HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Case No.	**WP No.9792/2021**
Parties Name	**Yatindra Verma** **Vs.** **State of MP & Ors.**
Date of Order	**24/06/2021**
Bench Constituted	**Division Bench:** **Justice Sujoy Paul** **Justice Shailendra Shukla**
Order passed by	**Justice Sujoy Paul**
Whether approved for reporting	**Yes**
Name of counsels for parties	Shri RS Chhabra, learned counsel for the petitioner. Shri Pushyamitra Bhargav, learned Additional Advocate General for the respondents/State.
Law laid down	**(1) Article 22(5) of Constitution of India** - The right of *detenu* to represent against detention order is a valuable and constitutional right, violation of which can make the order of detention as illegal **(2) Constitution of India - Preventive Detention** – is duly recognized in our constitutional scheme. The Constituent Assembly composed of politicians, statesman, lawyers and social workers who had experienced the imprisonment owing solely to their political beliefs resolved to put Article 22, Clause 3 to 7 in the Constitution. **(3) Section 3(3) of NSA Act, 1980** - Although there is no statutory requirement of mentioning the background reasons on the strength of which order of delegation is passed, if reasons are assigned, it encourages fairness. If partially wrong reason is assigned in the order of delegation, neither order of delegation nor order of detention will stand vitiated. **(4) The order of delegation dated 6/4/2021** – A mechanical reproduction

	of non existing reason namely "threat to communal harmony" is quoted, but court was alive of real situation because of second wave of corona and hence no interference was made. It was noted that order dated 6/4/2021 contains a correct reason to prevent a person to "commit act prejudicial to the maintenance of public order". **(5) Section 3(2) and (3) of NSA Act -** The expression "public order" is wide enough which includes the event of black listing of an essential drug namely Remdesivir. Thus, contention that the delegation order does not cover the reason of detention is not accepted. The use of "a" on two places in Sec.3(3) does not mean that an "area specific" and "authority specific" order must be passed in all circumstances. **(6) Preventive detention - of a person who is already in custody -** Permissible but compelling reasons with cogent material must be shown by the detaining authority based on antecedent activities of *detenu*. **(7) Right of representation before the District Magistrate by *detenu* - Effect of non mentioning of this right in the detention order -** The Constitution Bench judgment in *Kamlesh Kumar* was followed by Full Bench in *Kamal Khare*. It was clearly held that it violates valuable right of *detenu* to prefer representation before same authority.
Significant paragraph numbers	**15, 20, 22, 30, 36, 38**

O R D E R

(Passed on this 24th day of June, 2021)

Sujoy Paul, J. :

This petition filed under Article 226 of the Constitution assails the order of State Govt. dt.06/04/2021 published in the gazette Notification issued under Section 3(3) of the National

Security Act, 1980 (hereinafter called NSA Act) and the detention order dated 10.05.2021.

2) Briefly stated, petitioner submits that he is a social worker and is a member of a political party namely, Indian National Congress. The petitioner held the post of General Secretary and Secretary of the said party in Indore. Petitioner has organized various camps for the welfare of people from time to time. In the pandemic era also, petitioner made various efforts to provide helping hand to suffering people of Indore. The proof of welfare activities undertaken by petitioner are cumulatively filed as Annexure P/2. The petitioner claims that he was vocal in expressing his dissatisfaction over the manner in which the Covid crisis has been handled by the State Government. The petitioner was active in social media and photocopy of many such posts showing petitioner's criticism or dissent are cumulatively filed as Annexure P/3.

3) It is canvassed that the government of the day was annoyed with petitioner's comments and, therefore, a false FIR dated 08/05/2021 (Annexure P/4) was lodged against the petitioner for allegedly committing offence under Sections 420 and 188 of IPC r/w Section 3 of Epidemic Diseases Act 1897. The petitioner was also arrested on 07/05/2021. The District Magistrate passed the detention order dated 10/05/2021 wherein it is mentioned that petitioner is already in custody. This order dated 10/05/2021 nowhere mentions that petitioner has a right to prefer representation before the District Magistrate.

