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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 29th June, 2020

+ W.P.(CRL.) 3034/2019

SAT PRAKASH SONI

..... Petitioner

Through: Mr. Vikram Chaudhri, Senior
Advocate with Mr. Harshit Sethi, Mr.
Shubhankar Jha, Mr. Rahil Mahajan
and Mr. Tushan Rawal, Advocates

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Amit Mahajan, CGSC with Mr.
Gitesh Chopra and Mr. Dhruv Pande,
Advocates

CORAM:

HON'BLE MR. JUSTICE J.R. MIDHA

HON'BLE MR. JUSTICE BRIJESH SETHI

JUDGMENT (ORAL)

1. The petitioner has challenged the Detention Order dated 21st February, 2018 passed under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'COFEPOSA Act, 1974') on various grounds *inter alia* that the delay of 43 days by the Detaining Authority in deciding the representation of the petitioner has violated his fundamental rights and this case is squarely covered by the principles laid down in the recent judgment dated 04th March, 2020 of the Supreme Court in *Ankit Ashok Jalan v. Union of India*, 2020 SCC Online SC 288. The petitioner is in custody since 11th October, 2019.
2. The brief relevant facts of this case are as under:

2.1 On 21st February, 2018, Joint Secretary to the Government of India, empowered under Section 3(1) of the COFEPOSA Act, 1974, passed the Detention Order for detention of the petitioner for preventing him from abetting smuggling of goods, keeping smuggled goods and dealing in smuggled goods in future.

2.2 The grounds of detention were served on the petitioner on 15th October, 2019. In para 15 of the Detention Order, the petitioner was informed of his right to make a representation against the detention to the Detaining Authority; to the Central Government and to the Advisory Board. Para 15 of the grounds of detention order is reproduced hereunder:

“15 You have a right to make representation against your detention to the Detaining Authority, to the Central Government as well as to the Advisory Board. If you wish to avail your right of making representation, you should send it through the Jail Authorities, where you are detained, in the manner indicated below:

(i) Representation meant for the Detaining Authority should be addressed to the Joint Secretary (COFEPOSA), Government of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, 6th Floor, B Wing, Janpath Bhawan, Janpath, New Delhi-110001.

(ii) Representation meant for the Central Government should be addressed to Secretary, Government of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, 6th Floor, B Wing, Janpath Bhawan, Janpath, New Delhi-110001.

(iii) Representation meant for the Advisory Board should be addressed to the Chairman, COFEPSA Advisory Board, Delhi High Court, Sher Shah Road, New Delhi.”

2.3 On 05th November, 2019, the petitioner made a representation to the Detaining Authority which was forwarded to the Sponsoring Authority for their comments on 06th November, 2019.

2.4 On 13th November, 2019, the Detaining Authority made a reference to the Central Advisory Board. The representation of the petitioner and the comments on his representation prepared in consultation with the Sponsoring Authority were sent to the Central Advisory Board on 28th November, 2019.

2.5 On 28th November, 2019, the respondents intimated the petitioner that his representation will be considered only after the receipt of the opinion of the Central Advisory Board in view of the judgment of the Supreme Court in ***Golam Biswas v. Union of India***, (2015) 16 SCC 177.

2.6 On 05th December, 2019, the Central Advisory Board opined that there were sufficient grounds for detention of the petitioner. Based on the opinion of the Advisory Board, the Ministry confirmed the detention order on 16th December, 2019.

2.7 On 18th December, 2019, the Detaining Authority considered and rejected the representation of the petitioner dated 05th November, 2019.

3. Mr. Vikram Chaudhari, learned senior counsel for the petitioner urged at the time of the hearing that there was delay of 43 days on the part of the Detaining Authority to consider the petitioner's representation on the ground of awaiting the opinion of the Central Advisory Board which is violative of the fundamental rights of the petitioner under Articles 21 and 22(5) of the Constitution. Reliance is placed on the recent judgment of the Supreme Court in ***Ankit Ashok Jalan*** (supra) in which Supreme Court held that Detaining Authority was obliged to consider the representation of the detainees without waiting for the opinion of the Central Advisory Board and the delay by the Detaining Authority in considering the representation of the detainees on the ground of awaiting the report of the Central Advisory Board

violated the constitutional rights of the detainees. The Supreme Court quashed the detention order holding the detention to be illegal, invalid and unconstitutional and the detainees were directed to be set at liberty forthwith. Reliance is also placed on the judgment of the Kerala High Court in **V.K. Anusree v. Union of India**, WP(Crl.) No. 45 of 2020 decided on 17th March, 2020 in which the Kerala High Court, following the **Ankit Ashok Jalan** (supra), quashed the detention order.

