consideration to the representation. Whether in a particular case, a detenu has not been afforded an opportunity of making a representation or whether the detaining authority is abusing the powers of detention can be brought before the court of law."
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> [Emphasis supplied]

18. From the aforesaid authority, it is clear as day that while rejecting the representation, a speaking order need not be passed and what is necessary is that there should be real and proper consideration by the Government and the Advisory Board. The Constitution Bench has limited the application of principles of natural justice to the sphere of deliberation. It has confined it to real and proper consideration; application of mind. Dealing with the concept of fairness, it has been observed that fairness denotes abstention from abuse of discretion. Understanding the said principle correctly, it can be said that the use of discretion has to be based on fairness of approach. The authority concerned may not give reasons but there has to be application of mind. Mr. Kaul, learned Additional Solicitor General would submit that even if the order itself does not indicate application of mind by the competent authority or it has been communicated by another authority not indicating the approach of the competent authority the Court has ample power to call for the file and satisfy itself. In this regard, he has drawn our

attention to the view expressed by this Court in ***Ashok Narain*** (supra). In the said case, one Santosh Kumar Jain was engaged in illegal foreign exchange operations and he apprehended by the Enforcement Directorate of the Ministry of Finance. On the basis of certain materials, he was arrested under Section 35 of the Foreign Exchange Regulation Act and remanded to judicial custody and thereafter he was released on bail. After he was enlarged on bail, an order of detention was passed under COFEPOSA Act. The said detention was challenged under Article 32 of the Constitution before this Court, and it was contended before this Court that the failure to launch the prosecution, taken along with the circumstance, that a long time was allowed to lapse before the order of detention was made, was sufficient to expose the hollowness of the claim that the order was made with a view to prevent the detenu from acting in any manner prejudicial to the augmentation of foreign exchange. To appreciate the said submission, the Court called for the original file and upon perusal of the file held thus:-

> "In order to satisfy ourselves that there was no undue or unnecessary delay in making the order of detention, we sent for the original files and we have perused them. We are satisfied that the matter was examined thoroughly at various levels and the detaining authority applied his mind fully and satisfactorily to the question whether the petitioner should be detained under the COFEPOSA. The passage of time from the date of initial apprehension of the detenu and the making of the order of detention was not occasioned by any laxity on the part of the agencies concerned, but was the result of a full and detailed consideration of the facts and circumstances of the case by the various departments involved. We find from the file that the very question whether the passage of time had made it unnecessary to order the detention of the detenu was also considered by the detaining authority. We are unable to hold in the circumstances of this case that there was any tardiness on the part of any one or that the detention is in any manner illegal."

19. In this regard, we may profitably refer to the decision in ***Gurdev Singh*** (supra). In the said case, it was contended by the appellant therein that the order of detention was vitiated because of non-consideration of relevant materials by the detaining authority. The Court referred to the decisions in ***A. Sowkath Ali v. Union of India***[16], ***Ahamed Nassar v. State of T.N.***[17], ***Sanjay Kumar Aggarwal v. Union of India***[18] and ***Ashadevi v. K.***

[16] (2000) 7 SCC 148
[17] (1999) 8SCC 473
[18] (1990) 3 SCC 309

Shivraj, Addl. Chief Secretary to the Govt. of Gujarat[19]

and came to rule thus:-

> "Testing the case at hand on the touchstone of the principles laid down in the decisions noted above, we find that the subjective satisfaction arrived at by the detaining authority in the case is based on consideration of all the relevant materials placed before it by the sponsoring authority. It is not the case of the appellant that the sponsoring authority did not place before the detaining authority any material in its possession which is relevant and material for the purpose and such material, if considered by the detaining authority, might have resulted in taking a different view in the matter. All that is contended on behalf of the detenu is that the detaining authority should have taken further steps before being satisfied that a case for detention under the COFEPOSA Act has been made out against the detenu. Whether the detention order suffers from non-application of mind by the detaining authority is not a matter to be examined according to any straitjacket formula or set principles. It depends on the facts and circumstances of the case, the nature of the activities alleged against the detenu, the materials collected in support of such allegations, the propensity and potentiality of the detenu in indulging in such activities etc. The Act does not lay down any set parameters for arriving at the subjective satisfaction by the detaining authority. Keeping in view the purpose for which the enactment is made and the purpose it is intended to achieve, Parliament in its wisdom, has not laid down any set standards for the detaining authority to decide whether an order of detention should be passed against a person. The matter is

[19] (1979) 1 SCC 222

> left to the subjective satisfaction of the competent authority."