Notification/Order dated 06/04/2021:-

4) The legality, validity and propriety of the order dated 06/04/2021 published in the gazette of MP is called in question

by contending that this order is passed without application of mind. Reference is made to various similar orders issued from time to time by the government right from 2014. It is contended that main reason for issuance of such order is “threatening to communal harmony”. In the present scenario, there was no such threatening, yet order dated 06/04/2021 was passed which shows total non-application of mind.

Section 3(3) of NSA Act provides power of delegation to “a” Magistrate. Since “a” is used in the statute, the government intending to delegate powers under Section 3 needs to issue 'officer specific' and 'area specific' orders. Issuance of general order like 6th April 2021 (Annexure P/1) is outside the purview of the enabling provision. NSA Act gives draconian power which needs to be exercised with utmost care and caution.

5) The power under Section 3(2) of NSA Act can be exercised in three eventualities:-

i) for preventing him from acting in any manner prejudicial to the security of State.

ii) for preventing him from acting in any manner prejudicial to the maintenance of public order.

iii) for preventing him from acting in any manner prejudicial to the maintenance of supplies and services essential to the community.

6) If Notification/order dated 06/04/2021 is read carefully, it will be clear that the eventuality (iii) aforesaid has not been mentioned in the said order and, therefore, any power exercised relating to said eventuality was outside the scope of delegation of power.

Non Application of Mind:-

7) Article 22(4) of the Constitution of India was referred, to contend that it gives a constitutional right to the person under detention to prefer effective representation against his detention. The order of detention is served on the petitioner through Station House Officer (SHO) on 13/05/2021 which is evident from Annexure R/3. The factum of detention was not brought to the notice of State Govt. by the learned District Magistrate. Resultantly, the government presumed that petitioner is absconding. Reliance is placed on document dated 14/05/2021 (Annexure R/4) and another document of same date (Annexure R/5). It is urged that a conjoint reading of these documents, shows that State Govt. was carrying an impression that petitioner has not yet been detained and he is absconding. The same impression was given to the Central Govt. by communication dated 14/05/2021 (Annexure R/5) wherein it is mentioned that *"the person concern is reported to be absconding"*. The inevitable consequence of such misrepresentation is that State Govt. and Central Govt. did not deem it proper to examine the case of petitioner or in other words, examined the validity of the detention treating the petitioner to be an absconder. To buttress this contention "Proforma No.1" (page 33) was relied upon which is signed by Under Secretary to the Govt. of MP (Home Department) wherein on more than one occasion, it is mentioned that "detenue is absconding".

8) Shri Chhabra, learned counsel for the petitioner submits that a person already arrested can still be detained under the NSA Act, but for exercising that power, the authorities have to fulfill certain requirements. Reference is made to order of this Court passed in ***WP No.25986/2018 (Smt. Kamini Yadav vs. State of***

M.P.). The Order dated 06/04/2021 was challenged by taking assistance of ***(1991) 1 SCC 500 (Abhay Shridhar Ambulkar vs. S.V. Bhave, Commissioner of Police & Ors.)***. The necessary ingredients for recording a valid "subjective satisfaction" of Competent Authority is absent in the impugned order dated 06/04/2021 (Annexure P/1).

Right to represent to District Magistrate against Detention Order:-

9) It is submitted that the order of detention dated 10/05/2021 shows that the District Magistrate has mentioned that the petitioner may submit representation before State Govt. and the Central Govt. There is no mention that petitioner has a valuable right to prefer representation against the order of detention before the same Authority namely, District Magistrate. Reliance is placed on the recent Full Bench judgment passed in ***WP No.22290/2019 (Kamal Khare Vs. State of MP)***. For these cumulative reasons, the order dated 06/04/2021 (Annexure P/1) and detention order dated 10/05/2021 are liable to be interfered with is the contention of Shri Chabra, learned counsel for petitioner.

