A MOHINUDDIN @ MOIN MASTER

v.

DISTRICT MAGISTRATE, BEED & ORS.

JULY 28, 1987

B [A.P. SEN AND B.C. RAY, JJ.]

National Security Act, 1980: Section 8—Preventive Detention—Representation by detenu—Disposal of—Unexplained and unreasonable delay—Detention whether illegal and invalid—Failure to consider representation without waiting for opinion of Advisory Board—
C *Detention whether rendered invalid.*

Constitution of India, Articles 22(5), 32 & 226—Habeas Corpus petition—Preventive detention—Validity of order—Burden of proof on detaining authority—Effect of unexplained and unreasonable delay in
D *disposal of detenu's representation—Rule nisi—Persons competent to file return.*

Practice & Procedure: Writ Petition—Issuance of writ of habeas corpus—Disallowance on ground of imperfect pleadings—Validity of.

E

The appellant was placed under detention on September 8, 1986, consequent upon an order of detention passed by the District Magistrate, Beed under s. 3(2) of the National Security Act, 1980 on his being satisfied that it was necessary to do so 'with a view to preventing him
F **from acting in any manner prejudicial to the maintenance of public order'. He was served with the grounds of detention alongwith copies of the relevant documents on September 14, 1986. He addressed a representation to the Chief Minister, State of Maharashtra on September 22, 1986 through the Superintendent, Central Jail, Aurangabad, who forwarded the same to the State Government, Home Department which received it on September 26, 1986, and on the same day forwarded it to**
G **the District Magistrate for his comments. On October 3, 1986, the District Magistrate returned the representation along with his comments and the same were received in the Home Department on October 6, 1986. The State Government had, in the meanwhile, accorded its approval to the impugned order of detention under s. 3(4) of the Act on September 18, 1986. On October 6, the appellant made another**
H **representation to the Advisory Board against the order of detention.**

The Advisory Board met on October 8, 1986, considered the representation and forwarded its report to the State Government on October 13 recommending confirmation of the order of detention. Thereafter, the representation made by the appellant was processed in the Home Department along with the report of the Advisory Board and forwarded to the Chief Minister's Secretariat where the same was received on October 23, 1986. The representation remained undisposed in the Chief Minister's Secretariat and was put up before him on November 17, 1986 and he rejected the same.

Upon these facts, the appellant moved the High Court by a petition under Art. 226 of the Constitution for the grant of a writ of habeas corpus on the next day i.e. on November 18, 1986 contending that his continued detention was unconstitutional and void inasmuch as there was inordinate, unexplained delay on the part of the detaining authority to consider and dispose of his representation which was in violation of the constitutional safeguards enshrined in Art. 22(5) read with s. 8 of the National Security Act. The writ petition was dismissed by the High Court inter alia on the ground of defective pleadings regarding the delay in Chief Minister's Secretariat in dealing wih the representation.

In the appeal by special leave, the District Magistrate in his counter affidavit denied that there was any unreasonable delay in the disposal of the representation and submitted that no such ground regarding unreasonable delay was taken in the High Court in the writ petition, and was raised for the first time before this Court, presumably on the reasoning of the High Court. In the other counter affidavit the Desk Officer, Home Department (Special) explained the reasons for the delay in the Chief Minister's Secretariat asserting that the Chief Minister remained preoccupied with very important matters of the State during the period from October 23, 1986 to November 17, 1986 and therefore it was not possible for him to have dealt with the representation earlier.

Allowing the appeal,

HELD: 1.The continued detention of the appellant was illegal and he must be set at liberty forthwith. [679G]

2.1 It is incumbent on the State to satisfy the Court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Art. 22(5). [674F]

A **2.2 The constitutional right of the detenu to make a representation guaranteed by Art. 22(5) is a valuable right and is not a mere formality. It includes by necessary implication the constitutional right to a proper consideration of the representation by the authority to whom it is made. [677E]**

B **In the instant case, there were two representations made by the appellant, one to the Chief Minister dated September 22, 1986 and the other to the Advisory Board dated October 6, 1986. While the Advisory Board acted with commendable despatch in considering the same at its meeting held on October 8, 1986 and forwarded its report on October 13, 1986, it was not till November 17, 1986 that the Chief Minister** C **look at it. There was no reason why he could not deal with it with all reasonable promptitude and diligence. The explanation that he remained pre-occupied with very important matters of the State, which involved tours as well as Cabinet meetings, was no explanation at all. There was therefore, failure on the part of the Government to discharge its obligations under Art. 22(5). [676H-677B; 679F, 679E, 676G]**

