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

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Reserved on: 19th October, 2022
Pronounced on: 3rd November, 2022

+ **W.P.(CRL) 1205/2022, CRL.M.A. 20351/2022**

PRAMOD SINGLA

..... Petitioner

Through: Mr. Vikram Chaudhri, Senior Advocate with Mr. Rishi Sehgal, Ms. Arveen Sekhon, Ms. Prabhneer Swami, Mr. Nikhil Jain, Ms. Reena Rawat, Advocates.

Versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Satish Aggarwal, Senior Standing Counsel for DRI. Mr. Ajay Diggpaul, CGSC with Mr. Kamal Diggpaul, Ms. Swati Kwatra, Advocates for UOI.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA J.

1. The present writ petition under Article 226 of the Constitution of India, read with Section 482 of Cr.P.C. has been instituted on behalf of Pramod Singla (hereinafter referred to as 'detenu') praying for quashing and setting aside the detention order bearing F. No. PD-12001/07/2022-COFEPOSA, dated 01.02.2022, under Section 3(1) of

the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'COFEPOSA').

2. Relevant facts for adjudication of the present writ petition *qua* the detenu are as follows:

(i) The Directorate of Revenue Intelligence, Delhi Zonal Unit (Respondent No. 4, hereinafter referred to as 'DRI') received intelligence, that a syndicate comprising certain Chinese, Taiwanese and South Korean nationals, in association with some Indian individuals are indulging in smuggling of gold, into India through air cargo by concealing the gold in transformers of electroplating/re-working machines etc., and one such consignment has been imported by the said syndicate in the name of M/s Healthy Future Leaders Private Limited and is likely to arrive at Delhi Cargo Services Centre, Air Cargo Complex, IGI Airport, New Delhi on 18.11.2021, vide House Airway Bill No. SZGF21113657.

(ii) Acting on the said intelligence, the said purported consignment was examined by the officers of DRI on 18/19.11.2021 at Import Shed, Delhi Cargo Service Centre, Air Cargo Complex, IGI Airport, New Delhi and 80.126 kg of 995 purity (24 Carat) foreign origin gold, in the form of 'E' & 'I' shaped plates, having a market value of Rs. 39,31,38,219/- was recovered. *Panchnama* dated 18/19.11.2021 showing the recovery of the said 80.126 kg of gold was drawn. The said gold was seized

under Section 110 of the Customs Act, 1962, vide seizure memo dated 19.11.2021.

(iii) On the same day, i.e., on 18.11.2021, officers of DRI searched the detenu's premises, i.e., M/s D.P. Abhushan, Shop No. 4, 3rd Floor, 1167 Kucha Mahajani, Chandni Chowk, Delhi and seized 7 pieces of gold, weighing 5.409 kgs of primary gold of alleged foreign origin. *Panchnama* dated 18.11.2021 was drawn, showing a recovery of 5.409 kgs of gold having a market value of Rs. 2,64,44,680/-. The said gold was seized under Section 110 of the Customs Act, 1962, vide seizure memo dated 19.11.2021.

(iv) In total, 85.535 kg gold of foreign origin, having total market value of Rs. 41,95,82,899/- has been recovered and seized.

(v) On 18/19.11.2021, officers of DRI conducted further searches at four different places belonging to persons involved in the aforementioned smuggling syndicate and arrested four foreign nationals, namely, Dongyoung Oh, Liang Zhaobing *alias* Dawang Tstring, Li Wen Tsung and Choi Yong and one Indian national, namely, Neeraj Varshney. It was claimed by the DRI that the search at various places resulted in the recovery of certain incriminating evidence in the form of electronic devices.

(vi) Statement of the detenu under Section 108 of the Customs Act, 1962 was recorded on 18/19.11.2021 by the Investigating Officer. Co-accused, Neeraj Varshney's statement was also recorded under Section 108 of the Customs Act, 1962.

(vii) On 19.11.2021, statements under Section 108 of the Customs Act, 1962 of Dongyoung Oh, Liang Zhaobing *alias*

Dawang Tstring, Li Wen Tsung and Choi Yong were also recorded.