20. Be it stated, Mr. Kaul, learned Additional Solicitor General, relying on the said passage has urged that where after communicating detailed grounds of the detention order and upon receipt of the representation from the detenu, the same has been properly considered, mere non-supply of the original order of rejection of the detenu's representation would not vitiate the detention order itself and it can never be a ground for interference in the order of detention by the High Court under Article 226 of the Constitution.

21. Resisting the said submission, it is propounded by Mr. Basant that incorporation of the extract of the order passed by the competent authority where another authority communicates the order is a constitutional safeguard as envisaged under Article 22(5) of the Constitution. In ***Babu*** (supra), the Division Bench of the High Court, while dealing with the deprivation of right to life and liberty of the citizens, held that it is obligatory on the competent authority to make aware the reasoning of the decision to the detenu and intimation in laconic style has to be avoided. That apart, the authority must not be prisoner of the notes

submitted by the subordinate, for it is its duty to consider the representation in proper perspective. Emphasis has been laid on individual freedom and liberty especially in preventive detention where it gets vitiated only when there is violation of procedural safeguards. To arrive at the said conclusion, heavy reliance has been placed on Article 22(5) of the Constitution. The said decision, as we notice, has engrafted the principle that unless the extract of the original order is communicated, the detention is vitiated, as there is a violation of the constitutional safeguard. We may hasten to state that ***Babu*** (supra) clarifies the proposition of law laid down in ***Lekha Nandakumar*** (supra) but the base of both the decisions is that unless the detenu is made aware of the order passed by the competent authority, the said order is bound to suffer from legal impropriety. It has been laid down in ***Haradhan Saha*** (supra) that there may not be a speaking order but application of mind. In ***Gurdev Singh*** (supra), this Court had made it clear that whether the detention orders suffer from non-application of mind by the detaining authority is not a matter to be examined according to any straitjacket formula or set principles and it

would depend on the facts and circumstances of the case. Therefore, the stress is on the application of mind. Communication of grounds on which the order of detention has been made cannot be equated with communication of the order rejecting the representation. There is a constitutional command to intimate the grounds on which the order of detention has been made. There is a statutory mandate that grounds of detention have to be communicated within five days and delay upto fifteen days is allowed, if reason is given in writing. There can be no shadow of doubt that if reasons are not communicated within the said time, the order of detention would be vitiated. There can be no trace of doubt that in both the stages there has to be application of mind which would be in the realm of subjective satisfaction based on consideration of all the relevant materials placed before the competent authority. The satisfaction of the competent authority regarding sufficiency of materials on which the satisfaction is recorded is subjective in nature. In this regard, it is seemly to reproduce the observations made by this Court in ***Union of India v. Arvind Shergill***[20] :-

[20] (2000) 7 SCC 601

> "The High Court has virtually decided the matter as if it was sitting in appeal on the order passed by the detaining authority. The action by way of preventive detention is largely based on suspicion and the court is not an appropriate forum to investigate the question whether the circumstances of suspicion exist warranting the restraint on a person. The language of Section 3 clearly indicates that the responsibility for making a detention order rests upon the detaining authority which alone is entrusted with the duty in that regard and it will be a serious derogation from that responsibility if the court substitutes its judgment for the satisfaction of that authority on an investigation undertaken regarding sufficiency of the materials on which such satisfaction was grounded. The court can only examine the grounds disclosed by the Government in order to see whether they are relevant to the object which the legislation has in view, that is, to prevent the detenu from engaging in smuggling activity. The said satisfaction is subjective in nature and such a satisfaction, if based on relevant grounds, cannot be stated to be invalid. The authorities concerned have to take note of the various facts including the fact that this was a solitary incident in the case of the detenu and that he had been granted bail earlier in respect of which the application for cancellation of the same was made but was rejected by the Court. In this case, there has been due application of mind by the authority concerned to that aspect of the matter as we have indicated in the course of narration of facts. Therefore, the view taken by the High Court in the circumstances of the case cannot be sustained."