D

2.3 The constitution of an Advisory Board under s. 9 of the Act does not relieve the State Government from the legal obligation to consider the representation of the detenu as soon as it is received by it. The two obligations of the Government to refer the case of the detenu to the Advisory Board and to obtain its report on the one hand, and to give an E **earliest opportunity to him to make a representation and consider the representation on the other, are two distinct obligations independent of each other. There is thus a duty cast on the Government to consider the representation made by the detenu without waiting for the opinion of the Advisory Board. [677E, G, D]**

F *Narendra Purshotam Umrao* v. *B.B. Gujral & Ors.* **[1979] 2 SCC 637, referred to.**

The failure of the Government in the instant case to consider the representation without waiting for the opinion of the Advisory Board renders the continued detention of the appellant invalid and constitu- G **tionally impermissible. [678F]**

3. In return to the rule nisi issued by this Court or the High Court in a habeas corpus petition, the proper person to file the same is the District Magistrate who had passed the impugned order of detention, and he must explain his subjective satisfaction and the grounds therefor H **and if for some good reason the District Magistrate is not available, the**

affidavit must be sworn by some responsible officer like the Secretary or the Deputy Secretary to the Government in the Home Department who personally dealt with or processed the case in the Secretariat or submitted it to the Minister or other officer duly authorised under the Rules of Business framed by the Governor under Art. 166 of the Constitution to pass orders on behalf of the Government in such matters. [674F-675A] A B

Niranjan Singh v. *State of Madhya Pradesh* [1973] 1 SCR 691; *Habibullah Khan* v. *State of West Bengal*, [1974] 4 SCC 275; *Jagdish Prasad* v. *State of Bihar & Anr.*, [1974] 4 SCC 455 and *Mohd. Alam* v. *State of West Bengal*, [1974] 4 SCC 463, referred to.

C

In the instant case, no one has filed any affidavit to explain the delay in the Chief Minister's Secretariat. The counter affidavit filed by the District Magistrate contains a bare denial that there was any unreasonable delay in the disposal of the representation. As regards the delay in the Secretariat he adverts to the affidavit filed by the Desk Officer, Home Department and asserts that it reveals the different steps that were taken. There is in fact no explanation offered as regards the delay in the disposal of the representation in the Secretariat. [678G-679C] D

4. It was an improper exercise of power on the part of the High Court in disallowing the writ petition on the ground of imperfect pleadings. The rule that a petitioner cannot be permitted to raise grounds not taken in the petition at the hearing cannot be applied to a petition for grant of a writ of habeas corpus. It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. [674DE] E F

In the appeal the appellant having raised the ground of delay in disposal of his representation in Chief Minister's Secretariat it was the duty of the State Government to have placed all the material along with the counter affidavit. [679B] G

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 322 of 1987.

From the Judgment and Order dated 19.1.1987 of the Bombay High Court in Criminal Writ Petition No. 103 of 1986. H

A Hardev Singh and Ms. Madhu Moolchandani for the Appellant.

B.A. Masodkar, A.S. Bhasme and A.M. Khanwilkar for the Respondent.

The Judgment of the Court was delivered by

B

SEN, J. This appeal by special leave is directed against the judgment and order of the High Court of Bombay dated January 19, 1987 rejecting the petition under Art. 226 of the Constitution filed by the appellant in the High Court for grant of a writ of habeas corpus. The appellant has been placed under detention by the impugned order C dated September 7, 1986 passed by the District Magistrate, Beed under s. 3(2) of the National Security Act, 1980 on his being satisfied that it was necessary to do so 'with a view to preventing him from acting in any manner prejudicial to the maintenance of public order'. The appellant challenged the impugned order of detention on grounds *inter alia* that there was infraction of the constitutional safeguards D enshrined in Art. 22(5) read with s. 8 of the Act inasmuch as there was inordinate, unexplained delay on the part of the detaining authority to consider and dispose of his representation.

On the view that we take, it is not necessary to deal with the facts elaborately. The material facts are these. The appellant was taken into E custody on September 8, 1986 and was lodged at the Aurangabad Central Prison, Aurangabad where he is now detained. He was served with the grounds of detention along with the copies of the relevant documents on September 14, 1986. It appears that a week thereafter i.e. on September 22, 1986 he addressed a representation to the Chief Minister through the Superintendent, Aurangabad Central Prison, F Aurangabad which the Superintendent forwarded to the Home Department on September 24, 1986. The State Government, in the meanwhile, under s. 3 (4) of the Act accorded its approval to the impugned order of detention on September 18, 1986. On October 6, 1986 the appellant made another representation to the Advisory Board which met and considered the same on October 8, 1986. On October G 13, 1986 the Advisory Board after considering the representation made by the appellant together with the materials placed before it forwarded its report to the State Government recommending confirmation of the impugned order of detention as there was, in its opinion, sufficient cause for the detention of the appellant. Acting upon the report of the Advisory Board, the State Government by its order dated H November 19, 1986 confirmed the order of detention. In the mean-

