

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 4008 OF 2017

Mrs. Seema Vishal Salunke	}	
Age 29 years, residing at	}	
B-29/3, Sambhaji Nagar,	}	
Dhanukawadi, Pune	}	Petitioner
versus		
1.The Commissioner of Police	}	
Pune	}	
	}	
2. The State of Maharashtra,	}	
(through Addl. Chief	}	
Secretary to Government of	}	
Maharashtra, Mantralaya,	}	
Home Department,	}	
Mantralaya, Mumbai)	}	
	}	
3. The Superintendent	}	
Yerwada Central Prison	}	
Pune	}	Respondents

Mr. Udaynath Tripathi with Ms. Jayshree
Tripathi for the petitioner.

Mr. J. P. Yagnik-APP for State.

**CORAM :- S. C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.**

DATE :- JANUARY 4, 2018

ORAL JUDGMENT:- (Per S. C. Dharmadhikari, J.)

1. By this petition under Article 226 of the Constitution of India, the order of detention passed by the Detaining Authority dated 9th August, 2017 under section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders, Dangerous Persons, Video Pirates, Sand

Smugglers and Persons Engaged in Black-Marketing of Essential Commodities Act, 1981 (hereinafter referred to as “the MPDA Act”) is challenged by the wife of the detenu- Vishal Salunke.

2. Mr. Tripathi learned advocate appearing in support of this petition has pressed two grounds, incorporated and inserted in the memo of the petition by way of an amendment. The first ground incorporated by the amendment and with leave of this court dated 21st November, 2017 reads as under:-

“(g) The Petitioner says and submits that a communication was sent to the detenu by the Hon'ble Advisory Board through an intimation letter informing him the date of Advisory Board's meeting and the detenu's right to make representation to the Advisory Board and forward the same through the Superintendent of Jail, where he is detained. However, the detenu was not apprised/informed about his two valuable rights in the said intimation letter. They are, **Firstly**, the detenu has a right to make representation to Advisory Board. **Secondly**, the detenu has the right to lead oral evidence in rebuttal of allegations made against him by producing and examining witness to defend his case effectively before the Hon'ble Advisory Board and witness should be kept ready before the Board. As a result of non-appraisal of these rights to the detenu which are recognized by Hon'ble Supreme Court his right is violated. The detenu could not make any suitable arrangement to produce and examine witnesses by keeping them present and lead evidence in rebuttal of allegations made against him in order to present his case effectively before the Advisory Board. What is stated in the grounds of detention is that 'as well as other rights prescribed under the Act', which is absolutely vague. The procedure adopted by the Advisory Board is not just, fair and reasonable. It is pertinent to note that the Advisory Board has informed these rights to the many detenues earlier. The whole Board proceeding vitiates. This also amounts to discrimination as contemplated under Article 14 of the Constitution of India. Since the Advisory Board has not adopted a fair and just procedure, the detenu is

deprived of his right to defend his case before Advisory Board. As such Article 21 of the Constitution of India is violated. The whole Board proceeding vitiates. The report submitted to the State Government is erroneous and not according to law and procedure, consequently the confirmation order is also bad in law. The continued detention is illegal and bad in law, liable to be quashed and set aside.”

3. During the pendency of the writ petition, leave was sought to insert additional ground and that came to be granted on 14th December, 2017. Pursuant to that liberty, ground no. 10H at page 10C was inserted on 20th December, 2017. Mr. Tripathi would submit and in relation to the ground inserted by way of amendment on 20th December, 2017 that there is a contradiction and dichotomy in the affidavits filed in reply to this petition. The first affidavit proceeds to state that the petitioner was served with order of detention while in custody, whereas, the detaining authority maintains that the petitioner was enlarged on bail and was not in custody. Mr. Tripathi would submit that the petitioner has stated that there is a single/solitary case being C. R. No. 88 of 2017 alleging offences punishable under sections 387, 427, 323 and 504 of the Indian Penal Code, 1860. That criminal case/C. R. has been referred in the grounds of detention at para 4.1. In that, the detaining authority says that the detainee was arrested on 14th March, 2017 and applied for bail on 16th March, 2017. He was enlarged on bail and released on the same day. Thus, the petitioner was no more in custody. In these circumstances, in

para 8 of the grounds of detention, the detaining authority proceeds to say that the petitioner was released on bail in this C.R. No. 88 of 2017. If he was a free person, not in custody and duly enlarged on bail, then, the affidavit of the authorities filed in reply to this petition, containing the above statement, would vitiate the subjective satisfaction of the detaining authority.

4. Mr. Tripathi in that regard has invited our attention to the affidavit of Shri. Deepak Kharat, in which, he says in para 3 at page 65 as under:-

“3. I say that on 9.08.2017, the Order of Detention was issued by the Commissioner of Police, Pune, against the detenu. And thereafter the detenu, who was in custody executed with the order of detention on 10.08.2017 and the said order of detention was approved by State Government on 14.08.2017. The reference u/s. 10 of the MPDA Act, 1981 to the Advisory Board was on 14.08.2017. The case report of above detenu under MPDA Act, 1981 was sent from Home Department, SPL-3(B), dated 14.08.2017 was received to the Advisory Board on 21.08.2017.”