(viii) On 20.11.2021, the detenu, alongwith Dongyoung Oh, Liang Zhao Bing *alias* Dawang Tstring, Li Wen Tsung, Choi Yong and Neeraj Varshney was arrested by the officers of DRI. Thereafter, they were produced before the learned CMM, Patiala House Courts, New Delhi, and vide order dated 20.11.2021, were remanded to Judicial Custody till 04.12.2021.

(ix) The detenu filed a regular bail application dated 30.11.2021 before the learned CMM, Patiala House Courts.

(x) All the four foreign nationals also filed their respective bail applications on 06.12.2021 before the learned CMM, Patiala House Court, New Delhi.

(xi) On 09.12.2021, DRI filed its reply to the bail application filed by the detenu.

(xii) Vide order dated 13.12.2021, the learned CMM, Patiala House Courts granted bail to the detenu.

(xiii) The detenu, immediately on his release from the jail, filed his retraction application dated 14.12.2021 before the learned CMM Patiala House Court, New Delhi.

(xiv) Vide four separate orders dated 21.12.2021, the learned CMM, Patiala House Court, New Delhi granted bail to all the four foreign nationals.

(xv) Vide order dated 21.12.2021, the learned CMM, Patiala House Court, New Delhi granted bail to the accused Neeraj Varshney.

(xvi) On 21.12.2021, DRI filed a Crl. M.C. No. 3536/2021, under section 482 Cr.P.C. before the Hon'ble Delhi High Court, challenging the order dated 13.12.2021 passed by the learned CMM, PHC, New Delhi granting bail to the detenu.

(xvii) DRI filed separate petitions before the Hon'ble Delhi High Court under section 482 Cr.P.C. challenging the orders dated 21.12.2021 passed by the learned CMM, PHC, New Delhi granting bail to the co-accused Neeraj Varshney and all the four foreign nationals which are pending adjudication.

(xviii) DRI filed an application dated 24.12.2021 before the learned CMM, Patiala House Court, New Delhi praying for incorporating an additional condition in the bail order directing the detenu to appear in the office of DRI, DZU, New Delhi at 11 AM on every Monday. Similar applications were also filed by DRI seeking to incorporate the same additional condition with respect to other accused persons.

(xix) DRI filed an application dated 21.01.2022, before the learned CMM, Patiala House Court, New Delhi for cancellation of bail granted to the detenu on 13.12.2021 on the ground that the detenu had violated some of the conditions of bail imposed by the learned trial Court while granting bail.

(xx) Respondent No. 2 passed the impugned Detention Order bearing F. No. PD-12001/07/2022-COFEPOSA, dated 01.02.2022.

(xxi) On 04.02.2022, detenu was apprehended by the DRI, when he had gone to their office to surrender his passport in

compliance with the bail order dated 13.12.2021 passed by learned CMM, Patiala House Courts, New Delhi whereupon, the detenu was handed over to the Police Officers of P.S. Sector 8, Faridabad who served the impugned detention order dated 01.02.2021 upon the detenu and later lodged him at Tihar Jail.

(xxii) The detenu made a representation dated 02.03.2022 to respondent no. 2, detaining authority, through his counsel, pointing out several vital documents which had not been supplied and submitting that failure to supply the same violated Article 22(5) of the Constitution of India; thus vitiating the detention. The detenu further prayed for the revocation and quashing of the detention order and his release from custody, forthwith.

(xxiii) The detenu made another representation dated 10.03.2022 to the Director General, Central Economic Intelligence Bureau, Government of India, Ministry of Finance, Department of Revenue, New Delhi, through his counsel, pointing out several vital documents that had not been supplied and submitted that failure to supply the same violated Article 22(5) of the Constitution of India; thus vitiating the detention. The detenu further prayed for the revocation and quashing of the impugned detention order and his forthwith release from custody.

(xxiv) Deputy Secretary to the Government of India on behalf of the respondent no. 2, detaining authority, vide communication dated 15.03.2022 (received by the detenu in the jail on 15.03.2022) had informed the detenu that the representation dated 02.03.2022 stands rejected with the following statement:

“...the aforesaid representation dated 02.03.2022 has been carefully examined and considered by the Joint Secretary (COFEPOSA), the Detaining Authority, but it is regretted that the same has been rejected.”