time, the appellant moved the High Court on November 13, 1986. A

The main ground on which the legality of the impugned order of detention was assailed in the High Court was that although the appellant had addressed a representation to the Chief Minister on September 22, 1986, it was not considered and disposed of by the Chief Minister till November 17, 1986 i.e. there was unexplained, unreasonable B delay in disposal of the same. It was said that such unreasonable delay in disposal of the representation was sufficient to render the continued detention of the appellant illegal. The High Court did not think it necessary to call upon the respondents and by an oral judgment dismissed the writ petition mainly on the ground of imperfect pleadings. It observed that the appellant had not specifically pleaded that C there was unreasonable delay in the office of the Chief Minister which had not been explained and therefore the detention was illegal, but his grievance was that his representation had not been considered. It referred to paragraph 4 of the writ petition where it is submitted:

> "It is submitted that in law, the State Government is bound D to consider the representation before the decision of the Advisory Board, but in the instant case neither the State Government has considered the representation of the petitioner nor the Government has communicated its decision."

E

It referred to the underlined portion of the averments in paragraph 4 of the writ petition, namely:

> *"Eight weeks have elapsed since the date of detention of the petitioner* but still *neither the State Government has taken any decision on the representation forwarded through the* F *Home Department nor the petitioner is* communicated *any decision pursuant to the* report ....."

The High Court distinguished the decision of this Court in *Harish Pahwa* v. *State of Uttar Pradesh & Ors.*, [1981] 3 SCR 276 on the ground that in that case the Court had before it the affidavit of the G Government showing that it had no explanation to offer except that it had referred the matter to the Law Department and also there was sufficient material to show that there was unreasonable delay in dealing with the representation whereas in the present case there was no such ground raised. The High Court disallowed the prayer for grant of a writ of habeas corpus mainly on the ground of defective pleadings, and H

A added that the appellant "had not even asked for time to amend the petition" and "put the respondents to notice". It observed:

> "While the State undoubtedly has the duty to process the representation of the detenu promptly, it is also the duty of the petitioner to make specific averments of facts and their
B effect, if necessary, by amendment. This is necessary to put the respondents to notice, that the effect of these facts have to be answered and explained. The respondents may have an explanation as to why the Chief Minister took so much time. On such submission we cannot hold that the respondents have failed to explain delay or that the time taken by the Chief Minister was wholly necessary. We should not be
C understood to have held that the time taken by the Government was justified. Far from it. But we cannot allow the petitioner to take the respondents by surprise by such a style of pleading."

D It was an improper exercise of power on the part of the High Court in disallowing the writ petition on the ground of imperfect pleadings. Normally, writ petitions are decided on the basis of affidavits and the petitioner cannot be permitted to raise grounds not taken in the petition at the hearing. The same rule cannot be applied to a petition for grant of a writ of habeas corpus. It is enough for the
E detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the question and it is now well-settled that it is incumbent on the State to satisfy the Court that the detention of the petitioner/detenu was legal
F and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Art. 22(5). In return to a rule nisi issued by this Court or the High Court in a habeas corpus petition, the proper person to file the same is the District Magistrate who had passed the impugned order of detention and he must explain his subjective satisfaction and the grounds
G therefor; and if for some good reason the District Magistrate is not available, the affidavit must be sworn by some responsible officer like the Secretary or the Deputy Secretary to the Government in the Home Department who personally dealt with or processed the case in the Secretariat or submitted it to the Minister or other Officer duly authorised under the Rules of Business framed by the Governor under
H Art. 166 of the Constitution to pass orders on behalf of the Govern-

ment in such matters: *Niranjan Singh* v. *State of Madhya Pradesh*, [1973] 1 SCR 691; *Habibullah Khan* v. *State of West Bengal*, [1974] 4 SCC 275; *Jagdish Prasad* v. *State of Bihar & Anr.*, [1974] 4 SCC 455 and *Mohd. Alam* v. *State of West Bengal*, [1974] 4 SCC 463.