5. Based on the insertion of the additional ground, affidavits were filed again by Shri. Deepak Kharat styled as additional affidavits and in para 4 at page 73, the authority says as under:-

“4) I say that on 09.08.2017, the Order of Detention was issued by the Commissioner of Police, Pune, against the detenu. And thereafter the detenu, who was not in custody and executed with the order of detention on 10.08.2017 and the said Order of detention was approved by State Government on 14.08.2017. The reference u/s. 10 of the MPDA Act, 1981 to the Advisory Board was on 14.08.2017. The case report of above detenu under MPDA Act, 1981 was sent from Home Department, SPL-3, dated 14.08.2017 was received to the Advisory Board on

21.08.2017.”

6. In the additional affidavit of the detaining authority as well in para 6 at page 78, there is an explanation provided, which reads as under:-

“6. It is kindly submitted that the Detenu was arrested on 14/03/2017 and produced before Ld. Trial court, Pune who then remanded to police custody and magistrate custody to the Detenu from time to time. That thereafter the Detenu had applied for bail and the same was granted by the Ld. Trial Court on 16/03/2017. The said fact was clearly mentioned in para 4.1 of the grounds of detention. That thereafter the respondent has perused all the material on record and after subjectively satisfied that passed the order of detention on 09/08/2017 vide No./PCB/DET/2087/2017. Detenu was served with the grounds of detention on 10/08/2017 and copy of station diary mentioned in CCTNS Computer detailed report of execution of detention order are annexed collectively as **Annexure “A’ Colly.** for ready reference of this Hon’ble Court, then on 11/08/2017 detained in jail. In the said grounds it has specifically mentioned in para 8 that, the respondent carefully gone through the material on record and subjectively satisfied that the detenu was acting in a manner prejudicial to the maintenance of public order. The Detenu was released on bail by the concerned court and after availing bail facility, the Detenu again reverted to similar activities which were prejudicial to the maintenance of public order. As such on 10/08/2017 the Detenu was the free person and as such the said order was not served in custody.”

7. Mr. Yagnik learned APP appearing for the respondents would submit that the amended ground would not survive for consideration, particularly in the light of these additional affidavits and the error, if any, has been now corrected and consistent with the record.

8. We have heard the counsel on this point.

9. After noting the amended plea, we find that the same pertains to execution or service of the detention order. The first affidavit asserts and proceeds on the footing that the detention order was served on the detainee in custody. The contradiction was with regard to the specific statements or satisfaction in the grounds of detention, which proceeds on the footing that the detainee was taken into custody on 14th March, 2017, but enlarged on bail on 16th March, 2017, after which as well, his criminal activities posed a continued threat to the maintenance of public order and public peace in the area.

10. We have carefully perused the additional affidavits and the above reproduced statements. We are satisfied that the first error committed by the detaining authority, namely, Shri. Deepak Kharat, in his affidavit was inadvertent and not intentional. He was not at all indicating to this court that the detention order was passed while the detainee was in custody or that it was served upon him while in custody. Far from this, he was not suggesting that there was an error in stating that the detainee was in the custody and thereafter the detention order was served upon him. We are of the opinion that after the explanation in the affidavits, particularly of the detaining authority, this ground would not survive. We except the explanation and hold that the continued detention is not vitiated on this ground.

11. Thereafter, the petitioner's counsel reverts to the ground at page 10A, which we have reproduced above. The precise contention of Mr. Tripathi is that this is a preventive detention. Unlike the detention post trial, a detainee must be extended all the constitutional safeguards and protection. If the statute demands compliance and that too strict with the requirements stipulated therein before a detention order can be passed and equally requires the detainee to be informed about his rights in law, then, there is an obligation to inform the detainee about his further entitlement. His further rights, according to Mr. Tripathi, are three fold. Firstly that he has a right to make representation against the detention order to the Detaining Authority and secondly to the Advisory Board. He can seek assistance of his next friend and equally an advocate to make such representation to the board effective by insisting on an oral hearing and thirdly, at such oral hearing, he can lead evidence in rebuttal. As far as these three rights are concerned, there is no clear prescription and the procedure that is followed by the detaining authority is contradictory. Mr. Tripathi produced, as illustrations or examples, copies of three detention orders, which have been passed by the Commissioner of Police, Greater Mumbai as detaining authority. Mr. Tripathi, relying upon the language of these orders, would submit that this detaining authority is

consistently informing the detainee of his rights, particularly the later one noted above. That is in order to make him aware that he has an opportunity to seek revocation of the detention order by approaching the Advisory Board. For that purpose, the detainee can request the witnesses to remain present on the date and time of hearing. If no intimation is given of these rights by the detaining authority, then, it would not be possible for the detainee to arrange for witnesses to be produced on the given date and time. In the present case, according to Mr. Tripathi, the Advisory Board only forwarded an intimation through the Superintendent of Jail, Nashik Prison. That Superintendent of Jail handed over the communication informing the detainee that he must attend the proceedings before the Advisory Board and if so advised, engage an advocate or appear in-person. There was no intimation of the later two rights, namely, to engage an advocate and to lead evidence in rebuttal. If there was no proper intimation of his rights, then, the detainee, who is a layman, was handicapped and could not arrange for presence of the witnesses before the Advisory Board. He has been seriously prejudiced in this case. Mr. Tripathi also relies upon paragraph 14 of the detention order to submit that the detaining authority does not inform the petitioner of these valuable rights.