(xxv) After the rejection of the detenu's representation dated 02.03.2022 vide communication dated 15.03.2022 and having received no communication with respect to his representation dated 10.03.2022 addressed to the Director General, CEIB, New Delhi, the detenu made another representation dated 04.04.2022 to the Hon'ble Chairman and his companion members of the Central Advisory Board, High Court of Delhi, New Delhi, through his counsel pointing out several vital documents that had not been supplied and submitting that failure to supply the same violated Article 22(5) of the Constitution of India; thus vitiating the detention. The detenu further prayed for the revocation and quashing of the impugned detention order and his forthwith release from custody.

(xxvi) The hearing before the Hon'ble Advisory Board was fixed for 04.04.2022 and then for 12.04.2022. However, the matter could not be heard on the said dates. Finally, the matter was fixed for 18.04.2022 and the hearing concluded. During the hearing, representative of sponsoring authority furnished written submissions along with copies of a number of documents.

(xxvii) Vide order dated 02.05.2022, the Deputy Secretary to the Government of India, (COFEPOSA Wing) confirmed the impugned detention order, while observing as under:

“WHEREAS the case of Shri Pramod Singla was placed before the Advisory Board who is of the opinion that there exist sufficient grounds for detention of the detenu Shri Pramod Singla.

WHEREAS, the Central Government has considered the report of the Advisory Board and other material on record; and

NOW, THEREFORE, in exercise of the powers conferred by section 8(f) of the aforesaid Act, the Central Government hereby confirms the aforesaid detention order and further directs under section 10 ibid that Shri Pramod Singla be detained for a period of one year from the date of his detention i.e. from 04.02.2022.”

(xxviii) The Deputy Secretary to the Government of India, on behalf of Director General, CEIB, vide communication dated 09.05.2022 informed the detenu that the representation dated 10.03.2022 stands rejected with the following statement:

“..the aforesaid representation has been carefully examined and considered by the Director General, CEIB on behalf of Central Government, but it is regretted that the same has been rejected.”

(xxix) A perusal of the grounds of detention impugned in the present proceeding reveals that the role assigned to the detenu was that he actively participated in selling smuggled gold of foreign origin from abroad to different bullion traders in the domestic market. The detenu is said to be a key member of a well organized smuggling syndicate involved in said smuggling gold of foreign origin. It is further stated that the detenu had shown a general

habit and propensity to indulge in acts of smuggling in a planned manner, which is detrimental to the economy and security of the country.

3. The present writ petition, assailing the impugned detention order has been filed and the grounds for challenging the same have broadly been set out in the petition, under the following heads:

- A. Malice in law as well as fact.
- B. Inordinate and unexplained delay in passing of the impugned detention order.
- C. Inordinate and unexplained delay on the part of the Central Government in deciding the representation filed by the detenu.
- D. The absence of subjective satisfaction and non-placement of vital documents by the sponsoring authority and/or non-consideration thereof by the detaining authority and non-supply thereof to detenu.
- E. Use of the word “or in the detention order under grounds of detention.
- F. Detention was vitiated in view of the violation of settled mandate of law and procedure.
- G. Non-application of mind by detaining authority while passing the detention order renders the same to non-est in the eyes of law.
- H. Inchoate and incomplete investigation.
- I. Non-compliance of procedural safeguards/requirements.

4. In response to the aforesaid petition, a counter affidavit on behalf of respondent nos. 1 to 3 has been filed contesting the aforesaid grounds raised on behalf of the petitioner. Supporting the

order of detention, it has been asserted that the same is legally and constitutionally valid in as much as it has been passed by the competent authority with due application of mind and after arrival of subjective satisfaction based on the material facts and circumstances of the case.

5. We have heard learned counsel appearing on behalf of the parties and perused the record, i.e., petition, counter affidavit, rejoinder and the written submissions filed on behalf of the petitioner.

6. Mr. Vikram Chaudhari, learned Senior Counsel appearing on behalf of the detenu, limits his arguments on the sole ground that the impugned detention order dated 01.02.2022 has been rendered invalid in view of the inordinate and unexplained delay on the part of the respondent no. 3, i.e., the Central Government in deciding the representation dated 10.03.2022, filed by the detenu.