22. This being the position of law, when there is allegation that there has been non-application of mind and the

SUPREME COURT OF INDIA JUDGMENT

representation has been rejected in a laconic or mechanical manner by the competent authority, we are disposed to think, the Court can always call for the file and peruse the notes and the proceedings whether there has been application of mind by the competent authority or not. Our said conclusion gets support from the decision in ***Ashok Narain*** (supra). In the said case, this Court on perusal of file has expressed its opinion that there had been no tardiness on behalf of any one and, therefore, the detention in no manner was illegal.

23. We are absolutely conscious that liberty of an individual is sacred. The individual liberty has to be given paramount importance. But such liberty can be controlled by taking recourse to law. Preventive detention is constitutionally permissible. The Courts can interfere where such detention has taken place in violation of constitutional or statutory safeguards. Treating the issue of communication of rejection of the representation by the competent authority or incorporation of the order passed by the competent authority in the order of communication as a constitutional safeguard, would not be correct. The duty of

the Court in this regard is to see whether the representation submitted by the detenu has been rejected in a mechanical manner without application of mind. We are inclined to hold that for the said purpose, the relevant file can be called for and perused and, accordingly, keeping that in view, in the course of hearing, we had asked for production of the file and the same had been produced.

24. On a perusal of the file, we find that after receipt of the representation, the Under Secretary, COFEPOSA, had narrated the grounds of detention and the file pertaining to the detention was also placed on record. Parawise comments of the sponsoring authority, that is, the Directorate of Enforcement, Kochi has been obtained. Various contentions have been raised in the representation that the detenu had studied only upto 10th standard in the Malayalam medium school of his native place and though he can write and read certain English words, he does not have enough knowledge to understand the meaning of the English words and sentences. In the comment, it has been mentioned that free Malayalam translation of the grounds of detention and relied upon documents had been supplied to

the detenu to make him aware of the grounds and reasons for his detention under the COFEPOSA Act and, therefore, the ground had no relevance. As indicated earlier, such a ground was raised before the High Court and not found favour. It was also urged in the representation that he was unable to understand the documents which were furnished to him in Malayalam as they were not legible. It has been commented that the relevant writings were very much legible and photocopies of the FIR and Search List were furnished to the detenu. A further ground was urged that he was not supplied the reasons of his detention and the documents were not supplied within five days or maximum within fifteen days. As has been stated in the comment, he was supplied the documents in the language known to him, that is, Malayalam within the statutory period and acknowledgement was obtained from him. All the assertions made in the representation were commented by the Under Secretary and every aspect has been stated in detail. The competent authority has passed the following order:-

> "I have gone through the representation. I do not find sufficient ground for exercising powers under

> Section 11 of the COFEPOSA Act. The representation is rejected."

25. The order that has been communicated to him by the Under Secretary indicates that the representation submitted by the detenu had been carefully considered by the competent authority.

26. We have already referred to the Constitution Bench decision in ***Haradhan Saha*** (supra) in the context of duty of the Government while considering the representation; and the power of the Advisory Board. It has been clearly stated that the Government considers the representation to ascertain whether the order has been made within power under the law and the Board, on the other hand, considers whether in the light of the representation, there is sufficient cause for detention. The Court has expressed the view that the order of the Government rejecting the representation of the detenu should show real and proper consideration by the Government. The ratio of the said authority has to be appositely understood. The competent authority while considering the representation is not required to pass a speaking order but it must reflect that there has been real and proper consideration of the representation. It is, as has

SUPREME COURT OF INDIA JUDGMENT

been held in ***Gurdev Singh*** (supra), a subjective satisfaction. But the subjective satisfaction must show that the authority had the opportunity to peruse the material obtained against the detenu. To elucidate, the material documents are to be produced before the competent authority who has the competence to deal with the representation. On a scrutiny of the file, we find that the entire file relating to the detention was produced before the competent authority alongwith detailed comments. The said authority has clearly stated that he has gone through the representation and does not find any sufficient ground to exercise the jurisdiction under the COFEPOSA Act. In our considered opinion, this would tantamount to real and proper consideration, for the competent authority is not required to pass an adjudicatory order. The High Court of Kerala in ***Lekha Nandakumar*** (supra) lays down that the order passed by the competent authority has to be communicated to the detenu and the decision in ***Babu*** (supra) clarifies that the order passed by the authority may be extracted in extenso or completely by a subordinate officer and that may be communicated to the detenu. Thus,

in ***Babu*** (supra), the emphasis is on the effective communication.

