A **PANKAJ KUMAR CHAKRABARTY AND ORS.**

v.

STATE OF WEST BENGAL

May 1, 1969

B [J. M. SHELAT, V. BHARGAVA, C. A. VAIDIALINGAM, K. S. HEGDE AND A. N. GROVER, JJ.]

Constitution of India, Art. 22(5)—*Preventive Detention—Representation if to be considered by Government—Preventive Detention Act* (4 *of* 1950), *ss.* 7 *and* 13.

The petitioners who were detained under ss. 3(1)(a) (ii) (iii) and
C 3(2) of the Preventive Detention Act, 1950, made representations to the State Government against their detentions. The representations were made after their cases were placed before the Advisory Board. The State Government without considering the representations, passed them on to the Advisory Board. The Board considered the case of the petitioners as well as their representations to the Government and confirmed the order of detention. The petitioners filed a writ of *habeas corpus*, challenging their detentions on the ground that the State Government had failed to carry out
D its obligation under Art. 22(5) of the Constitution to consider the representation. On the questions (i) whether there is on the appropriate Government the obligation to consider the representation made by detenue, and (ii) if there is, whether it makes any difference where such a representation is made after the detenue's case is referred to the Advisory Board.

HELD : Setting aside the detention,

E (i) Clause (5) of the Art. 22 not only contains the obligation of the appropriate government to furnish the grounds and to give the earliest opportunity to make a representation but also by necessary implication the obligation to consider that representation. The expressions "as soon may be" and "the earliest opportunity" in that clause clearly indicate that the grounds are to be served and that the opportunity to make a representation is provided for to enable the detenue to show that his detention is unwarranted and since no other authority who should consider such repre-
F sentation is mentioned it can only be the detaining authority to whom it is to be made which has to consider. [548 B, F]

Sk. Abdul Karim v. *State of West Bengal*, [1969] 3 S.C.R. 479, approved.

(ii) The Constitution could not have intended that a representation under cl. (5) need not be considered by the appropriate Government
G where an Advisory Board is constituted. If that was the intention cl. (5) would not have directed the detaining authority to afford the earliest opportunity to the detenue. In imposing the obligation to afford the opportunity to make a representation cl. (5) does not make any distinction between orders of detention for only three months or less, where there is no necessity of having the opinion of an Advisory Board, and those for a longer duration. The clause does not say that the representation is to be considered by the appropriate Government in the former class of cases
H and by the Board in the latter class of cases. The obligation of the Government to consider the representation is distinct from the obligation to constitute an Advisory Board. Whereas the Government considers the representation to ascertain whether the order is in conformity with its

power under the relevant law, the Board considers such representation from the point of view of also arriving at its opinion whether there is sufficient case for detention. [549 B-C, E-H]. A

The provisions of the Act also strengthen the conclusion that the Government has to consider the representation. If the representation was for consideration not by the Government but by the Board there was no necessity to provide in s. 7 that it should be addressed to the Government. Further, it could not have been the intention of Parliament that the Government could pass an order under s. 13 revoking or modifying an order of detention without considering the representation which has under s. 7 been addressed to it. [550 C—F] B

Sk. Abdul Karim v. *State of West Bengal*, [1969] 3 S.C.R. 479, approved.

ORIGINAL JURISDICTION : Writ Petition No. 377 of 1968. C

Petition under Art. 32 of the Constitution of India for the enforcement of fundamental rights.

S. N. Prasad, for the petitioners Nos. 15 and 36.

Sukumar Basu, for the respondent.

R. S. Garg and *A. K. Gupta*, for interveners Nos. 1 to 5. D

Niren De, Attorney-General, R. H. Dhebar and *S. P. Nayar*, for intervener No. 6.

The Judgment of the Court was delivered by

Shelat, J. 37 persons detained under s. 3(1)(a)(ii) and (iii) read with s. 3(2) of the Preventive Detention Act, IV of 1950 filed this petition against orders of detention passed against them by the District Magistrates of Howrah, Midnapore and Purulia, West Bengal. We are however, concerned only with Subodh Chandra Barik and Gopiram Gope, petitioners 15 and 36, as the rest of them have since then been released. The petition came up for hearing on April 11, 1969 before Sikri and Bachawat, JJ. who referred it to a larger Bench as the question involved in this petition was of substantial importance. That is how this petition has come up before us for disposal. E F