7. It is the case of the detenu that while he was incarcerated in jail, he made a representation to respondent no. 3, i.e., Director General, Central Economic Intelligence Bureau, Government of India, Ministry of Finance, Department of Revenue, New Delhi, on 10.03.2022. The said representation was sent through his counsel, highlighting the non-supply of vital documents, failure of which violated Article 22(5) of the Constitution of India and further prayed for revocation and quashing of the impugned detention order and his forthwith release from custody. It is further submitted on behalf of

the detenu that having received no further communication with respect to this representation dated 10.03.2022, he made another representation on 04.04.2022 to the Hon'ble Chairman and his companion members of the Central Advisory Board, High Court of Delhi, New Delhi. The hearing before the Advisory Board was concluded on 18.04.2022.

8. Finally, vide order dated 02.05.2022, the Deputy Secretary to the Government of India confirmed the impugned detention order. Thereafter, the Deputy Secretary to the Government of India on behalf of the Director General, CEIB, vide communication dated 09.05.2022, informed the detenu that the representation dated 10.03.2022 stands rejected.

9. Learned Senior Counsel has vehemently argued that this inordinate and unexplained delay of 60 days vitiates the detention order as the same is fatal to the continued detention of the detenu. Reliance is placed by the learned Senior Counsel, on behalf of the detenu, on a judgment passed by a Division Bench of this Court in **Mohd. Nashruddin vs. Union of India and Ors., 2021 SCC OnLine Del 4017**, wherein it was held as under:-

*“93. On the **sixth** issue regarding the delay on the part of the Central Government in deciding the representation filed by the detenu, it would be relevant to consider the circumstance that the detenu was detained on 12.10.2020 and filed representation dated 27.10.2020 with the Detaining Authority, as well as before the Central Government. Although the*

Detaining Authority rejected his representation on 09.11.2020, no decision was taken by the Central Government on the detenu's representation. Instead the Central Government made a reference dated 10.11.2020 to the Central Advisory Board, which gave its opinion qua the sufficiency of the grounds with regard to the detenu's detention. The subject representation was finally rejected by the Central Government only on 23.12.2020, three days after confirmation by it of the order of detention by the Central Advisory Board.

94. *A bare perusal of the above clearly reflects that there was massive delay of 57 days by the Central Government in dealing with the petitioner's representation.*

95. *In Ankit Ashok Jalan v. Union of India, reported as (2020) 16 SCC 127, the Hon'ble Supreme Court has observed, particularly in paragraph 17 thereof, as under:—*

“17. In terms of these principles, the matter of consideration of representation in the context of reference to the Advisory Board, can be put in the following four categories:

17.1. 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.

17.2. If the representation is received just before the reference is made to the Advisory Board and there is not sufficient time to decide the representation, in terms of law laid down in Jayanarayan Sukul [Jayanarayan Sukul v. State of W.B., (1970) 1 SCC 219 : 1970 SCC (Cri) 92]

and Haradhan Saha [Haradhan Saha v. State of W.B., (1975) 3 SCC 198 : 1974 SCC (Cri) 816] 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.

17.3. 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 [Haradhan Saha v. State of W.B., (1975) 3 SCC 198 : 1974 SCC (Cri) 816], the representation must be decided. The decision as well as the representation must thereafter be immediately sent to the Advisory Board.

17.4. 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."

96. It is, therefore, well settled that the right of the detenu to make a representation and have it considered by the appropriate Government with expedition, is a constitutional right under Article 22(5) of the Constitution of India and any unreasonable and unexplained delay in considering the representation is fatal to the continued detention of the detenu.

97. In this view of the matter and the circumstance that this proposition is too well settled by a long line of decisions, it is not considered necessary for us to examine the authorities relied upon by the respondents on this aspect.

98. We, therefore, hold that there has been inordinate and unexplained delay on the part of the Central Government in deciding the statutory representation filed by the detenu.”