12. Mr. Tripathi was very critical of the stand taken in the affidavit in reply by the detaining authority as also the Advisory Board. Mr. Tripathi would submit that these authorities are proceeding on the footing that the MPDA Act must provide specifically that the detainee is free to engage an advocate of his choice when he appears before the board and equally he can lead evidence in rebuttal by requesting the Advisory Board to summon witnesses on his behalf. Absent such prescription in law, there is no mandate, according to these authorities to inform the detainee of these rights. Mr. Tripathi would submit that such submissions or stand overlooks the authoritative pronouncements of the Hon'ble Supreme Court of India and our attention is invited to the judgments in the case of *A. K. Roy vs. Union of India*¹ and *Harbans Lal vs. M. L. Wadhawan and Ors.*². Mr. Tripathi also relies upon a judgment in the case of *Kamleshkumar Ishwardas Patel vs. Union of India and Ors.*³ as also the judgment in the case of *State of Maharashtra vs. Zubair Haji Qasim*⁴. Finally, Mr. Tripathi would submit that as far as this court is concerned, the correct pronouncement of law emerges from its discussion in the case of *Kekalwa Samuele Kongwa vs. Union of India*⁵.

¹ 1982 CRI. L. J. 340,

² (1987) 1 SCC 151

³ (1995) 4 SCC 51

⁴ (2008) 12 SCC 797

⁵ 1984 Bom. L. R. 24

13. On the other hand, Mr. Yagnik would submit that these judgments of the Hon'ble Supreme Court apart, the MPDA Act has not provided for any such procedure and he relies upon the language of Article 22(4) and 22(7) of the Constitution of India in that regard. Mr. Yagnik would submit that there was no obligation or mandate to inform the petitioner that he has a right to engage an advocate and lead evidence in rebuttal before the Advisory Board. It may be that one detaining authority deems it appropriate to inform him, but because there is no such intimation either from the detaining authority or Advisory Board in this case does not mean that the Petitioner is prejudiced or unable to effectively present his case. There is no presumption in law of this nature. Hence, there is no prejudice caused to the petitioner. If at all a procedural safeguard is relied upon, then, breach of procedure by itself does not vitiate any legal action and any prejudice must be proved. There is no such prejudice established and on facts, Mr. yagnik would submit that there is a specific statement of compliance with law made on oath by the Advisory Board before this court. Once the intimation was sent to the Superintendent of Jail, Nashik Central Prison, which was duly served, the petitioner engaged an advocate. That advocate remained present before the Advisory Board. The petitioner was duly advised by him. If that advocate did not deem it fit and

proper to seek adjournment to produce witnesses or he makes any application, but that request is denied, then, the petitioner cannot complain unless he establishes a serious breach and prejudice. Such a prejudice being absent, according to Mr. Yagnik, we should not go into any larger or wider question, but must sustain the detention order.

14. Mr. Yagnik relies upon a Division Bench judgment of this court in the case of *Anthony @ Sandy John Nigero vs. Ramamurthi, Commissioner of Police for Greater Bombay and Ors.*⁶ and a judgment of the Hon'ble Supreme Court in the case of *State of Maharashtra and Ors. vs. Shri. Ramchandra Rammilan Mishra*⁷.

15. For properly appreciating these contentions, we must first make a reference to Article 22 of the Constitution of India. Article 22 grants protection against arrest and detention in certain cases. Clause (1) of this Article says that no person, who is arrested, shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. Clauses (1) and (2) are not applicable to any person who is arrested or detained under any law

⁶ 1993 CRI. L. J. 3259

⁷ 2004 SCC (Cri.) 1329

providing for preventive detention. Clause (4) then deals with the law authorising preventive detention and says in categorical terms that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless the requirements set out in sub-clauses (a) and (b) thereof are satisfied. The detention that has to be made and styled as preventive detention must be in accordance with the provisions of law made by Parliament under sub-clauses (a) and (b) of clause (7). Clause (7) of Article 22 reads as under:-

“(7) Parliament may by law prescribe -

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).”

16. A perusal of the same would indicate as to how the Parliament may, by law, prescribe, inter alia, procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

17. We are dealing with a statute prevailing in the State of Maharashtra (MPDA) and which permits an order to be passed of

detention under section 3 thereof on a satisfaction to be reached as stated therein. Thus, with a view to prevent a person from acting in any manner prejudicial to the maintenance of public order, if it is necessary to do so, the State Government can make an order directing that such person be detained. After such an order is made, the factum of such order being passed or made has to be forthwith reported to the State Government by the detaining authority. Sections 4 and 5 thereof provide for execution of detention order and to regulate and place conditions of detention. We are not concerned with section 5(A) and sections 6 and 7 for the present petition. Section 8 obliges the communication of the grounds, on which the order of detention has been made and affording of an opportunity to the detenu at the earliest of making a representation against that order. Section 9 deals with constitution of Advisory Board. Section 10 deals with reference to Advisory Board and section 11 reads as under:-

“11. (1) The Advisory Board shall, after considering the materials placed before it and, after calling for such further information as it may deem necessary from the State Government or from any person called for the purpose through the State Government or from the person concerned, and if, in any particular case, the Advisory Board considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report to the State Government, within seven weeks from the date of detention of the person concerned. (2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.

(3) When there is difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(4) The proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

(5) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board.”

18. A perusal of section 11 would reveal that it's sub-sections deal with the manner in which the Advisory Board may consider materials placed before it or such further information which it has called for. If the Advisory Board considers it essential to do so or if the person concerned desires to be heard, after hearing him/her in person, it shall submit its report to the State Government. Sub-section (5) of section 11 says nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board.