Petitioners in W. P. 448 of 1969, pending in this Court and who are detained under the Jammu & Kashmir Preventive Detention Act, applied for intervention as the point involved in this petition also arises in their petition and that having been allowed. Mr. Garg representing them appeared before us supporting the contentions raised on behalf of petitioners 15 and 36. G

The order of detention against petitioner Barik was passed on March 23, 1968 by the District Magistrate, Midnapore, as he was satisfied that with a view to preventing the petitioner from acting in a manner prejudicial to the maintenance of supplies and services essential to the community it was necessary to detain him. H

A The District Magistrate reported to the State Government his said order on March 27, and the Governor approved the same on April 1, 1968. As required by s. 3(4) of the Act, the Governor reported the case to the Central Government. The petitioner was taken into custody on September 16, 1968 when he was served with the said order and the grounds therefor. His case was placed B before the Advisory Board on September 21, 1968 under s. 9 of the Act. On October 21, 1968 the petitioner made his representation against the said order to the State Government. On November 6, 1968 the Advisory Board, after considering his case as also his said representation, gave its opinion that there was sufficient cause for his detention and thereupon the Governor, by his order dated November 11, 1968, confirmed the said order. The C petitioner filed a petition in the High Court at Calcutta against the said order but that was dismissed.

As regards petitioner Guhiram Gope, the order of detention was passed against him by the District Magistrate of Purulia on August 29, 1968 on the ground that he was satisfied that he was D acting in a manner prejudicial to the maintenance of supplies and services essential to the community and also to the maintenance of public order, *i.e.*, under cls. (ii) and (iii) of s. 3(1)(a). The order was reported to the State Government on the same day. The Governor approved the order on September 6, 1968 and made his report to the Central Government on the same day. The petitioner was taken into detention on August 29, 1968 after E he was served with the order and the grounds therefor. His case was placed before the Advisory Board on September 29, 1968. The petitioner made his representation to the State Government on October 5, 1968. On November 6, 1968 the Board considered his case as also his said representation and on its finding that there was sufficient cause for his detention the Governor confirm- F ed the said order on November 12, 1968. It is not necessary to go into the various grounds furnished to the petitioners. It is sufficient to notice that in the affidavit in reply filed on behalf of the State Government the detention of the two petitioners was sought to be defended on the ground that the petitioners, taking advantage of the scarcity conditions prevailing in the State, were G indulging in illegitimate procuring, holding and disposing of food grains thereby defeating the policy of and the various control orders passed in that behalf by the State Government. We may also notice that the grounds supplied to the petitioners also stated that the petitioners may make a representation to the State Government as early as possible and that such representation should be addressed to the officer specified therein.

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It is an admitted fact that though the grounds furnished to the detenues stated that they might, if they so desired, make a representation to the State Government, the State Government

did not consider the representations and merely passed them on to the Advisory Board for its consideration. Presumably that was done as the representations were made after the cases of the two petitioners were referred to the board and the Government felt that it should not interfere with the decision of the Board by expressing its own views one way or the other on those representations. The stand taken before us by counsel for the State was that neither Art. 22, cls. 4 and 5, nor any of the provisions of the Act made it mandatory either expressly or by necessary implication for the State Government to consider the representations and that it was sufficient for the Government to pass them on to the Board for its consideration while viewing the case of the two detenues. Counsel argued that the decision in *Sk. Abdul Karim & Ors.* v. *State of West Bengal*(1) which has held that there was a legal obligation on the appropriate Government to consider the representation of a detenue besides constituting an advisory board and referring to such board the case of such a detenue for its opinion was not warranted by the provisions of Art. 22 or the provisions of the Act and that in any event according to that decision consideration of such a representation by the appropriate Government was obligatory only where it was made before and not after the detenue's case was referred to the Board. That decision, therefore, said counsel, cannot help these petitioners as they had made their representations after their cases were referred to the Advisory Board. Besides, there was no practical utility, said counsel, in the Government considering their representations when their cases including the representations were being considered by the Board.

On these contentions two questions arise : (1) whether there is on the appropriate Government the obligation to consider the representation made by a detenue, and (2) if there is, whether it makes any difference where such a representation is made after the detenue's case is referred to the Advisory Board.

In *Sk. Abdul Karim's* case(1), this Court, examining Art. 22 and the several provisions of the Act, held that (i) a person detained under the Act has a right to be furnished with the grounds for his detention, (ii) that he has a right to make a representation against the order for his detention, (iii) that though cl. 5 of Art. 22 does not in express language provide as to whom such a representation is to be made and how the detaining authority is to deal with it, there is by necessary implication an obligation on the part of the appropriate Government to consider it, and (iv) the setting up of an advisory board under s. 8 of the Act does not relieve the appropriate Government from its obligation to consider the representation as soon as it is received

(1) [1969] 3 S.C.R. 479.