Government's Stand:

10) Shri Pushyamitra Bhargav, learned Additional Advocate General submits that necessary requirements flowing from Article 22(5) of Constitution were fulfilled. The order was passed by Competent Authority. Petitioner was informed that he has a valuable right of representation before competent authorities. As per Section 3(4) of NSA Act, after passing the order of detention, the District Magistrate became *functus officio*. Hence, question of preferring representation before the same authority does not

arise.

11) Learned AAG placed reliance on the definition of "appropriate govt." and urged that cases arising out of NSA Act are difference than the COFEPOSA and PIT NDPS Act. The judgment of Full Bench is distinguishable which is based on other provisions of law.

12) The detention order was communicated to the petitioner on 13/05/2021. It was approved by State Govt. on 14/05/2021 i.e. within statutory limit. As per ***(2012) 7 SCC 181 (Konungjao Singh vs. State of Manipur & Ors.)***, the petitioner was entitled to receive an information regarding grounds of detention and was further entitled to get an opportunity to represent against it. Both the requirements were taken care of. Hence, no interference is required by this Court. The report of Superintendent of Police shows that the likelihood of involvement of petitioner in similar acts was not ruled out. This report became basis for passing of detention order. The stand of the State is that there was no suppression or misrepresentation of fact regarding showing the status of corpus as "absconder". The scope of judicial review in NSA matters is limited. Necessary parameters on which interference can be made are missing. Hence, interference may be declined.

13) No other point is pressed by the learned counsel for the parties.

14) We have heard the parties at length and perused the record.

FINDINGS:-

15) The power of preventive detention is duly recognized in our constitutional scheme. The constituent assembly composed of politicians, statesman, lawyers and social workers, who had attained a high status in their respective specialties and many of whom had

experienced the travails of incarceration owing solely to their political beliefs, resolved to put Article 22, Clause (3) to (7) in the constitution, may be as a necessary evil (See: ***(1976) 2 SCC 521, Additional District Magistrate, Jabalpur vs. S.S. Shukla***). Pertinently, this finding of Supreme Court has not been overruled in the subsequent judgment.

16) *M.H. Beg, J.* in ***Ram Bali Rajbhar vs. State of W.B. (1975) 4 SCC Page 47*** opined:-

> "The law of preventive detention, (…..) is authorised by our Constitution presumably because it was foreseen by the Constitution-makers that there may arise occasions in the life of the nation when the need to prevent citizens from acting in ways which unlawfully subvert or disrupt the bases of an established order may outweigh the claims of personal liberty."
>
> ***Emphasis supplied***

17) In view of these pronouncements, there is no manner of doubt that preventive detention is constitutionally recognized.

VALIDITY OF ORDER DATED 06/04/2021 (ANNEX. P/1)

18) Before dealing with the validity of said order, it is apposite to reproduce the enabling provision namely, ***Section 3(3) of NSA Act, 1980*** which reads as under:-

> "(3) If, having regard to the circumstances prevailing or likely to prevail in **any area** within the local limits of the jurisdiction of **a** District Magistrate or **a** Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that **during such period as may be specified in the order**, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section: Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time."
>
> ***Emphasis supplied***

19) Order dated ***06/04/2021 (Annexure P/1)*** is reproduced thus:-

> "F. No.31-05-1998-II-C-I.- Whereas, there are reports with the State Government that certain elements are active and are likely to be active **to threaten the communal harmony** and **commit act prejudicial to the maintenance of public order and the security of the State;**
>
> And whereas having regard to such circumstances prevailing in the areas within the local of each District, the State Government is satisfied that it is necessary to authorize the concerned District Magistrate to exercise powers conferred under Section 3(3) of the National Security Act, 1980 (No.65 of 1980).
>
> Therefore, in exercise of the powers conferred by the proviso sub-section (3) of Section 3 of the National Security Act, 1980 (No.65 of 1980), the State Government hereby, authorizes the concerned District Magistrate during the period from 1st April, 2021 to 30th June, 2021 within their respective Jurisdiction if satisfied, **as provided in sub-Section (2) of the said section, exercise the powers of making an order of detention conferred by sub-section (2) of the said Section 3**."
>
> ***Emphasis supplied***