10. *Per contra*, Mr. Ajay Digpaul, learned Central Government Standing Counsel (hereinafter referred to as ‘CGSC’), appearing on behalf of the respondents, submitted that the impugned detention order, dated 01.02.2022, passed by the competent authority under Section 3(1) of the COFEPOSA is legal and constitutional and the same has been passed by the competent authority with due application of mind and suffers from no illegality. With respect to the aforesaid ground urged by the petitioner, learned CGSC invites the attention of this Court to Para 4(iv) of the para-wise reply in the counter affidavit filed by Mr. Naresh Kumar, Deputy Secretary to the Government of India, CEIB, Department of Revenue, Ministry of Finance, Government of India. The aforesaid para 4(iv) is being reproduced hereunder;

“The allegation regarding delay in deciding the representation by the Central Government is wrong and misleading. The Petitioner made a representation dated 10.03.2022 through the Jail Authorities to the DG, CEIB on behalf of the Central Government requesting therewith to revoke the impugned detention order. The said representation was received on 11 .03 .2022 when the matter of the petitioner had already been referred to the Central Advisory Board, Delhi High Court on 24.02.2022. As per the law settled by the Hon' ble Supreme Court in the matter of Ankit Ashok Jalan vs. Union of India reported as ‘(2020) 16 SCC 127’, the said representation was kept pending for want of the opinion

of the Advisory Board in the matter under reference. The opinion tendered by the Central Advisory Board was considered by the Central Government and, accepting the said opinion, confirmed the impugned detention order vide order dated 02.05.2022 as duly conveyed to the petitioner. Thereafter, the said representation dated 10.03.2022 of the petitioner was disposed of by the DG, CEIB after carefully examining and considering the same as conveyed to the petitioner vide memorandum dated 09.05.2022. Hence, there is no delay in disposing of the said representation.”

11. In the present case, admittedly, the representation dated 10.03.2022 was received by the Central Government on 11.03.2022. As per the counter affidavit filed by the official respondents, the detenu's case had already been referred to the Central Advisory Board, High Court of Delhi on 24.02.2022. The said representation was decided on 09.05.2022, i.e., after receiving the opinion of Advisory Board. At this stage, it is pertinent to note that in the present case, the detenu had made two representations. The first representation dated 02.03.2022 was addressed to respondent no. 2, i.e., the detaining authority, and the second representation dated 10.03.2022 was addressed to respondent no. 3, i.e. the Central Government. Detenu's representation dated 02.03.2022, addressed to respondent no. 2, i.e., the detaining authority was rejected by the latter on 15.03.2022 and the same was informed to the detenu. This distinction between representation being made to the detaining authority and the Central Government assumes significance in view of the decision in **Ankit Ashok Jalan vs. Union of India & Ors.,**

(2020) 16 SCC 127. The Hon'ble Supreme Court, in Ankit Ashok Jalan (*supra*), was dealing with a situation where the representation by the detenu was made to the detaining authority who was a specially empowered officer exercising the powers of detention.

12. Learned Senior Counsel placed reliance on Para 17 of Ankit Ashok Jalan (*supra*), wherein the Hon'ble Supreme Court had categorized four stages for receipt and disposal of a representation made by the detenu. In particular, learned Senior Counsel relied upon the third category, as laid down in Para 17.3 of the said judgment.

“17.3. 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 sent to the Advisory Board.”

However to determine the present issue at hand, the discussion and the conclusion in the subsequent paras of Ankit Ashok Jalan (*supra*) will be relevant and are being reproduced as under:

*“18. There can be no difficulty with regard to the applicability of the principles in the 1st and the 4th stage of the aforesaid categories. **The difficulty may arise as regards the application of principles at the 2nd and the 3rd stage. But that difficulty was dealt with sufficient clarity in Jayanarayan Sukul and Haradhan Saha as stated hereinabove.** If it is well accepted that the representation must be considered with utmost expedition; and the power of the Government is completely independent of the*

power of the Advisory Board; and the scope of consideration is also qualitatively different, there is no reason why the consideration by the Government must await the decision by the Advisory Board. None of the aforesaid cases even remotely suggested that the consideration must await till the report was received from the Advisory Board.

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

19.1. 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

19.2. Where the representation is received after the case is referred to the Advisory Board. 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.”

20. Since the decision of this Court in K.M. Abdulla Kunhi was rendered by the Constitution Bench of this Court after considering all the earlier decisions on the point including those in Pankaj Kumar Chakrabarty, Jayanarayan Sukul and Haradhan Saha, we are bound by the principles laid down therein. When the learned counsel for the petitioner were so confronted, it was submitted by them that the decision in K.M. Abdulla Kunhi dealt with the matter relating to the consideration of representation by the appropriate Government and not in the context where power of detention was exercised by a specially empowered officer as the detaining authority. According to

them, that would make a huge difference and put the matter in a qualitatively different compass.