In the present case, in answer to the notice issued by this Court under Art. 136, the affidavit in reply has been filed by Shri S.V. Joshi, District Magistrate, Beed who passed the impugned order of detention. There is a general denial in paragraph 2 of the counter-affidavit that there was unreasonable delay in the disposal of the representation made by the appellant. However, the delay in disposal of the representation was in the Secretariat and therefore it is averred in paragraph 11:

> "I say that the affidavit filed by Shri Vishwasrao, Desk Officer, Home Department (Special), Mantralaya, Bombay on behalf of State of Maharashtra in the High Court Bench at Aurangabad will reveal that different steps, as required by the provisions of National Security Act, 1980 are taken immediately, within stipulated period."

and it is then averred in paragraph 12 that the contentions raised by the appellant with regard to delay have been dealt with by the High Court while deciding the writ petition. It is said that the appellant has raised the contention about unreasonable delay in disposal of his representation, for the first time in this Court presumably on the reasoning of the High Court. There is on record an affidavit sworn by I.S. Vishwasrao, Desk Officer, Home Department (Special), Mantralaya, Bombay in answer to the grounds 16(A) and 16(E). As regards the grounds 16(A) and 16(E) formulated in the petition for grant of special leave regarding unreasonbale delay, it is averred in paragraph 3 of the affidavit:

> "I say that the representation dated 22nd September, 1986 addressed to the Chief Minister by the detenu was forwarded by the Superintendent, Aurangabad Central Prison, Aurangabad on 24th September, 1986. I further say that the said representation was received in the Department on 26th September, 1986. I further say that the parawise remarks on the said representation were called for from the detaining authority, i.e. District Magistrate, Beed on 26th September, 1986 and remarks of the District Magistrate dated 3rd October, 1986 were received by the

A Government on 6th October, 1986. I further say that thereafter, the said representation was processed together with report of the Advisory Board and as stated in the earlier paragraphs, the said representation was rejected and the detention of the detenu was confirmed by the Chief Minister on 17th November, 1986."

B

In the same paragraph, there is the following averment made with regard to delay in disposal of the representation in the Chief Minister's Secretariat:

"I further say that the Chief Minister was pre-occupied in
C connection with very important matters of the State which involved tours as well as meetings outside Bombay. I further say that during the period from 23.10.1986 to 17.11.1986, two Cabinet meetings were held at Pune and Aurangabad, each meeting lasting for two days i.e. 28th and 29th October, 1986 at Pune and 11th and 12th
D November, 1986 at Aurangabad. I further say that such meetings in Pune and Aurangabad are generally held once a year to focus the attention on regional problems. I further say that the preparations for these meetings as well as other meetings held with the concerned Ministers and officials demanded a lot of time of the Chief Minister and this
E naturally resulted in some delay in disposing of several cases submitted to the Chief Minister including this case. I further say that the cases where such representations are made in the detention matters, they required a close scrutiny of all the relevant record and careful application of mind. I therefore, respectfully submit that the time taken
F for passing the Government order in this case should be viewed in the light of the averments made in this affidavit and therefore, if properly considered, it cannot be said that the delay in disposing of the representation is unreasonable and unexplained."

G It is somewhat strange that the State Government should have acted in such a cavalier fashion in dealing with the appellant's representation addressed to the Chief Minister. We are satisfied that there was failure on the part of the Government to discharge its obligations under Art. 22(5). The affidavit reveals that there were two representations made by the appellant, one to the Chief Minister
H dated September 22, 1986 and the other to the Advisory Board dated

October 6, 1986. While the Advisory Board acted with commendable despatch in considering the same at its meeting held on October 8, 1986 and forwarded its report together with the materials on October 13, 1986, there was utter callousness on the part of the State Government to deal with the other representation addressed to the Chief Minister. It was not till November 17, 1986 that the Chief Minister condescended to have a look at the representation. When the life and liberty of a citizen is involved, it is expected that the Government will ensure that the constitutional safeguards embodied in Art. 22(5) are strictly observed. We say and we think it necessary to repeat that the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of personal liberty is largely the history of insistence on observance of the procedural safeguards.

Apart from the admitted inordinate delay, there is a fundamental defect which renders the continued detention of the appellant constitutionally invalid. As observed by one of us (Sen, J.) in *Narendra Purshotam Umrao* v. *B.B. Gujral & Ors.*, [1979] 2 SCC 637 there was a duty cast on the Government to consider the representation made by the detenu without waiting for the opinion of the Advisory Board. The constitution of an Advisory Board under s. 9 of the Act does not relieve the State Government from the legal obligation to consider the representation of the detenu as soon as it is received by it. It goes without saying that the constitutional right to make a representation guaranteed by Art. 22(5) must be taken to include by necessary implication the constitutional right to a proper consideration of the representation by the authority to whom it is made. The right of representation under Art. 22(5) is a valuable constitutional right and is not a mere formality. The representation made by the appellant addressed to the Chief Minister could not lie unattended to in the portals of the Secretariat while the Chief Minister was attending to other political affairs. Nor could the Government keep the representation in the archives of the Secretariat till the Advisory Board submitted its report. In *Narendra Purshotam Umrao's* case it was observed: "Thus, the two obligations of the Government to refer the case of the detenu to the Advisory Board and to obtain its report on the one hand, and to give an earliest opportunity to him to make a representation and consider the representation on the other, are two distinct obligations, independent of each other." After referring to the decisions of this Court in *Abdul Karim* v. *State of West Bengal,* [1969] 3 SCR 479; *Pankaj Kumar Chakrabarty* v. *State of West Bengal,* [1970] 1 SCR 543