4. Mr. Amit Mahajan, learned Standing Counsel urged at the time of the hearing that there is no undue delay on the part of the Detaining Authority to consider the petitioner's representation. It is submitted that the petitioner's representation was received by the Detaining Authority on 06th November, 2019 and was forwarded for comments to the Sponsoring Authority on the same day. While waiting for the comments from the Sponsoring Authority, the Detaining Authority made a reference to the Central Advisory Board on 13th November, 2019. The copy of the representation of the petitioner and the comments prepared in consultation with Sponsoring Authority were sent to the Central Advisory Board on 28th November, 2019. The Central Advisory Board submitted its report on 05th December, 2019 and based on the opinion of the Central Advisory Board, the Central Government confirmed the detention order on 16th December, 2019. The Detaining Authority considered the petitioner's representation and rejected it on 18th December, 2019. It is submitted that the Detaining Authority awaited the opinion of the Central Advisory Board based on the understanding of the principles laid down in **Golam Biswas's** case (supra). It is submitted that **Golam Biswas's** case (supra) does not create any distinction between the representation made to the Central Government and specially empowered

officer. With respect to the judgment of the Supreme Court in **Ankit Ashok Jalan** (supra), it is submitted that the principles laid down by the Supreme Court fall in the category of Prospective Overruling i.e. the decision would not have retrospective operation. Reliance is placed on **I.C.Golaknath v. State of Punjab**, AIR 1967 SC 1643 and **Baburam v. C.C. Jacob**, (1999) 3 SCC 362.

5. Mr. Vikram Chaudhari, learned senior counsel for the petitioner refuted the submissions of the respondent. Learned senior counsel submits that the position of law is well settled ever since the judgment of the Constitution Bench in **Kamleshkumar Ishwardas Patel v. Union of India**, (1995) 4 SCC 51 in which it was held that the Detaining Authority is bound to consider the representation without any delay. Both **Golam Biswas** (supra) as well as **K.M. Abdullah Kunhi** (supra) dealt with the power of the Government to defer the consideration of representation of the detainee to await the opinion of the Advisory Board. It is submitted that no judgment of the Supreme Court held that the Detaining Authority can defer the consideration of representation of the detainee to await the report of the Advisory Board. It is further submitted that the principles laid down by the Supreme Court in **Ankit Ashok Jalan's** case (supra) would apply to all cases irrespective of the stage of pendency. It is further submitted that the plea of Prospective Overruling is not applicable to the present case. It is further submitted that the plea of Prospective Overruling can be considered only by the Supreme Court. Reliance is placed on **Major General A.S. Gauraya v. S.N. Thakur**, (1986) 2 SCC 709, **Sarwan Kumar v. Madan Lal Aggarwal**, (2003) 4 SCC 147 and **M.A. Murthy v. State of Karnataka**, (2003) 7 SCC 517.

Legal position

6. In *Ankit Ashok Jalan* (supra), the detainees made a representation to the Detaining Authority which was sent for comments to the Sponsoring Authority. The detainee's representation and the comments of the department were thereafter forwarded to the Central Advisory Board. The Detaining authority communicated to the detainees that their representation would be considered after the opinion of the Central Advisory Board. The Central Advisory Board gave its opinion on 06th December, 2019. The Central Government confirmed the detention on 14th January, 2020. The Detaining Authority considered and rejected the representation of the detainees on 14th January, 2020. As such, there was delay of 47 days in considering the representation of the detainees.

7. The detainees challenged the Detention Order on the ground that the Detaining Authority ought to have considered the representation without waiting for the report of the Central Advisory Board and delay in consideration of the representation violated the rights of the detainees guaranteed by the Constitution.

8. The Detaining Authority contested the writ petition on the ground that the representation could be considered only after the report of the Central Advisory Board. Para 8 of the judgment containing the contentions of the respondent is reproduced hereunder:

*“8. On the other hand, Mr. K.M. Nataraj, learned Additional Solicitor General, for the respondents relied upon the decisions of this Court in **Golam Biswas** and in **K.M. Abdulla Kunhi** to submit that while the matter was pending consideration before the Central Advisory Board, the representation in question could not be*

considered and it could be considered only after the receipt of the report of the Central Advisory Board.”

9. The following questions arose for consideration before the Supreme Court:

“(i)Whether the Detaining Authority was justified in deferring the consideration of the representation till the receipt of the opinion of the Central Advisory Board?

(ii)Whether the Detaining Authority ought to have considered the representation independently and without waiting for the report of the Central Advisory Board?