19. Such stipulations and in relation to the preventive detention orders have always been matters of debate before the Hon'ble Supreme Court. The Constitution Bench dealing with one such law of preventive detention of *A. K. Roy* and others (*supra*) considered very broad and wide challenge. We are not concerned

with the same. While dealing with the validity of a Ordinance which later became the National Security Act, 1980, the Hon'ble Supreme Court dealt with extensively an argument of the detenues that if there are three rights, as enumerated by Mr. Tripathi before us, then what are the contours thereof. In paragraph 104, the Bench dealt with one of the rights, which are styled as trinity of rights. The first one is the right of legal representation, the second is the right of cross examination and the third is the right to present evidence in rebuttal. In paras 85, 86 and 87, the Bench observes as under:-

“85. First and foremost, we must consider whether and to what extent the detenu is entitled to exercise the trinity of rights before the Advisory Board: (i) the right of legal representation; (ii) the right of cross examination and (iii) the right to present his evidence in rebuttal. These rights undoubtedly constitute the core of just process because without them, it would be difficult for any person to disprove the allegations made against him and to establish the truth. But there are two considerations of primary importance which must be borne in mind in this regard. There is no prescribed standard of reasonableness and therefore, what kind of processual rights should be made available to a person in any proceeding depends upon the nature of the proceeding in relation to which the rights are claimed. The kind of issues involved in the proceeding determine the kind of rights available to the persons who are parties to that proceeding. Secondly, the question as to the availability of rights has to be decided not generally but on the basis of the statutory provisions which govern the proceeding, provided of course that those provisions are valid. In the instant case, the question as to what kind of rights are available to the detenu in the proceeding before the Advisory Board has to be decided in the light of the provisions of the Constitution, and on the basis of the provisions of the National Security Act to the extent to which they do not offend against the Constitution.

86 Turning first to the right of legal representation which is claimed by the petitioners, the relevant article of the Constitution to consider is Article 22 which bears the marginal note "protection against arrest and detention in certain cases." That article provides by clause (1) that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. Clause (2) requires that every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest and that no person shall be detained in custody beyond the said period without the authority of a magistrate. Clause (3) provides that nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention. It may be recalled that clause 4(a) of Article 22 provides that no law of preventive detention shall authorise the detention of a person for a period longer than three months unless the Advisory Board has reported before the expiry of the said period of three months that there is in its opinion sufficient cause for such detention. By clause 7(c) of Article 22, the Parliament is given the power to prescribe by law the procedure to be followed by the Advisory Board in an inquiry under clause 4(a).

87. On a combined reading of clauses (1) and (3) (b) of Article 22, it is clear that the right to consult and to be defended by a legal practitioner of one's choice, which is conferred by clause (1), is denied by clause 3(b) to a person who is detained under any law providing for preventive detention. Thus, according to the express intendment of the Constitution itself, no person who is detained under any law, which provides for preventive detention, can claim the right to consult a legal practitioner of his choice or to be defended by him. In view of this, it seems to us difficult to hold, by the application of abstract, general principles or on a prior considerations that the detenu has the right of being represented by a legal practitioner in the proceedings before the Advisory Board. Since the Constitution, as originally enacted, itself contemplates that such a right should not be made available to a detenu, it cannot be said that the denial of the said right is unfair, unjust or unreasonable. It is indeed true to say, after the decision in the Bank Nationalisation case, that though the subject of preventive detention is specifically dealt with in Article 22, the requirements of Article 22 have nevertheless to be satisfied. It is therefore

necessary that the procedure prescribed by law for the proceedings before the Advisory Boards must be fair, just and reasonable. But then, the Constitution itself has provided a yardstick for the application of that standard, through the medium of the provisions contained in Article 22(3)(b). Howsoever much we would have liked to hold otherwise, we experience serious difficulty in taking the view that the procedure of the Advisory Boards in which the detenu is denied the right of legal representation is unfair unjust or unreasonable. If Article 22 were silent on the question of the right of legal representation, it would have been possible, indeed right and proper, to hold that the detenu cannot be denied the right of legal representation in the proceedings before the Advisory Boards. It is unfortunate that courts have been deprived of that choice by the express language of Article 22(3)(b) read with Article 22(1).”

20. In express words, the Hon'ble Supreme Court holds that if Article 22 was silent on the question of representation, the detenue cannot be denied the right of representation in the proceedings before the Advisory Boards. However, the express language of Article 22 would have some bearing on the issue. Then, in para 88, the Bench deals with the argument that the right of legal representation is available to the detenue apart from the provisions of Article 22(1). That right cannot be denied to him by reason of the exclusionary provisions contained in Article 22(3)(b). The Bench then, in para 89, holds as under:-

“89. To read the right of legal representation in Article 22(5) is straining the language of that article. Clause (5) confers upon the detenu the right to be informed of the grounds of detention and the right to be afforded the earliest opportunity of making a representation against the order of detention. That right has undoubtedly to be effective, but it does not carry with it the right to be represented by a legal practitioner before the Advisory Board merely because, by section 10 of the National

Security Act, the representation made by the detenu is required to be forwarded to the Advisory Board for its consideration. If anything, the effect of section 11(4) of the Act, which conforms to Article 22(3)(b), is that the detenu cannot appear before the Advisory Board through a legal practitioner. The written representation of the detenu does not have to be expatiated upon by a legal practitioner.”

21. In para 95, the Bench observes that the embargo on the appearance of legal practitioner should not be extended so as to prevent the detenue from being aided or assisted by the friend, who, in truth and substance, is not a legal practitioner. Therefore, the persons whose interests are adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend. However, as noted by the Hon'ble Supreme Court itself, the argument did not rest there. The argument proceeded further and revolved around effective representation and even if it is presumed that the right to appear is through a next friend and not through the legal practitioner, whether that would be effective in the absence of the opportunities to cross examine and to lead evidence in rebuttal. In para 104, the Bench concluded that in proceedings before the Advisory Board, the detenue has no right to cross examine either the persons on the basis of whose statement the order of detention is made or the detaining authority.