20) That, in the order it is mentioned that in view of apprehension of threatening of "communal harmony" and committing of act prejudicial to the maintenance of public order and security of the State, the Govt. thought it proper to exercise power envisaged in Sub-Section 3 of Section 3 of NSA Act. If the reason for issuance of order dated 06/04/2021 is examined in juxtaposition with the similar orders passed right from 2014, we find substance in the argument of Shri Chhabra that said order has been mechanically passed without due application of mind by mentioning the threat regarding communal harmony. We are of the opinion that Sub-Section 3 of Section 3 does not mandate that reasons for issuance of such order must be mentioned. In order to maintain fairness, it is a good practice of mentioning reason for issuance of such administrative orders. The fairness is an integral part of good administration. It is said that

"Sunlight is the best disinfectant".Thus, in order to ensure fairness and to indicate the necessity for issuance of such delegation of power, mentioning of background reasons deserves appreciation. However, if an incorrect reason is mentioned in the order, but existence of actual/real reasons and circumstances cannot be doubted, the order cannot be interfered with solely because it partially contains a wrong reason. Putting it differently, the operative reason for issuance of such an order was to ensure the requirements ingrained of Sub-Section 2 of Section 3 of NSA Act. It is a matter of common knowledge that in the second wave of Corona, maintenance public order was a big challenge. However, we deem it proper to observe that it will be lawful for the State to issue such orders with due care and caution. The real reason for issuance of such order may be spelled out with clarity.

The first para of impugned order dated 06/04/2021 shows that apart from an anticipated threatening communal harmony, yet another reason for issuance of order was mentioned i.e..... **'commit act prejudicial to the maintenance of public order'**. This reason is a relevant basis for issuance of such an order of delegation. Thus, we find no reason to interfere with the impugned order dated 06/04/2021 on this ground.

Another limb of argument to assail this order dated 06/04/2021 is that as per Sub-Section 3 of Section 3, the order should have been "area specific" and "authority specific". Sub-Section 3 of aforesaid shows that keeping in mind the circumstances prevailing or likely to prevail in 'any area' within the jurisdiction of government, government can delegate its power of detention, to District Magistrate or to Commissioner of Police. Much emphasis is laid on use of "a" in two places in Sub-Section 3 of Section 3. We are unable to persuade ourselves with this line of argument of Shri Chhabra. The use of word "a" cannot be divorced from the remaining part of the provision. It is

clearly mentioned in Section 3(3) that having regard to the circumstances in "any area", a District Magistrate or a Commissioner of Police can be permitted to exercise power of detention. If "any area" covers the entire State in a situation like present one namely Covid-19 pandemic, 'any area' may be the entire State and in that situation, it is not necessary to issue the 'area specific' and 'authority specific' order. We find no such requirement in Sub-Section 3 of Section 3 for issuance of 'area specific' or 'authority specific' order. Thus, this argument must fail.

21) The impugned order is questioned on yet another ground that while passing the impugned order dated 6/4/2021 (Annexure P/1) the powers delegated to the District Magistrate were confined to see whether person (i) needs to be prevented from acting in any manner prejudicial to the security of the State (ii) from acting in any manner prejudicial to the maintenance of the public order. No power is delegated to District Magistrate for preventing a person from acting in any manner prejudicial to the maintenance of supplies and services essential to the community, the main reason for detention of corpus. We do not see any merit in this contention.

22) Last para of Annexure P/1 leaves no room for any doubt that the power so delegated was in relation to sub-section (2) of Sec.3 of the Act which, in our view, contains all the eventualities including the last one regarding which Shri Chhabra contended that it was not delegated. Apart from this, in our view, the expression 'public order' is wide enough which includes the aspect of black-marketing of an essential drug namely Remdesivir. On this account also, no interference is warranted by this Court.