21. We now proceed to deal with these submissions.

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23. It must also be borne in mind that in all cases, the appropriate Government would be acting in two capacities; one while considering the representation and the other while taking appropriate decision after a report is received from the Advisory Board that there is sufficient cause for detention. Since the decision would be required to be taken in these two capacities, it was observed in K.M. Abdulla Kunhi that it would be proper for the appropriate Government to wait till the report is received from the Advisory Board in cases dealt with in para 16 of the decision. But such may not be the case with the detaining authority who is a specially empowered officer.

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*25. In terms of Section 8, the report of the Advisory Board is meant only for the consumption of the appropriate Government and apart from the operative part of the report which is to be specified in a separate paragraph as per sub-section (c), the mandate in terms of sub-section (e) is to keep the report of the Advisory Board completely confidential. Thus, a specially empowered officer who may have passed the order of detention, by statutory intent is not to be privy to the report nor does the statute contemplate any role for such specially empowered officer at the stage of consideration of the opinion of the Advisory Board. The report of the Advisory Board may provide some qualitative inputs for the appropriate Government but none to the specially empowered officer who acted as the detaining authority. ***If that be so, would a specially empowered officer who had passed the order of detention be bound by what has been laid****

down by this Court in para 16 of the decision in K.M. Abdulla Kunhi in the context of the appropriate Government?

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27. 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 principles concerned adverted to in para 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 para 16 has therefore to be understood in the light of the subsequent decision rendered by another Constitution Bench of this Court in Kamleshkumar.

28. 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.

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30. We are conscious that the view that we are taking, may lead to some incongruity and there could be clear dichotomy when the representations are made simultaneously to such specially empowered officer who had passed the order of detention and to the appropriate Government. If we go by the principle in para 16 in K.M. Abdulla Kunhi it would be proper for the appropriate Government to wait till the report was received from the Advisory Board, while at the same time

the specially empowered officer who had acted as the detaining authority would be obliged to consider the representation with utmost expedition. At times a single representation is prepared with copies to the detaining authority, namely, the specially empowered officer and to the appropriate Government as well as to the Advisory Board. In such situations there will be incongruity as stated above, which may be required to be corrected at some stage. However, such difficulty or inconsistency cannot be the basis for holding that a specially empowered officer while acting as a detaining authority would also be governed by the same principles as laid down in para 16 of K.M. Abdulla Kunhi.”

(emphasis supplied)

13. A bare perusal of the aforesaid discussion of the Hon’ble Supreme Court reflects that a clear distinction has been carved out with respect to consideration of representation made by the detenu, at the third stage, to the detaining authority, who could be the specially empowered officer who has passed the order of detention, as in the present case; and to the appropriate government. While noting the principle in Para 16 of the judgment in **K.M. Abdulla Kunhi Vs. Union of India, (1991) 1 SCC 476**, it was held that when the representation from the detenu is received after the matter has been referred to the Advisory Board, it would be proper for the appropriate government to wait till the receipt of the report but the specially empowered officer who acted as detaining authority would be obliged to decide the representation without waiting for such report.

14. During the course of the arguments, when the aforesaid distinction made by the Hon'ble Supreme Court in Ankit Ashok Jalan (*supra*) was pointed out, Mr. Vikram Chaudhari, learned Senior Counsel appearing on behalf of the petitioner submitted that Para 17 of the aforesaid judgment is the '*ratio decidendi*' and the aforesaid observations are in nature of '*obiter dictum*'. He further submitted that if the aforesaid distinction between the detaining authority and the appropriate government is made, then Para 17 of the judgment in Ankit Ashok Jalan (*supra*), would not serve any purpose. Learned Senior Counsel took us through the judgment of K. M. Abdulla Kunhi (*supra*) and drew our attention to Paras 5, 11, 12, 13, 14 and 15 thereof and submitted that the decision in K. M. Abdulla Kunhi (*supra*) was in the context of the facts in the judgment of **Frances Coralie Mullin Vs. W.C. Khambra, (1980) 2 SCC 275**. It was argued by the learned Senior Counsel that in Frances Coralie Mullin (*supra*), the representation of the detenu was received on the day when the Advisory Board was meeting and therefore, there could be no question of the detaining authority considering the representation before the Board met and thus, in the facts of that case, the Hon'ble Supreme Court held that delay in deciding the representation was not fatal. It was also urged on behalf of learned Senior Counsel that in the case of K. M. Abdulla Kunhi (*supra*), it has been observed, in Para 5 thereof, that the question of delay was not in issue before the Constitution Bench. Learned Senior Counsel further relied on a judgment of a Division Bench of the Hon'ble High Court of