22. After holding so, in para 105, the Bench held as under:-

“105. The last of the three rights for which Shri Jethmalani contends is the right of the detenu to lead evidence in rebuttal before the Advisory Board. We do not see any objection to this right being granted to the detenu. Neither the Constitution nor the National Security Act contains any provision denying to the detenu the right to present his own evidence in rebuttal of the allegations made against him. The detenu may therefore offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him. We would only like to add that if the detenu desires to examine any witnesses, he shall have to keep them present at the appointed time and no obligation can be cast on the Advisory Board to summon them. The Advisory Board, like any other tribunal, is free to regulate its own procedure within the constraints of the Constitution and the statute. It would be open to it, in the exercise of that power, to limit the time within which the detenu must complete his evidence. We consider it necessary to make this observation particularly in view of the fact that the Advisory Board is under an obligation under section 11(1) of the Act to submit its report to the appropriate Government within seven weeks from the date of detention of the person concerned. The proceedings before the Advisory Board have therefore to be completed with the utmost expedition.”

23. Thus, the Hon'ble Supreme Court holds that the detenue may, therefore, offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him. If the detenue desires to examine any witnesses, he shall have to keep them present at the appointed time and no obligation is cast on the Board to summon them. The Advisory Board like any other Tribunal is free to follow a procedure within the constraints of the Constitution and the statute. It would be open to it to limit the time within which the detenue must complete his evidence. Given the nature of the proceedings

before the Advisory Board they are required to be completed with utmost expedition. The Hon'ble Supreme Court then observes that the Advisory Board must be granted that liberty and freedom. In these circumstances, the judgment holds that it is clear from the mandate of the Constitution of India that in preventive detention matters, the safeguards and protection to the extent noted above cannot be denied.

24. In the case of *Harbans Lal vs. M. L. Wadhawan and Ors.* (supra), the issue raised and expressly before the Hon'ble Supreme Court was that the detainee wanted to prove that the premises in which the alleged contraband goods were found was not in his possession and that in fact he lived at some other place. In support of that case, he wanted to examine five witnesses before the Advisory Board. These witnesses were present when the matter was heard by the Advisory Board. This fact was made known to the Board. The Board intimated to the legal advisor that it would not examine the witnesses, but instead permit the detainee to produce affidavits. Thus, an opportunity was lost to him that day to examine the witnesses in rebuttal. It was the case of the detainee that despite best efforts by his legal advisor, it was possible to secure the affidavits of the witnesses, but for that purpose, time was consumed. The witnesses were brought again

on 1st May, 1986 when the Board resumed its hearing and an application was made to the Board to examine then, but it declined. The High Court considered this aspect of the case and justified the rejection of this request on the plea that the detainee could not waste the time of the Advisory Board by asking the Board to record oral evidence. The two questions of law, therefore, were (i) whether the Advisory Board acted in violation of law as mandated by a Constitution Bench judgment in the case of A. K. Roy in denying to the detainee his right to examine witnesses, who were readily available and present on the dates of hearing before the Advisory Board, in rebuttal of the case of the detaining authority; (ii) whether the Advisory Board was bound under law to send the entire record and proceedings before it to the Central Government and the Central Government, in turn, was bound to apply its mind to the entire materials before proceeding to make the order of confirmation. We are not concerned with the later question, but the earlier one. In para 5, the trinity of the rights is emphasised and then in para 6, the court observes that it was not told that the Advisory Board has regulated any procedure that oral evidence will not be permitted when it inquires into the orders of detention. The court holds that even if there is any such procedure, it will be of no legal consequence after the law in this behalf has been laid down in the

case of A. K. Roy. The right to adduce oral evidence by examining witnesses is a right available to a detenu under the above decision and this should be deemed to be incorporated in the statute dealing with detention without trial. The specific observations in paras 6 and 7 read as under:-

“6. We have not been told that the Advisory Board has regulated any procedure that oral evidence will not be permitted when it enquires into orders of detention. Even if there is any such procedure it will be of no legal consequence after the law in this behalf had been laid down by this Court in A.K. Roy case (supra). The right to adduce oral evidence by examining witnesses is a right available to a detenu under the above decision and this should be deemed to be incorporated in the statute dealing with detention without trial. Support for this position was sought by the learned counsel for the petitioner from a decision of this Court in Narendra Purshotam Umrao vs. B. B. Gujral (1979) 2 S.C.C. 637. In that case, this Court was dealing with the absence of any express provision in Section 8(b) of the COFEPOSA Act placing an obligation to forward the representation made by a detenu alongwith the reference to the Advisory Board unlike those contained in Section 9 of the Preventive Detention Act, 1950 and Section 10 of the 431 Maintenance of Internal Security Act, 1971. It was contended in that case that in the absence of an express provision in this behalf no obligation was cast on the Government to consider the representation made by the detenu before forwarding it to the Advisory Board or to forward the same to the Advisory Board. After discussing the scope of Article 22(5), this Court held "the constitutional safeguards embodied in Article 22(5) of the Constitution, as construed by this Court, must, therefore, be read into the provisions of Section 8(b) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 to prevent any arbitrary Executive action."