NON APPLICATION OF MIND

23) It is apposite to remind ourselves with wonderful exposition by Supreme Court in the case of ***1975 (Supp.) SCC 1 (Smt. Indira Nehru Gandhi vs. Raj Narain)***:-

> "*K.K. Methew, J.* in ***Smt. Indira Nehru Gandhi vs. Raj Narain*** stated that the major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence; and the difficulty has been to discover the practical means of achieving this grand objective and to find the opportunity for applying these means in the ever shifting tangle of human affairs."
>
> ***Emphasis supplied***

24) Justice ***M.N. Venkatchaliah*** in ***(1989)1 SCC 374 (Ayya Ayub vs. State of UP)*** held as under:-

> "....the actual manner of administration of the law of preventive detention is of utmost importance. **The law has to be justified by the genius of its administration so as to strike the right balance between individual liberty on the one hand and the needs of an orderly osciety on the other....** The paradigms and value judgments of the maintenance of a right balance are not static **but vary according as the 'pressures of the day' and according as the intensity of the imperatives that justify both the need for and the extent of the curtailment of individual liberty.** Adjustments and readjustments are constantly to be made and reviewed. No law is an end in itself. The 'inn that shelters for the night is not journey's end and the law, like the traveller, must be ready for the tomorrow."
>
> ***Emphasis supplied***

25) Justice ***Savyasachi Mukherjee*** in ***(1986) 4 SCC 407 (Raj Kumar Singh vs. State of Bihar)*** held as under:-

> "Preventive detention as reiterated as hard law and must be applied with circumspection rationally, reasonably and on relevant materials. Hard and ugly facts make application of harsh laws imperative."
>
> ***Emphasis supplied***

26) In the instant case, as noticed, in the impugned order dated 06/04/2021, the State has partially mentioned the reason of "communal threat" in a mechanical manner. Similarly, we have noticed that despite recording a finding in the impugned detention order that the Corpus was already in custody, the State Govt.

repeatedly mentioned that he is "absconding". We are not impressed with the argument of learned AAG that it was not a mistake on the part of the government. We also find substance in the argument of Shri Chhabra that if State Govt. and Central Govt. carry an impression that detenu is absconding, this may have an adverse impact on their decision. Thus, utmost care and caution must be taken while giving a finding whether the person concern is really absconding or not.

27) Thus, we have no hesitation to hold that the respondents have mechanically opined that Corpus was "absconding". This is an example of non-application of mind or acting in a mechanical manner.

28) This is trite that a person who is already arrested can still be detained under the NSA Act. This aspect was clearly taken note of by this Court in ***Kamini Yadav vs. State of M.P. & Ors. (W.P. No.25986/2018).*** The relevant portion reads as under:-

> "15. In the case of Bhagwan Singh @ Choti Vs. State of M.P., 2012 (III) MPWN 37 [DB] the detention order was passed by D.M. Ujjain on 18.01.2012 on which the petitioner was already in Jail in connection with the crime No. 446 of 2011 under sections 323, 365, 368, 120(B), 506, 395, 397, 364A R/w 34 of IPC. The D.B. took the note of Chhenu @ Yunus vs. State of M. P. and another, 2010(4) MPL J 253 = 2011(1) MPHT 208 and examined the matter in the light of the observation made by Supreme Court in Vijay Kumar Vs. State of Jammu & Kashmir and Ors., AIR 1982 SC 1023, and queshed the order and said in para 8 that :-
>
> > ".....We find that there is no indication in the order to the effect that the detaining authority was aware that the detenu was already in custody and that <u>he has reason to believe on the basis of reliable material that there is a possibility of his being released on bail and that on being so released the detenu would in all probabilities indulge in prejudicial activities and for compelling reasons a preventive detention order need to be made.</u>"
>
> 16. Therefore it is the settled position of law that the authorities are not precluded from passing an order of detention when the person concerned is in jail, but while passing the order of detention, they are required

> to apply their mind to the fact that the person concerned is already in jail and there are compelling reasons justifying such detention despite the fact that the detenu was already in detention and the **compelling reasons implies that there must be cogent material before the Detaining Authority on the basis of which it may be satisfied that the detenu is likely to be released** from custody in the near future or taking into account the **nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities** and it is necessary to detain him in order to prevent him from engaging in such activities."
>
> ***Emphasis supplied***

29) In ***(2012) 7 SCC 181 (Konungjao Singh vs. State of Manipur & Ors.)*** it was again held that while detaining a person, who was already arrested, due care should be taken and it must be shown (i) regarding knowledge of detaining authority about detenu custody, (ii) real possibility of detenu's released on bail and (iii) necessity of preventing him from indulging in activities prejudicial to the security of State maintenance of public order upon his release on bail.