27. Mr. Kaul, learned Additional Solicitor General, has submitted that the both the decisions have not laid down the correct principles of law and further the factual score in ***Babu*** (supra) is quite different.

28. At this juncture, it would be quite pertinent to refer to the authority in ***John Martin v. State of West Bengal***[21], wherein a three-Judge Bench dealt with the rejection of representation of the petitioner therein against the order of detention and in that context, opined that appropriate Government cannot reject the representation of the detenu in a casual and mechanical manner and it must bring to bear on the consideration of the representation an unbiased mind. The Court referred to ***Haradhan Saha*** (supra) wherein it has been stated that there has to be "a real and proper consideration" of the representation by the appropriate Government and thereafter proceeded to opine thus:-

> "We cannot over-emphasise the need for the closest and most zealous scrutiny of the representation for the purpose of deciding

[21] (1975) 3 SCC 836

> whether the detention of the petitioner is justified."

29. A contention was raised in the said case that the order passed by the State Government rejecting the representation of the detenu should be a reasoned order. The three-Judge Bench on consideration of the principles laid down in ***Haradhan Saha*** (supra), quoted a passage therefrom and observed as follows:-

> "These observations must give a quietus to the contention that the order of the State Government must be a reasoned order. It is true that in *Bhut Nath Mete* v. *State of W.B.*[22] Krishna Iyer, J., speaking on behalf of a Division Bench of this Court observed that: [SCC p. 659 para 23, SCC (CRI) p. 314]
>
> "It must be self-evident from the order that the substance of the charge and the essential answers in the representation have been impartially considered",
>
> but if we read the judgment as a whole there can be no doubt that these observations were not meant to lay down a legal requirement that the order of the State Government must be a speaking order but they were intended to convey an admonition to the State Government that it would be eminently desirable if the order disclosed that "the substance of the charge and the essential answers in the representation" had been impartially considered. The learned Judge in fact started the discussion of this point by stating: [SCC p. 659 para 23, SCC (CRI) p. 314]

[22] (1974) 1 SCC 645

> "We are not persuaded that a speaking order should be passed by the Government or by the Advisory Board while approving or advising continuance of detention;"
>
> In any event, the decision in *Haradhan Saha case* being a decision rendered by a Bench of five judges must prevail with us. We, therefore, reject the present contention of the petitioner."

30. From the aforesaid analysis, it is quite limpid that whatever has been stated in ***Bhut Nath Mete*** (supra) has been explained in ***John Martin*** (supra) and it has reiterated the principle that a speaking order need not be passed by the government or by the Advisory Board. It has also been explained that the observations made in ***Bhut Nath Mete*** (supra) were not meant to lay down a legal requirement that the order of the State Government must be a speaking order. Reliance was placed on the Constitution Bench decision in ***Haradhan Saha*** (supra) to lay down that ***Bhut Nath Mete*** (supra) is not a binding precedent. The said delineation makes it absolutely clear that the Court should be guided by the principles stated in ***Haradhan Saha*** (supra) and not by ***Bhut Nath Mete*** (supra). Thus the principle behind "real and proper consideration" would only mean as has been stated in ***John Martin*** (supra), the

SUPREME COURT OF INDIA
JUDGMENT

representation cannot be rejected in a casual and mechanical manner. Overemphasis cannot be placed on "real and proper consideration". What has to be seen by the competent authority is that the materials are placed before him and such materials come within the purview of the statute and it must show that there has been subjective satisfaction. The word "satisfaction" need not be used while rejecting the representation. To elaborate, the consideration by the competent authority the government is to ascertain essentially whether the order is in consonance with the power conferred under the law and the allegations made against the detenu come within the purview of the said law. The real and proper consideration by the appropriate government means the order of rejection should indicate that there has been subjective satisfaction by the competent authority to reject the representation. As has been held in ***John Martin*** (supra), there cannot be zealous scrutiny of the representation for the purpose of deciding whether the detention of the petitioner is justified. In the said case, analyzing the principle stated in ***Haradhan Saha*** (supra), it has been reiterated that the order need not be a speaking

order and non-speaking order does not amount to failure of justice. The said controversy, as has been observed by the three-Judge Bench, should be given a quietus. That being the legal position, on a careful perusal of the file, we find that there has been subjective satisfaction on the basis of the materials placed before the competent authority along with the representation. It cannot be said that the subjective satisfaction is not discernible from the order passed. In view of the analysis, the decision in ***Lekha Nandakumar*** (supra) by the Division Bench of the High Court stating the principle that the order passed by the competent authority should be communicated failing which there will be a violation of the constitutional command engrafted under Article 22(5) is not correct. The Court can always call for the file and peruse whether there has been rejection of the representation as required under the law.