7. This decision rendered by a three Judge Bench of this Court has laid down that the Constitutional safeguards embodied in Article 22(5) of the Constitution as understood by this Court must be read into Section 8(b) of the COFEPOSA Act. Therefore, the right in a detenu to adduce oral evidence in rebuttal, being a right in the

nature of a Constitutional safeguard embodied in Article 22(5) of the Constitution as construed by this Court in *A.K. Roy's case* (supra) has necessarily to be read into Section 8(b) and (c) of the COFEPOSA Act. If this right is denied to a detenu, the necessary consequence must follow. Article 22(7) enables Parliament to prescribe by law the procedure to be followed by an Advisory Board an enquiry under Article 22(4)(a). Section 8 of the COFEPOSA Act is a sequel to this prescription. There is nothing in Section 8 prohibiting oral evidence of the witnesses tendered by a detenu being taken. The concept of enquiry by the Advisory Board takes within its ambit this aspect of 'hearing' also. This right has received the seal of approval in *A.K. Roy's case*."

25. It is in the light of these specific observations and the law culled out from the decision in the case of *A. K. Roy*, the Hon'ble Supreme Court holds that the witnesses on behalf of the detaining authority cannot be examined by the detenu. That is the ratio clearly spelt out from the case of *A. K. Roy* (supra). However, as far as the evidence in rebuttal is concerned, the Hon'ble Supreme Court did not agree with the High Court from whose order an appeal was brought before it by Harbans Lal. This denial of the opportunity to examine witnesses present before the Advisory Board vitiated the detention of the detenu.

26. As far as the third decision of a Division Bench of this court is concerned, following the judgment in the case of *A. K. Roy* (supra) and *Nand Lal vs. State of Punjab*⁸, the Division Bench held that the detenu has a right to examine witnesses before the Advisory Board in support of his case though the Advisory Board

⁸ AIR 1983 SC 2041

is under no obligation to summon such witnesses. The issue before the Division Bench was whether by informing a detainee that he could produce the oral testimony only through the affidavits, the Board denies the detainee his right to produce and examine witnesses before it. It is in these circumstances, the Division Bench considered the challenge and concluded that consistent with the mandate of Article 14 of the Constitution of India, the Advisory Board must device its procedure so that the rights by virtue of the Constitution Bench judgment are not rendered ineffective.

27. Mr. Tripathi relies upon a judgment in the case of *Zubair Haji Qasim* (supra). In that, however, the Hon'ble Supreme Court was concerned with an order of detention and made against the detainee, who, pursuant to the same, appeared before the Advisory Board and made a representation for permission to be represented in the proceedings through a legal practitioner. That representation was rejected on the ground that it could not be considered for some obvious reasons. It is that vague ground, which was considered to be untenable by the Hon'ble Supreme Court.

28. In the case of *Kamleshkumar Ishwardas Patel* (supra), the issue was whether the order of preventive detention is passed by

an official especially empowered by the State Government or the Central Government, if the said officer is required to consider the representation submitted by the detainee. Once again, the two rights are clearly distinguishable. One is to make a representation against the detention order to the detaining authority and another is to the Advisory Board. In para 14 of this judgment, which Mr. Tripathi heavily relies upon, the Hon'ble Supreme Court holds that Article 22(5) must be, therefore, construed to mean that the person detained has a right to make representation, which can be made not only to the Advisory Board, but also to the detaining authority. The right to make representation carries with it a corresponding obligation on the authority making the order of detention to inform the person detained of his rights to make representation against the order of detention to the authorities, who are required to consider such representation.

29. Before us, the argument is that this intimation or information about the right envisaged by Article 22(5) of the Constitution of India must also include an intimation to the detainee that he can, if so advised, engage a legal practitioner to defend himself and that he can also lead evidence in rebuttal. Mr. Tripathi would submit that the intimation is, therefore,

incomplete if the later of the two rights possessed by a detainee are not brought to his notice expressly or that he was not made aware of the same by the detaining authority or the Advisory Board. Omission to intimate about the later two rights is fatal.

30. We are considering the correctness of this submission and in that regard, we would be failing in our duty if we do not refer to another Division Bench judgment of this court. In the case of *Anthony* (supra), the detention order was challenged on five points. The Division bench was called upon to decide whether the petitioner must be informed that he has a right of legal assistance or engage a next friend and to adduce evidence in rebuttal before the Advisory Board. Secondly, the Advisory Board had not adjourned the hearing to enable the petitioner to keep the next friend present for legal assistance. These failures vitiate the detention. As far as this aspect is concerned, the facts were very clear, in the sense, the detention order was served on the detainee. He was informed that if he wishes to make any representation to the Advisory Board, he can do so and address it to the Chairman and submit it through the Superintendent of Jail. He was further informed that he shall be heard in person by the Board if it considers it necessary to do so if he so desires and the desire, if any, to be heard in person may also be similarly

communicated. The detenue neither made any representation nor expressed any desire to be heard in person. The Secretary of the Advisory Board issued a letter informing that in case the petitioner wanted to make a representation, he could address it to the Chairman, immediately. The petitioner did not respond. The meeting of the Board was fixed on 26th June, 1992. As per the normal practice, he was brought from Nashik Prison to Bombay on 26th June, 1992 for giving personal hearing by the Board. He made detailed representation of seven pages and made three prayers, which have been noted by the Division Bench. Then, the proceedings of the Board meeting are referred and what transpires is that the detenue did not object to the conduct of the proceedings despite the Board raising a query whether his next friend was present. He did not pray for adjournment. In that factual backdrop, the Division bench negatived the contention that the petitioner has not been made aware of his right of representation, constitutional as well as statutory, neither the Constitution nor the statute makes it mandatory to permit assistance or adduce evidence in rebuttal. The right is spelt out from the judgment in the case of *A. K. Roy* (supra). It is in these circumstances, the Division Bench held that there is no requirement of giving advance intimation to the detenue about these rights. It was submitted that the right of representation

can never be effectively exercised without these particulars and failure to intimate these rights adversely affects the right of representation itself and on that ground, the order of detention gets vitiated. This submission was not accepted. We are not concerned with other factual aspects for the Division Bench held that the proceedings before the Advisory Board were not vitiated.