30) In the instant case, the allegation against the Corpus was that he was black-marketing a single oxyflow meter. The stand of Corpus is that he is a social/political worker and it was his attempt to provide the oxyflow meter to a man in need. He is falsely trapped and implicated and arraigned in a criminal case. Since Corpus is facing a criminal case, we are not inclined to give any finding on this aspect which may have a bearing on the trial. In view of aforesaid three requirements, we are only inclined to observe that there was no material before the learned District Magistrate to believe that the Corpus will again indulge in similar activity of black-marketing.

RIGHT OF REPRESENTATION BEFORE THE DISTRICT MAGISTRATE:-

NON-MENTIONING OF THIS RIGHT IN THE DETENTION ORDER-EFFECT:-

31) Indisputably, the detention order does not contain any stipulation that the detenu has right to prefer representation before the same authority namely, District Magistrate. The reliance is placed on the recent Full Bench judgment of this Court passed in the case of ***Kamal Khare*** *(supra).* To counter this argument, the bone of contention of learned AAG was that the said Full Bench decision is distinguishable. Full Bench judgment is based on a constitution bench judgment in the case of ***Kamleshkumar Ishwardas Patel v. Union of India, (1995) 4 SCC 51***. In ***Kamleshkumar*** (supra), the Apex Court was dealing with the provisions of COFEPOSA Act and the PIT NDPS Act and not with NSA Act. Hence, the said constitution Bench judgment could not have been relied upon.

32) We do not see much merit in this argument because similar argument was advanced by the Govt. before Full Bench in the case of ***Kamal Khare*** (supra) which is reproduced in extenso in para-14 of the said judgment. The similar argument could not find favour by the Full Bench.

33) In ***Kamleshkumar (supra),*** Apex Court opined as under:-

> "6. This provision has the same force and sanctity as any other provision relating to fundamental rights. (See: State of Bombay v. Atma Ram Shridhar Vaidya [1951 SCR 167, 186 : AIR 1951 SC 157] .) Article 22(5) imposes a dual obligation on the authority making the order of preventive detention: (i) to communicate to the person detained as soon as may be the grounds on which the order of detention has been made; and (ii) to afford the person detained the earliest opportunity of making a representation against the order of detention. Article 22(5) thus proceeds on the basis that the person detained has a right to make a representation against the order of detention and the aforementioned two obligations are imposed on the authority making the order of detention with a view to ensure that right of the person detained to make a representation is a real right and he is able to take steps for redress of a wrong which he thinks has been committed. Article 22(5) does not, however, indicate the authority to whom the representation is to be made. Since the object and purpose of the representation that is to be

made by the person detained is to enable him to obtain relief at the earliest opportunity, the said representation has to be made to the authority which can grant such relief, i.e., the authority which can revoke the order of detention and set him at liberty. **The authority that has made the order of detention can also revoke it. This right is inherent in the power to make the order. It is recognised by Section 21 of the General Clauses Act, 1897 though it does not flow from it.** It can, therefore, be said that Article 22(5) postulates that the person detained has a right to make a representation against the order of detention to the authority making the order. In addition, such a representation can be made to any other authority which is empowered by law to revoke the order of detention.

14. Article 22(5) must, therefore, be construed to mean that the person detained **has a right to make a representation** against the order of detention which can be made not only to the Advisory Board **but also to the detaining authority**, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation.

38. Having regard to the provisions of Article 22(5) of the Constitution and the provisions of the COFEPOSA Act and the PIT NDPS Act the question posed is thus answered: Where the detention order has been made under Section 3 of the COFEPOSA Act and the PIT NDPS Act by an officer specially empowered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person detained to make a representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the

State Government and the Central Government where the detention order has been made by an officer specially authorised by a State Government and to the Central Government where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation."