31. The decision in ***Babu*** (supra) while explaining the ***Lekha Nandakumar*** (supra) states that if an order is communicated by the Under Secretary do not meet the constitutional obligation, for the order passed by the authority would be extracted in extenso completely by a

subordinate officer and that may be communicated to the detenu. Thus, the said decision introduces principle of effective communication in a different way. This approach, in our view, is erroneous. If the order is communicated by another authority and eventually the order is affirmed by the Advisory Board and the same is challenged, the constitutional courts have ample power to call for the records and verify how the representation has been rejected. We are not adverting to the facts in ***Babu*** (supra) whether there had been real and proper consideration or not, but suffice it to say that jurisdiction of the court is only to see whether there has been any subjective satisfaction that the proper law had been applied at the time of detention of the detenu. There is no need on the part of the competent authority to pass a speaking order and to give reasons on any facet. Thus analysed, the extended proposition in ***Babu*** (supra) is not legally correct.

32. In this context, we may fruitfully refer to a four-Judge Bench decision in ***Khudiram Das v. The State of West Bengal and others***[23] wherein explaining the observations made in ***Bhut Nath Mete*** (supra), the Court observed that:-

[23] (1975) 2 SCC 81

> "It was, however, sought to be contended on behalf of the petitioner, relying on the observation of this Court in *Bhut Nath Mete* v. *State of W.B* that the exercise of the power of detention "implies a quasi-judicial approach", that the power must be registered as a quasi-judicial power. But we do not think it would be right to read this observation in the manner contended on behalf of the petitioner. This observation was not meant to convey that the power of detention is a quasi-judicial power. The only thing which it intended to emphasise was that the detaining authority must exercise due care and caution and act fairly and justly in exercising the power of detention.

33. In the said case, while dealing with subjective satisfaction, the Court observed:-

> "There are several grounds evolved by judicial decisions for saying that no subjective satisfaction is arrived at by the authority as required under the statute. The simplest case is whether the authority has not applied its mind at all; in such a case the authority could not possibly be satisfied as regards the fact in respect of which it is required to be satisfied. *Emperor* v. *Shibnath Bannerji*[24] is a case in point. Then there may be a case where the power is exercised dishonestly or for an improper purpose : such a case would also negative the existence of satisfaction on the part of the authority. The existence of "improper purpose", that is, a purpose not contemplated by the statute, has been recognised as an independent ground of control in several decided cases. The satisfaction, moreover, must be a satisfaction of the authority itself, and therefore, if, in exercising the power, the authority has acted under the dictation of another body as the Commissionerof Police did in

[24] AIR 1943 FC 75 = 45 CriLJ 341

Commissioner of Police v. *Gordhandas Bhanji*[25] and the officer of the Ministry of Labour and National Service did in *Simms Motor Units Ltd.* v. *Minister of Labour and National Service*[26] the exercise of the power would be bad and so also would the exercise of the power be vitiated where the authority has disabled itself from applying its mind to the facts of each individual case by self-created rules of policy or in any other manner. The satisfaction said to have been arrived at by the authority would also be bad where it is based on the application of a wrong test or the misconstruction of a statute. Where this happens, the satisfaction of the authority would not be in respect of the thing in regard to which it is required to be satisfied. Then again the satisfaction must be grounded "on materials which are of rationally probative value". *Machindar* v. *King*[27]. The grounds on which the satisfaction is based must be such as a rational human being can consider connected with the fact in respect of which the satisfaction is to be reached. They must be relevant to the subject-matter of the inquiry and must not be extraneous to the scope and purpose of the statute. If the authority has taken into account, it may even be with the best of intention, as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, the exercise of the power would be bad. *Pratap Singh* v. *State of Punjab*[28]. If there are to be found in the statute expressly or by implication matters which the authority ought to have regard to, then, in exercising the power, the authority must have regard to those matters."