Bombay, in **Shrinivas Kishor Sanga v. Commissioner of Police, 2019 SCC Online Bom. 493**, and in particular on the following paragraphs;

“21. Hence, paragraph 16 of K.M. Abdulla's case (supra) cannot be read in isolation without making reference to the paragraphs 11, 12 and 13 of the said Judgment.

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24. Thus, it is clearly observed that if the representation was made after the matter was referred to the Advisory Board the detaining authority had to consider it before sending it to the Advisory Board.

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30. This Judgment, in our view, settles the issue and answers the questions raised by Mrs. Mhatre on the basis of K.M. Abdulla's case. The Hon'ble Supreme Court, in Moosa's case, has taken Kunhi's case as well as other cases cited by Ms. Tripathi into consideration and has clearly laid down that the appropriate Government would not be justified in postponing the consideration of the representation while the matter was pending before the Advisory Board because the obligation of the Government to consider the representation was different from that of the Advisory Board.

31. In the instant case before us, admittedly, the representation of the detenu was received by the State Government after the matter was referred to the Advisory Board. The representation was kept pending and it was considered only after the receipt of the report of the Advisory Board. In the light of the discussion in the Judgments referred to hereinabove this course was impermissible and it violated the mandate of section 22(5) of the Constitution of India

and thereby infringed the detenu's right to make his representation at the earliest for its expeditious consideration.”

15. We have considered the submissions made by learned Senior Counsel and the judgments cited hereinabove. In our considered view, the Hon’ble Supreme Court in Ankit Ashok Jalan (*supra*), has, in no uncertain terms carved out a distinction with respect to the determination of a representation, received after reference to the Advisory Board, sent to the detaining authority and to the appropriate government. While noting the judgment of the Constitution Bench in K.M.Abdulla Kunhi (*supra*), it has held as under:-

“20. Since the decision of this Court in K.M. Abdulla Kunhi was rendered by the Constitution Bench of this Court after considering all the earlier decisions on the point including those in Pankaj Kumar Chakrabarty, Jayanarayan Sukul and Haradhan Saha , we are bound by the principles laid down therein....”

It was observed that since the judgment in K.M.Abdulla Kunhi (*supra*) had dealt with a situation where the detaining authority was the appropriate Government itself, the principle laid down there would not be applicable in a case where the detaining authority and the appropriate Government are distinct. It was therefore held in Ankit Ashok Jalan (*supra*), as under:

“27. 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 principles concerned adverted to in para 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.... ”

16. We are unable to agree with the submissions made by learned Senior Counsel that the conclusion made in Para 30 of Ankit Ashok Jalan (*supra*) is in the nature of ‘*obiter dictum*’. As noted in the preceding paragraphs, the Hon’ble Supreme Court, in Ankit Ashok Jalan (*supra*), after detailed analysis of the precedents on the subject held that the principle in Para 16 of K.M. Abdulla Kunhi (*supra*) is binding, in so far as it governs procedure to be followed by the appropriate government is concerned. It is further pertinent to note that Hon’ble Supreme Court in Paras 14.6, 14.7, 14.8 & 14.9 of the judgment in Ankit Ashok Jalan (*supra*) has considered K.M.Abdulla Kunhi (*supra*) in detail. More specifically, it is recorded in Para 21 of Ankit Ashok Jalan (*supra*) as under :

“21. We now proceed to deal with these submissions.”