(iii)If the answer to the second question is yes, whether the time taken by the Detaining Authority from 27.11.2019 till 14.01.2020 could be characterised as undue and avoidable delay violating the constitutional rights of the detenues?”

10. The Supreme Court held that the law on the first issue was well settled by the Constitution Bench judgment in **Kamleshkumar** (supra) that the Detaining Authority is obliged to consider the representation and the failure of the Detaining Authority to consider the same would violate the constitutional rights of the detainee. Para 18 of the judgment is reproduced hereunder:

“18. With the judgment of the Constitution Bench of this Court in Kamleshkumar, the law on the first issue is well settled that where the detention order is made inter alia under Section 3 of the COFEPOSA Act by an officer specially empowered for that purpose either by the Central Government or the State Government, the person detained has a right to make a representation to the said officer; and the said officer is obliged to consider the said representation; and the failure on his part to do so would result in denial of the right conferred on the person detained to make a representation. Further, such right of the detainee has been taken to be in addition to the right to make the representation to the State Government and the Central Government. It must be stated that para 12 of the grounds of detention in the instant

case, as quoted hereinabove, is in tune with the law so declared by this Court.”

11. In para 19, the Supreme Court considered **Pankaj Kumar Chakrabarty v. State of West Bengal**, (1969) 3 SCC 400, **Jayanarayan Sukul v. State of West Bengal**, 1970) 1 SCC 219 and **Haradhan Saha v. The State of West Bengal**, (1975) 3 SCC 198 and held that the Detaining Authority has to consider the detainee’s representation whether made before or after the reference to the Advisory Board. Para 20 of the judgment is reproduced hereunder:

“20. It was, thus, clarified that if the representation is received before the matter is referred to the Advisory Board, the Detaining Authority ought to consider such representation; and if the representation is made after the matter is referred to the Advisory Board, the Detaining Authority would first consider it and then send the representation to the Advisory Board.”

12. The Supreme Court thereafter considered **Frances Coralie Mullin v. W.C. Khambra**, (1980) 2 SCC 275, **K.M. Abdullah Kunhi** and **Jayanarayan Sukul** (supra) and **Golam Biswas** (supra). The Supreme Court held that **Golam Biswas’s** case (supra) was dealing with the representation of the detainee to the appropriate Government and not to the Detaining Authority.

13. In para 32 of the judgment, the Supreme Court summarized the principles which emerge out of the aforesaid judgments as under:

“32. These decisions clearly laid down that the consideration of representations by the appropriate Government by the Board would always be qualitatively different and the power of consideration by the appropriate Government must be completely independent of any action by the Advisory Board. In para 12 of the decision in Pankaj Kumar Chakrabarty it was stated that the obligation on part of the Government to consider representation would be irrespective whether

the representation was made before or after the case was referred to the Advisory Board. As stated in paragraph 18, this was stated so, as any delay in consideration of the representation would not only be an irresponsible act on part of the appropriate authority but also unconstitutional. The contingency whether the representations were received before or after was again considered in para 29 of the decision in Haradhan Saha. In terms of these principles, the matter of consideration of representation in the context of reference to the Advisory Board, can be put in following four categories: -

A) If the representation is received well before the reference is made to the Advisory Board and can be considered by the appropriate Government, the representation must be considered with expedition. Thereafter the representation along with the decision taken on the representation shall be forwarded to and must form part of the documents to be placed before the Advisory Board.

B) If the representation is received just before the reference is made to the Advisory Board and there is no sufficient time to decide the representation, in terms of law laid down in Jayanarayan Sukul and Haradhan Saha the representation must be decided first and thereafter the representation and the decision must be sent to the Advisory Board. This is premised on the principle that the consideration by the appropriate Government is completely independent and also that there ought not to be any delay in consideration of the representation.

C) If the representation is received after the reference is made but before the matter is decided by the Advisory Board, according to the principles laid down in Haradhan Saha, the representation must be decided. The decision as well as the representation must thereafter be immediately sent to the Advisory Board.

D) If the representation is received after the decision of the Advisory Board, the decisions are clear that in such cases there is no requirement to send the representation to the Advisory Board. The representation in such cases must be considered with expedition.”

14. In para 34 of the judgment, the Supreme Court noted that **K.M. Abdullah Kunhi** (supra) held that the Government would wait for the report

of the Advisory Board in two situations. Para 34 of the judgment is reproduced hereunder:

“34. However, it was for the first time that the decision in K.M. Abdulla Kunhi laid down in paragraph 16 that it would be proper for the Government in the two situations dealt with in said paragraph to await the report of the Board; those two situations being: -

a. where the representation is received before the matter is referred to the Advisory Board and where there may not be sufficient time to dispose of the representation before referring the case to the Advisory Board, and

b. where the representation is received after the case is referred to the Advisory Board.

c. It was also laid down: -

“In both the situations there is no question of consideration of the representation before the receipt of report of the Advisory Board.””