SUPREME COURT OF INDIA
JUDGMENT

[25] 1952 SCR 135 = AIR 1952 SC 16
[26] (1946) 2 All ER 201
[27] AIR 1950 FC 129 = Cri LJ 1480
[28] AIR 1964 SC 72

34. We have referred to the aforesaid passage only to highlight that how the subjective satisfaction has been understood by this Court especially in the context of preventive detention. The detaining authority on the basis of certain material passes an order of detention. The same has to be communicated at the earliest as mandated under Article 22(5) of the Constitution. A period has been determined. Non-communication within the said period would be an impediment for sustaining the order of detention. Similarly, if a representation is made and not considered with promptitude and there is inordinate delay that would make the detention order unsustainable. In ***Raj Kishore Prasad v. State of Bihar and others***[29] while dealing with an order of detention passed the National Security Act, 1980 the Court was dealing with the contention that as there was inordinate delay in considering the representation of the detenu and the unexplained delay in considering the representation of the detenu could vitiate the order. The two-Judge Bench referred to Section 3(2) of the 1980 Act and in the backdrop of the statutory scheme proceeded to state that when there has been a long delay of

[29] (1982) 3 SCC 10

28 days in disposing of the representation, it would invalidate the order.

35. In ***Vijay Kumar v. State of Jammu & Kashmir and others***[30] while dealing with the order of detention passed under Section 8 of the Jammu & Kashmir Public Safety Act, 1978, took into consideration the delay in disposal of representation and in that context opined:-

> "In *Khudiram Das* v. *State of W.B.,* (1975) 2 SCC 81, this Court held that one of the basic requirements of clause (5) of Article 22 is that the authority making the order of detention must afford the detenu the earliest opportunity of making a representation against the order of detention and this requirement would become illusory unless there is a corresponding obligation on the detaining authority to *consider the representation of the detenu as early as possible.* Thus, in the facts of this case we are not satisfied that the representation was dealt with as early as possible or as expeditiously as possible, and, therefore, there would be contravention of Section 13 of the Act which would result in the invalidation of the order."

36. We have referred to the said authorities solely to emphasise the duty of the appropriate government to dispose of the representation at the earliest and what is understood by the concept of subjective satisfaction. The Government has to follow the safeguards provided under

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[30] (1982) 2 SCC 43

Article 22(5) and the provisions of the statute. It is because without a trial a person is deprived of his liberty. Promptitude of action within the statutory scheme is imperative. In the case at hand, these aspects which have been raised before the High Court have been negatived, and rightly so. On a scrutiny of the file which has been produced before us, we find that the competent authority of the appropriate government has passed an order on the basis of the material produced before it. It cannot be said that there is no subjective satisfaction. We may ingeminate that when the material, the file, the representation and the comments on the representation were produced before the authority and he had mentioned in the order that he had gone through the representation and not found sufficient ground for exercising the power under Section 11 of the COFEPOSA Act, it cannot be said that there has been no subjective satisfaction. The Constitution Bench in ***Haradhan Saha*** (supra) has laid down that the order need not be a speaking one but there should be real and proper consideration. The principle stated by the Constitution Bench has to be properly understood. The said principle has been explained

in ***John Martin*** (supra) and ***Khudiram Das*** (supra). Succinctly put, it is to be seen by the said authority that the materials on record on the basis of which the order is passed are under appropriate statute; that the detaining authority has not travelled beyond the grounds that are within the framework of the statute; and that the grounds are not vague, etc., and all these come within the scope and ambit of subjective satisfaction and need not be objectively pronounced by an order. There is no trace of doubt that "subjective satisfaction" is not insusceptible from judicial reviewability. Thus analysed, the impugned order granting the writ of habeas corpus and directing the detenu to be set at liberty is totally vulnerable and accordingly we set aside the same.

37. Now, we shall proceed to deal with the alternative submission of Mr. Basant, learned senior counsel for the respondent. It is urged by him that the detenu was detained on 25.2.2013 and released on 24.10.2013 and in this backdrop, the detenu should not be sent back to undergo the remaining period of detention, for there exists no proximate temporal nexus between the period of

detention indicated in the order for which the detenu was required to be detained and the date when the detenu is required to be detained if the order is set aside. Learned senior counsel would urge that there is a necessity on the part of the authorities to be satisfied whether it is desirable that the detenu should be further detained for the balance period of detention. Mr. Basant has commended us to certain authorities which we shall proceed to deal with it.