A by it. The Court held that the constitutional right to make a representation guaranteed by Art. 22(5) includes by necessary implication the constitutional right to a consideration of the representation by the detaining authority to whom it is made and repelled the contention that once an advisory board was constituted for the consideration of the detenue's case it was enough if the
B State Government were to send the representation to the board for consideration without itself considering it. The learned Judges there gave several illustrations to show that such a contention was not only incorrect but would defeat the provisions of Art. 22(4) and (5) and those of the Act.

Article 21 guarantees protection against deprivation of per-
C sonal liberty save that in accordance with the procedure established by law. At first sight it would appear somewhat strange that the Constitution should make provisions relating to preventive detention immediately next after Art. 21. That appears to have been done because the Constitution recognizes the necessity of preventive detention on extraordinary occasions when control over public order, security of the country etc. are in danger of a break-
D down. But while recognizing the need of preventive detention without recourse to the normal procedure according to law, it provides at the same time certain restrictions on the power of detention both legislative and executive which it considers as minimum safeguards to ensure that the power of such detention is not illegitimately or arbitrarily used. The power of preventive
E detention is thus acquiesced in by the Constitution as a necessary evil and is, therefore, hedged in by diverse procedural safeguards to minimise as much as possible the danger of its misuse. It is for this reason that Art. 22 has been given a place in the Chapter on guaranteed rights.

Clause 1 of Art. 22 guarantees to a detenue the right to be
F informed as soon as possible of the grounds for his detention and the right to consult and of being defended by a legal practitioner of his choice. Clause 2 imposes the obligation of his having to be produced before a magistrate within 24 hours of his detention and of not being detained beyond that period without the authority of such magistrate. Clause 3, however, withdraws these safeguards in the case of two categories of persons, namely, an enemy alien
G and persons detained under a law providing for preventive detention. But the next two clauses impose certain restrictions on and safeguards against the power of detention. Clause 4 thus lays down that no law providing for such detention can authorise the detention for more than 3 months unless an advisory board composed as therein stated certifies that there is sufficient cause for
H such detention and such detention is in consonance with and is not for a period longer than the one provided by a Parliament Act made under cl. 7. Clause 7 authorises Parliament to make a law prescribing the circums-

tances under which and the class or classes of cases in which a person can be detained for more than 3 months without obtaining the opinion of the advisory board and the maximum period for which a person may in any such class or classes of cases be detained and the procedure to be followed by the advisory board in the enquiry under cl. 4(a). Clause 5 imposes on obligation on the detaining authority to furnish to the person detained by it grounds for his detention "as soon as may be" and give him "the earliest opportunity" of making a representation against the order of detention passed against him. These clauses thus clearly impose on the detaining authority the obligation to furnish to the detenue as soon as may be the grounds for his detention, the obligation to afford him the earliest opportunity of making a representation against the order and the obligation to constitute an advisory board and not to keep the detenue in detention for a period longer than 3 months unless before the expiry of that period it has obtained the opinion of the board that there is sufficient cause for such detention except in cases prescribed in a Parliament Act passed under and by virtue of cl. 7. The reason for the expressions "as soon as may be" for furnishing the grounds and "the earliest opportunity" for making a representation in these clauses is the extreme anxiety of the Constitution to see that no person is detained contrary to the law enabling preventive detention or in breach of or countrary to the safeguards and restrictions provided in these clauses. The grounds for detention are to be served on the detenue as soon as may be and the earliest opportunity to make a representation against the order is to be given to him to enable him to protest against the order that he is either wrongly or illegally detained.

It is true that cl. 5 does not in positive language provide as to whom the representation is to be made and by whom, when made, it is to be considered. But the expressions "as soon as may be" and "the earliest opportunity" in that clause clearly indicate that the grounds are to be served and the opportunity to make a representation are provided for to enable the detenue to show that his detention is unwarranted and since no other authority who should consider such representation is mentioned it can only be the detaining authority to whom it is to be made which has to consider it. Though cl. 5 does not in express terms say so it follows from its provisions that it is the detaining authority which has to give to the detenue the earliest opportunity to make a representation and to consider it when so made whether its order is wrongful or contrary to the law enabling it to detain him. The illustrations given in *Sk. Abdul Karim's* case(1) show that cl. 5 of Art. 22 not only contains the obligation of the appropriate Government to furnish the grounds and to give the

(1) [1969] 3 S.C.R. 479.