15. The Supreme Court concluded that the Detaining Authority has to consider the detainee’s representation independently and without waiting for the report of the Central Advisory Board. Paras 42 and 43 of the judgment are reproduced hereunder:

“42. Thus, if the law is now settled that a representation can be made to the specially empowered officer who had passed the order of detention in accordance with the power vested in him and the representation has to be independently considered by such Detaining Authority, the concerned principles adverted to in paragraph 16 of the decision in K.M. Abdulla Kunhi would not be the governing principles for such specially empowered officer. It must be stated that the discussion in K.M. Abdulla Kunhi was purely in the context where the order of detention was passed by the appropriate Government and not by the specially empowered officer. The principle laid down in said paragraph 16 has therefore to be understood in the light of the subsequent decision rendered by another Constitution Bench of this Court in Kamleshkumar.

43. In the light of the aforesaid discussion, our answer to first two questions is that the Detaining Authority ought to have considered the

representation independently and without waiting for the report of the Central Advisory Board.

(Emphasis supplied)”

16. Applying the aforesaid principles, the Supreme Court quashed the Detention Order on the ground that there was no valid explanation for awaiting the report of the Central Advisory Board and not considering the representation from 27th November, 2019 to 14th January, 2020. The inaction on the part of the Detaining Authority to consider the detainees’ representation was held to be violative of their constitutional rights. The Supreme Court quashed the Detention Order and directed the detainees to be set at liberty forthwith. Paras 46 and 47 of the judgment are reproduced hereunder:

“46. Since there was complete inaction on part of the Detaining Authority in the present case, to whom a representation was addressed in dealing with the representation as stated above, we hold that the constitutional rights of the detainees were violated and the detainees are entitled to redressal on that count. We, therefore, allow this Writ Petition and hold the continued detention of the detainees in terms of the Detention Orders to be illegal, invalid and unconstitutional.

47. This writ petition is therefore allowed. The Detention Orders are quashed and the detainees are directed to be set at liberty forthwith, unless their custody is required in connection with any other proceedings or crime”

Findings

17. Applying the principles laid down by the Supreme Court in **Ankit Ashok Jalan** (supra), this Court holds that the Detaining Authority was obliged to expeditiously consider the petitioner’s representation without waiting for the opinion of the Central Advisory Board.

18. There is no valid explanation for non-consideration of the petitioner's representation from 06th November, 2019 to 18th December, 2019. There is no merit in the respondents' explanation that they were waiting for the report of the Central Advisory Board. This very objection was raised before the Supreme Court but was rejected in **Ankit Ashok Jalan** (supra).

19. The delay on the part of the Detaining Authority to consider the petitioner's representation violated his constitutional rights.

20. This case is squarely covered by the principles laid down by the Supreme Court in **Ankit Ashok Jalan** (supra).

21. The respondents' plea of Prospective Overruling cannot be considered by this Court in view of **Sarwan Kumar** (supra) in which the Supreme Court held that the High Court is not competent to adjudicate the same. Relevant portion is reproduced hereunder:

"It was not for the High Court to say that the law laid down by this Court in Gian Devi Anand's case (supra) would be prospective in operation. If this is to be accepted then conflicting rules can supposedly be laid down by different High Courts regarding the applicability of the law laid down by this Court in Gian Devi Anand's case (supra) or any other case. Such a situation cannot be permitted to arise. In the absence of any direction by this Court that the rule laid down by this Court would be prospective in operation the finding recorded by the High Court that the rule laid down in Gian Devi Anand's case (supra) by this Court would be applicable to the cases arising from the date of the judgment of this Court cannot be accepted being erroneous."

22. The petitioner has raised various other grounds to challenge the Detention Order. Since this case is squarely covered by **Ankit Ashok Jalan** (supra), it is not necessary to decide the other grounds urged by the petitioner.

Conclusion

23. The petition is allowed, the Detention Order dated 21st February, 2018 is hereby quashed and the detenue is directed to set at liberty forthwith.

24. This Court appreciates the assistance rendered by learned counsels for both the parties who filed brief note of submissions and video clips of their oral arguments in terms of the order dated 01st June, 2020. The video clips of the oral arguments filed by the learned counsels were seen by this Court in advance and it enabled this Court to conclude the oral hearing in two short video conferences on 18th June, 2020 and 24th June, 2020.

J.R. MIDHA, J.

BRIJESH SETHI, J.

JUNE 29, 2020

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