A and *Khairul Haque* v. *State of West Bengal*, W.P. No. 246 of 1969, decided on September 10, 1969 the nature and dual obligation of the Government and the corresponding dual right in favour of the detenu under Art. 22(5) was reiterated. The following observations of the Court in *Khairul Haque's* case were quoted with approval:

B "It is implicit in the language of Art. 22 that the appropriate Government, while discharging its duty to consider the representation, cannot depend upon the view of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. There was, therefore, no reason for the Government to wait for considering the petitioner's C representation until it had received the report of the Advisory Board. As laid down in *Abdul Karim* v. *State of West Bengal*, the obligation of the appropriate Government under Art. 22(5) is to consider the representation made by the detenu as expeditiously as possible. The consideration D by the Government of such representation has to be, as aforesaid, independent of any opinion which may be expressed by the Advisory Board.

The fact that Art. 22(5) enjoins upon the detaining authority to afford to the detenu the earliest opportunity to E make a representation must implicitly mean that such representation must, when made, be considered and disposed of as expeditiously as possible, otherwise, it is obvious that the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning."

F In the circumstances, there being a failure on the part of the State Government to consider the representation made by the appellant addressed to the Chief Minister without waiting for the opinion of the Advisory Board, renders the continued detention of the appellant invalid and constitutionally impermissible.

G We have no manner of doubt that there is no explanation whatever much less any reasonable explanation for the inordinate delay in consideration of the representation made by the appellant addressed to the Chief Minister and that by itself is sufficient to invalidate the impugned order of detention. In fact, no one has filed any affidavit to explain the cause for the delay in Chief Minister's Secretariat. The H counter-affidavit filed by Shri S.V. Joshi, District Magistrate contains

a bare denial in paragraph 2 that there was any unreasonable delay in the disposal of the representation. As regards the delay in disposal of the representation in the Secretariat, he adverts in paragraph 11 to the affidavit filed by Vishwasrao, Desk Officer, Home Department on behalf of the State Government and asserts that it reveals the different steps that were taken and in paragraph 12 he submits that the contention about unreasonable delay in disposal of the representation by the State Government was not raised in the High Court and it has been taken for the first time in this Court. Even so, the appellant having raised the ground in appeal it was the duty of the State Government to have placed all the material along with the counter-affidavit. There is in fact no explanation offered as regards the delay in disposal of the representation in the Secretariat. We have already extracted the relevant portion from the affidavit of Vishwasrao, Desk Officer. It is accepted that the representation made by the appellant to the Chief Minister on September 22, 1986, forwarded by the Superintendent, Aurangabad Central Prison on the 24th, was received in the Home Department on the 26th which in its turn forwarded the same to the detaining authority i.e. the District Magistrate on the same day i.e. 26th for his comments. The District Magistrate returned the representation along with his comments dated October 3, 1986 which was received by the Government on the 6th. It is said that thereafter the representation was processed *together with the report of the Advisory Board* and was forwarded to the Chief Minister's Secretariat where the same was received on October 23, 1986. It is enough to say that the explanation that the Chief Minister was "pre-occupied with very important matters of the State which involved tours as well as two Cabinet meetings at Pune on October 28 and 29, 1986 and at Aurangabad on November 11 and 12, 1986" was no explanation at all why the Chief Minister did not attend to the representation made by the appellant till November 17, 1986 i.e. for a period of 25 days. There was no reason why the representation submitted by the appellant could not be dealt with by the Chief Minister with all reasonable promptitude and diligence and the explanation that he remained away from Bombay is certainly not a reasonable explanation. In view of the wholly unexplained and unduly long delay in the disposal of the representation by the State Government, the further detention of the appellant must be held illegal and he must be set at liberty forthwith.

For these reasons, the appeal must succeed and is allowed. The judgment and order passed by the High Court are set aside and the appellant is directed to be set at liberty forthwith.

P.S.S. Appeal allowed.