38. In ***Sunil Fulchand Shah*** (supra), the Constitution Bench was dealing with the issue whether the period of detention under the COFEPOSA Act is a fixed period running from the date specified in the detention order and ending with the expiry of that period or the period is automatically extended by any period of parole granted to the detenu. While dealing with the said issue, the majority speaking through the learned Chief Justice noted the observation made in ***State of Gujarat v. Adam Kasam Bhaya***[31], viz., "if he has served a part of the period of detention, he will have to serve out the balance" and adverted to various facets and eventually recorded the following conclusion in respect of the said issue:-

[31] (1981) 4 SCC 216

"33.6. The quashing of an order of detention by the High Court brings to an end such an order and if an appeal is allowed against the order of the High Court, the question whether or not the detenu should be made to surrender to undergo the remaining period of detention, would depend upon a variety of factors and in particular on the question of lapse of time between the date of detention, the order of the High Court, and the order of this Court, setting aside the order of the High Court.

A detenu need not be sent back to undergo the remaining period of detention, after a long lapse of time, when even the maximum prescribed period intended in the order of detention has expired, unless there *still* exists a proximate temporal nexus between the period of detention indicated in the order by which the detenu was required to be detained and the date when the detenu is required to be detained pursuant to the appellate order and the State is able to satisfy the court about the desirability of "further" or "continued" detention.

7. That where, however, a long time has *not* lapsed or the period of detention initially fixed in the order of detention has not expired, the detenu may be sent back to undergo the balance period of detention. It is open to the appellate court, considering the facts and circumstances of each case, to decide whether the period during which the detenu was free on the basis of an erroneous order should be excluded while computing the total period of detention as indicated in the order of detention though normally the period during which the detenu was free on the basis of such an erroneous order may not be given as a "set-off" against the total period of detention. The actual period of incarceration cannot, however, be permitted to exceed the maximum period of

detention, as fixed in the order, as per the prescription of the statute."

39. In ***Kethiyan Perumal*** (supra), a two-Judge Bench, after referring to the Constitution Bench decision in ***Sunil Fulchand Shah*** (supra), directed as follows:-

> "... it is for the appropriate State to consider whether the impact of the acts, which led to the order of detention, still survives and whether it would be desirable to send back the detenu for serving the remainder period of detention. Necessary order in this regard shall be passed within two months by the appellant State. Passage of time in all cases cannot be a ground not to send the detenu to serve the remainder of the period of detention. It all depends on the facts of the act and the continuance or otherwise of the effect of the objectionable acts. The State shall consider whether there still exists a proximate temporal nexus between the period of detention indicated in the order by which the detenu was required to be detained and the date when the detenu is required to be detained pursuant to the appellate order."

40. In ***Alagar*** (supra), similar observations were made. In ***Chandrakant Baddi*** (supra), a two-Judge Bench referred to the earlier decisions and opined that:-

> "A reading of the abovequoted paragraphs would reveal that when an order of a court quashing the detention is set aside, the remittance of the detenu to jail to serve out the balance period of detention does not automatically follow and it is open to the detaining authority to go into the various factors delineated in the judgments aforequoted so as to find out as to whether it

> would be appropriate to send the detenu back to serve out the balance period of detention. ...”

41. In the present case, the detenu was initially detained for one year. He remained in incarceration from 25.2.2013 to 24.10.2013. The High Court has quashed the order of detention and he has been set at liberty. Submission of Mr. Kaul, learned Additional Solicitor General is that regard being had to the nature of grounds on which the detention order was passed, this Court may direct that the detenu should surrender to custody. Regard being had to the authorities cited by Mr. Basant, we are of the opinion that the appropriate course would be that the detaining authority should re-examine the matter keeping in view the principle stated in ***Sunil Fulchand Shah*** (supra) and ***Chandrakant Baddi*** (supra) within two months from today.

42. Consequently, the appeal is allowed in above terms.

.................................J.
[Dipak Misra]

...............................J.
[Prafulla C. Pant]

New Delhi
January 29, 2016

SUPREME COURT OF INDIA
JUDGMENT