A earliest opportunity to make a representation but also by necessary implication the obligation to consider that representation. Such an obligation is evidently provided for to given an opportunity to the detenue to show and a corresponding opportunity to the appropriate Government to consider any objections against the order which the detenue may raise so that no person is, through B error or otherwise, wrongly arrested and detained. If it was intended that such a representation need not be considered by the Government where an advisory board is constituted and that representation in such cases is to be considered by the board and not by the appropriate Government, cl. 5 would not have directed the detaining authority to afford the earliest opportunity to the C detenue. In that case the words would more appropriately have been that the authority should obtain the opinion of the board after giving an opportunity to the detenue to make a representation and communicate the same to the board. But what would happen in cases where the detention is for less than 3 months and there is no necessity of having the opinion of D the board ? If counsel's contention were to be right the representation in such cases would not have to be considered either by the appropriate Government or by the board and the right of representation and the corresponding obligation of the appropriate Government to give the earliest opportunity to make such representation would be rendered nugatory. In imposing the obligation to afford the opportunity to make a representation cl. 5 does E not make any distinction between orders of detention for only 3 months or less and those for a longer duration. The obligation applies to both kinds of orders. The clause does not say that the representation is to be considered by the appropriate Government in the former class of cases and by the board in the later class of cases. In our view it is clear from cls. 4 and 5 of Art. 22 that F there is a dual obligation on the appropriate Government and a dual right in favour of the detenue, namely, (1) to have his representation irrespective of the length of detention considered by the appropriate Government and (2) to have once again that representation in the light of the circumstances of the case considered by the board before it gives its opinon. If in the light of that representation the board finds that there is no sufficient cause G for detention the Government has to revoke the order of detention and set at liberty the detenue. Thus, whereas the Government considers the representation to ascertain whether the order is in conformity with its power under the relevant law, the board considers such representation from the point of view of arriving at its opinion whether there is sufficient cause for detention. The obli- H gation of the appropriate Government to afford to the detenue the opportunity to make a representation and to consider that representation is distinct from the Government's obligation to constitute a board and to communicate the representation amongst other

materials to the board to enable it to form its opinion and to obtain such opinion. A

This conclusion is strengthened by the other provisions of the Act. In conformity with cls. 4 and 5 of Art. 22, s. 7 of the Act enjoins upon the detaining authority to furnish to the detenue grounds of detention within five days from the date of his detention and to afford to the detenue the earliest opportunity to make his representation to the appropriate Government. Sections 8 and 9 enjoin upon the appropriate Government to constitute an advisory board and to place within 30 days from the date of the detention the grounds for detention, the detenue's representation and also the report of the officer where the order of detention is made by an officer and not by the Government. The obligation under s. 7 is quite distinct from that under as. 8 and 9. If the representation was for the consideration not by the Government but by the board only as contended, there was no necessity to provide that it should be addressed to the Government and not directly to the board. The Government could not have been intended to be only a transmitting authority nor could it have been contemplated that it should sit tight on that representation and remit it to the board after it is constituted. The peremptory language in cl. 5 of Art. 22 and s. 7 of the Act would not have been necessary if the board and not the Government had to consider the representation. Section 13 also furnishes an answer to the argument of counsel for the State. Under that section the State Government and the Central Government are empowered to revoke or modify an order of detention. That power is evidently provided for to enable the Government to take appropriate action where on a representation made to it finds that the order in question should be modified or even revoked. Obviously, the intention of Parliament could not have been that the appropriate Government should pass an order under s. 13 without considering the representation which has under s. 7 been addressed to it.

B C D E F

For the reasons aforesaid we are in agreement with the decision in *Sk. Abdul Karim's* case(1). Consequently, the petitioners had a constitutional right and there was on the State Government a corresponding constitutional obligation to consider their representations irrespective of whether they were made before or after their cases were referred to the Advisory Board and that not having been done the order of detention against them cannot be sustained. In this view it is not necessary for us to examine the other objections raised against these orders. The petition is therefore allowed, the orders of detention against petitioners 15 and 36 are set aside and we direct that they should be set at liberty forthwith.

G H

Y.P. *Petition allowed.*

(1) [1969] 3 S.C.R.479.