31. Mr. Yagnik also relies upon a judgment in the case of *Shri. Ramchandra Rammilan Mishra* (supra), where, the Hon'ble Supreme Court was considering a challenge to a preventive detention order. This court was of the view that there was no material to show that the Advisory Board inquired with the detainee whether his witnesses were present and thus opportunity of examining witnesses, when he was interviewed by the Advisory Board, was denied. Pertinently, the later ground of challenge was that the detainee was not granted opportunity of producing witnesses before the Advisory Board though a representation was made in this regard on 1st March, 1997. Before us, Mr. Yagnik would rely upon observations and particularly in paras 6 and 7 of this judgment. They read as under:-

“6. The position, therefore, is clear that detainee was free to produce the witnesses before the Advisory Board in order to rebut the allegations levelled. There was no obligation on the Advisory Board to summon witnesses and

it was for the detenu to keep his witness present at the appointed time. In the instant case specific affidavit of the Secretary which was noted by the High Court, inter alia, stated as under:

"With reference to para 8(D & K) of the petition, it is stated that the detenu Shri Ramchandra Rammilan Pandey was informed by the Advisory Board through the Superintendent, Nasik Road Central Prison, Nasik to make representation to the Chairman, Advisory Board, M.P.D.A. 1981 and for taking assistance of his friend who is not a legal practitioner or examine witnesses and keep him/them present at the *time of his interview before the Advisory Board*.

The said detenu has submitted two representations dated the 1st March, 1997 and 21st March, 1997 through the Superintendent, Nasik Road Central Prison, Nasik. Both the representations were duly considered by the Advisory Board. He was heard against the detention order. *The detenu did not produce any witness for examination and did not state before the Advisory Board that he wanted to examine witnesses*". (underlined for emphasis)

7. The undisputed position, therefore, is that the detenu did not produce any witness for examination and even did not state before the Advisory Board that he wanted to examine the witness or that the witness was present. The High Court seems to have proceeded on the basis that once a representation is made indicating the desire to examine witness, there was no necessity for any oral prayer. That may be so. But as noticed in A.K. Roy's case (supra), it was for the detenu to keep his witness ready for examination. The specific statement of the Secretary to the Advisory Board on affidavit is that detenu did not produce any witness for examination. It was not for the Advisory Board to summon any witness. When the detenu did not produce any witness for examination, there was no necessity for the Advisory Board to require the detenu to produce witnesses. The approach of the High Court which proceeded on the basis as if there was such an obligation on the Advisory Board, therefor is not right. That apart the Court had nothing concrete before it to surmise that any witness was present, and the failure on the part of the Advisory Board to verify about the same constituted denial of an opportunity. We set aside the judgment of the High Court."

32. Even if we proceed on the basis that this is a decision based on the case of *A. K Roy* (supra) and considers it as well, what is evident therefrom is that the detainee was free to produce witnesses before the Advisory Board, but there was no obligation on the Board to summon witnesses. The detainee in that case did not produce any witnesses nor examined them and even did not state before the Advisory Board that he wanted to examine witnesses.

33. Before us, however, we have an intimation from the detaining authority in the detention order itself that the detainee can make a representation to the detaining authority and he can also make a representation to the Advisory Board by addressing it to the Chairman of the Advisory Board and submit it through the Superintendent of Jail. He was also informed that he shall be heard by the Board if the Board considers it essential to do so or if he so desires. If he desires to be heard in person by the Advisory Board, he may intimate his desire to the Advisory Board or to the Government of Maharashtra, through the Superintendent of Jail, so that the Advisory Board may be intimated about it and necessary arrangements may be made to produce him before the Advisory Board on the date fixed by the Board. The detainee was also informed that he has right to seek assistance of any friend or

legal practitioner during the course of hearing before the Advisory Board as well as other rights as prescribed in the Act.

34. Mr. Tripathi would submit that this information or intimation to the detainee does not satisfy the requirements in law for the simple reason that what other rights, as prescribed in the Act, are referred by the detaining authority is unclear from this statement. Pertinently, the argument is that the Advisory Board did not intimate to the detainee about all rights and particularly the last of the two flowing from the trinity. In that regard, we have an affidavit, firstly of the detaining authority and thereafter of the Advisory Board itself. As far as this ground is concerned, the procedure followed by the Advisory Board is placed before us. The statement on oath is that the petitioner was detained in Nashik Central Prison. It is denied that the constitutional safeguards and protection were not brought to the detainee's notice. The statement that the detainee has not been informed that he may be assisted by his next friend to defend his case before the Advisory Board is denied and equally, his right to lead oral evidence in rebuttal by producing witnesses. It is stated that the order of detention was passed on 9th August, 2017 by the Commissioner of Police, Pune and the detainee was detained on 10th August, 2017. An intimation letter dated 21st August, 2017

was issued to the detenue through the Superintendent of Jail, Pune by the Secretary, Advisory Board. The detenue was informed that the hearing will be fixed on 1st September, 2017 at 1.00 p.m. The detenue was served with this intimation. The case of the detenue was referred to the Advisory Board on 1st September, 2017, on which date, the detenue was present along with his advocate Shri. Abdul Latif Choudhary. He submitted a written submission before the Board. The detenue was heard by the Board on 1st September, 2017. Thus, he as well as the advocate were heard and in detail so also his written representation was considered. On that date, the advocate prayed for time to examine witnesses, but since the witnesses were not kept present before the Board by the detenue, the Board considered the detailed representation of the detenue and on hearing him and his advocate, forwarded its opinion to the Government. Thus, there is no substance in the ground urged before us that the detenue was not informed about his rights or the constitutional safeguards and protection extended to him.