It is thus clear that the decision of the Hon’ble Supreme Court in Ankit Ashok Jalan (*supra*) in Para 30 was in the context of an issue which arose for consideration in the said case and on which the judgment was delivered. Moreover, the Hon’ble Supreme Court in **PASL Wind Solutions Private Limited vs. GE Power Conversion India Private Limited, (2021) 7 SCC 1** held that;

“54. It is clear that there can be more than one ratio decidendi to a judgment. Thus, in Jacobs v. London County Council, the House of Lords, after referring to some earlier decisions, held, as follows : (AC pp. 369-70 : All ER p. 741)

... however, this may be, there is, in my opinion, no justification for regarding as obiter dictum a reason given by a Judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing. A good illustration will be found in London Jewellers Ltd. v. Attenborough. In that case the determination of one of the issues depended on how far the Court of Appeal was bound by its previous decision in Folkes v. R., [in which] the court had given two grounds for its decision, the second of which [as stated by Greer, L.J., in Attenborough case was that : (KB p. 222)

“... where a man obtains possession with authority to sell, or to become the owner himself, and then sells, he cannot be treated as having obtained the goods by larceny by a trick.”

In Attenborough case it was contended that, since there was another reason given for the decision in Folkes case, the second reason was obiter, but Greer, L.J., said in reference to the argument of counsel : (Attenborough case, KB p. 222)

“I cannot help feeling that if we were unhampered by authority there is much to be said for this proposition which commended itself to Swift, J., and which commended itself to me in Folkes v. R., but that view is not open to us in view of the decision of the Court of Appeal in Folkes v. R. In that case two reasons were given by all the members of the Court of

Appeal for their decision and we are not entitled to pick out the first reason as the ratio decidendi and neglect the second, or to pick out the second reason as the ratio decidendi and neglect the first; we must take both as forming the ground of the judgment.”

So, also, in Cheater v. Cater Pickford, L.J., after citing a passage from the judgment of Mellish, L.J., in Erskine v. Adeane, said : (Cheater case, KB p. 252)

“... That is a distinct statement of the law and not a dictum. It is the second ground given by the Lord Justice for his judgment. If a Judge states two grounds for his judgment and bases his decision upon both, neither of those grounds is a dictum.”

The said judgment has been followed in State of Gujarat v. Manoharsinhji Pradyumansinhji Jadeja (at paras 78 and 79) and in Shayara Bano v. Union of India (at footnote 65).”

17. The decision of learned Division Bench of the Hon’ble High Court of Bombay relied upon by the learned Senior Counsel, is of no assistance as the same is contrary to the judgment of Hon’ble Supreme Court in Ankit Ashok Jalan (*supra*). Learned Senior Counsel had also relied upon a judgment of a Division Bench of this Court in Mohd. Nasiruddin Vs. Union of India (*supra*) wherein it was held that inordinate and unexplained delay on the part of the central government in deciding the representation filed by the detenu is fatal to his continued detention. It is pertinent to note that the representation of the detenu in Mohd. Nasiruddin (*supra*) was received well before the reference was made to the Advisory Board. In the present case, admittedly, the representation made to the central government was

after the reference to the Advisory Board. In this context, the observation made by Hon'ble Supreme Court in Para 19 of Ankit Ashok Jalan (*supra*) assumes significance. The observation made in Para 19 is reproduced hereunder:

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

19.1. 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

19.2. Where the representation is received after the case is referred to the Advisory Board. 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.”

18. In the present case, the representation made to the detaining authority, i.e., respondent no. 2 on 02.03.2022, who was specially empowered officer passing the order of detention, was decided on 15.03.2022, without waiting for the opinion of the Advisory Board or confirmation of the detention order by the Central Government. The second representation dated 10.03.2022 made by the detenu to the Central Government, i.e., respondent no. 3 was received by the latter after the reference being made to the Central Advisory Board and decided on 09.05.2022, i.e., after

receipt of the said opinion and confirmation of the detention order by the Central Government. Applying the law laid down by the Hon'ble Supreme Court, referred to hereinabove, to the facts of the present case, we are of the considered opinion that the detention order cannot be quashed on the ground urged on behalf of the detenu that there was inordinate and unexplained delay on the part of the Central Government, i.e., respondent no. 3 in deciding the representation dated 10.03.2022.

19. In view of the reasons stated above, the present writ petition is dismissed and disposed of accordingly. Pending application(s) if any, also stands disposed of.

**AMIT SHARMA
JUDGE**

**SIDDHARTH MRIDUL
JUDGE**

NOVEMBER 3, 2022/hb