35. Pertinently, we do not have any rejoinder or denial of these statements made on oath. Thus, we find that on due receipt of the intimation of the proceedings before the Board, the petitioner consulted and engaged an advocate, that advocate appeared

before the board and made detailed oral submissions as well as tendered written representation. The detenue was present throughout. Both did not make any grievance before the Advisory Board that the witnesses are not present because no intimation of the nature required by law was given to the detenue. There was no grievance made that the intimation falls short of the requirement of law and it is nothing but an information about the date of the hearing and the time thereof. Thus, no grievance was made about the intimation or its contents and that it did not meet the constitutional safeguards or the law laid down in the case of *A. K. Roy* (supra). If the petitioner has obtained legal advise and he and the advocate were allowed to make representation, then, we do not see how any grievance can be made now in the grounds raised in the writ petition. There is no allegation against the Advisory Board particularly that it hastily concluded the proceedings to the detriment of the interests of the detenue. Thus, no prejudice has been established in this case and we agree with Mr. Yagnik that the order of detention cannot be held to be vitiated by non compliance with the legal mandate. Mr. Yagnik fairly brings to our notice the contents of para 4 of this affidavit of the Secretary of the Advisory Board and particularly the portion where he says that when the Act does not provide the Board to record evidence, there is no question of the detenue examining

the witnesses. Mr. Yagnik made no serious attempt to support this stand, rather he fairly brings to our notice the judgments on the point, including of the Hon'ble Supreme Court. There is substance in the contention of Mr. Tripathi that if there is one detaining authority at Mumbai, which has been informing and intimating the detenue of their constitutional rights and safeguards, then, there is no justification for others not following that course. We are of the opinion that if the Advisory Boards wish to avoid any charge or complaint of unfairness or non-adherence to the mandate of Article 14 of the Constitution of India and/or the allegations of arbitrariness or discrimination, then, it would be better advised to intimate the detenue the trinity of rights and there is further substance in the grievance of Mr. Tripathi that if no such intimation is given, it will not be possible for the detenues to arrange for presence of witnesses on the given date and time. Thus, even if deteneues are informed that may engage an advocate, in the proceedings before the Board, they are expected to be informed about the last of the rights in the trinity so that they can arrange for the presence of the witnesses or lead evidence in rebuttal. It is stated that detenues have right to lead evidence in rebuttal. Mr. Tripathi has produced copies of detention orders passed by the detaining authority at Mumbai. These copies were produced for our perusal

and Mr. Yagnik does not dispute the contents thereof. If one detaining authority or on some occasion the Secretary of the Board deem it fit to inform the detenu of the trinity of rights, we think that there should be some consistency and a uniform pattern to be followed by the State as far as the intimations are concerned. We do not think that this is a matter of formality any longer. Once there are authoritative pronouncements in the field, then, it would be better if a uniform pattern is followed either by the detaining authority or the Secretary of the Advisory Board. However, we hasten to add that the non-intimation about the same necessarily vitiates the continued detention would have to be decided in the facts and circumstances in each case. No general rule can be laid down and ultimately post – detention procedural matters cannot be placed above that of substance. More so, when the subjective satisfaction is not questioned at all. Prejudice by non-adherence to procedural matters would have to be alleged and proved. In the present case, that element is lacking.

36. In the present case and in the view that we have taken, we do not think that the continued detention can be held to be bad in law. In the present case, the detenu had due intimation of appearance before the Advisory Board and prior to that date, he had engaged an advocate. He could have discussed the matter

with his advocate and both of them could have arranged for presence of the witnesses for they had 10 days time with them to make appropriate preparation. Within these days, they could make a detailed representation and tender it to the Advisory Board. None prevented them from in these days in securing the presence of witnesses before the Board. The detainee, therefore, could have arranged for the presence of the witnesses and leading evidence in rebuttal as well. In the facts and circumstances of the present case and in the absence of any rejoinder affidavit or pleading, we hold that the detainee had full opportunity to effectively represent his case before the Board. We do not think that the Advisory Board was in error in not taking cognizance of the grievance now made. Since the witnesses were not present before the Board, when if their presence could have been arranged, now, as an afterthought, the petitioner cannot complain that the procedure adopted by the Advisory Board contravenes the mandate of Article 14 of the Constitution of India. We have carefully perused all the grounds of challenge and we do not think that the procedure adopted by the Advisory Board in this case was unfair, unjust and unreasonable. Once the detainee was aware of his rights, then, he cannot turn around and question the procedure adopted by the Advisory Board.

37. In these circumstances and without laying down any general rule and in the light of our discussion above, we dismiss the writ petition. Rule is discharged.

(SMT. BHARATI H. DANGRE, J.)

(S.C.DHARMADHIKARI, J.)