Emphasis supplied

34) The Full Bench after considering the constitution Bench judgment opined as under:-

"20. The Supreme Court in Life Insurance Corporation of India v. D.J. Bahadur and Others, (1981) 1 SCC 315 dealing with the aspect whether the Life Insurance Corporation Act, 1956 is a special statute qua the Industrial Disputes Act, 1947 when it came to a dispute regarding conditions of service of the employees of the Life Insurance Corporation of India held that the Industrial Disputes Act would prevail over the Life Insurance Corporation of India Act as the former relates specially and specifically to industrial disputes between the workmen and employers. Relevant discussion in paragraph No.52 of the report would be useful to reproduce hereunder:-

"52. In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes – so too in life. The ID Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for the nature of industrial disputes coming within its ambit. It creates an infrastructure for investigation into, solution of and adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From

alpha to omega the ID Act has one special mission – the resolution of industrial disputes through specialised agencies according to specialised procedures and with special reference to the weaker categories of employees coming within the definition of workmen. Therefore, with reference to industrial disputes between employers and workmen, the ID Act is a special statute, and the LIC Act does not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation, or management when private businesses are nationalised and a plurality of problems which, incidentally, involve transfer of service of existing employees of insurers. The workmen qua workmen and industrial disputes between workmen and the employer as such, are beyond the orbit of and have no specific or special place in the scheme of the LIC Act. And whenever there was a dispute between workmen and management the ID Act mechanism was resorted to."

30. Now coming to the question as to what would be the effect of not informing the detenu that he has a right of making representation, apart from the State Government and the Central Government, also to the detaining authority itself, the Constitution Bench of the Supreme Court in Kamlesh Kumar Ishwardas Patel (supra) even examined this aspect in paragraph No.14 of the report and categorically held as under:-

"14. Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, who is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention

> to the authorities who are required to consider such a representation."

33. In view of the above, the Constitution Bench of the Supreme Court in Kamlesh Kumar Ishwardas Patel (supra) analyzed the effect of not informing the detenu of his right to make a representation to the detaining authority itself in paragraph No.47 of the report and held that this results in denial of his right under Article 22(5) of the Constitution of India, which renders the detention illegal. The relevant paragraph No.47 is reproduced hereunder:-

> "47. In both the appeals the orders of detention were made under Section 3 of the PIT NDPS Act by the officer specially empowered by the Central Government to make such an order. In the grounds of detention the detenu was only informed that he can make a representation to the Central Government or the Advisory Board. The detenu was not informed that he can make a representation to the officer who had made the order of detention. As a result the detenu could not make a representation to the officer who made the order of detention. The Madras High Court, by the judgments under appeal dated 18-11-1994 and 17.1.1994, allowed the writ petitions filed by the detenus and has set aside the order of detention on the view that the failure on the part of the detaining authority to inform the detenu that he has a right to make a representation to the detaining authority himself has resulted in denial of the constitutional right guaranteed under Article 22(5) of the Constitution. In view of our answer to the common question posed the said decisions of the Madras High Court setting aside the order of detention of the detenus must be upheld and these appeals are liable to be dismissed."
>
> ***Emphasis supplied***

35) Another Division Bench in ***WP No.5866/2015 (Salma vs. State of MP)*** opined as under:-

> "On the last date of hearing opportunity was granted to the learned counsel for the State to examine the law laid down b the Apext Court, which has been

made applicable in the various cases by the Division Bench of this Court, in the matter of compliance of provisions of Article 22 (5) of the Constitution of India in the matter of detention itself, intimating the detenu that he/she is entitled to make a representation before the Detaining Authority himself against the order of detainsion. Such law was considered and made applicable in view of the law laid down by the Apex Court in the matter of State of Maharashtra and others Vs. Santosh Shankar Acharya (2000) 7 SCC 463, vary same law was made application by this Court in W.P. No.1830/2015, W. P. No.3491/2015, W .P. No.3677/2015 & W. P. No.3683/2015 in the following manner :

Notably, both these points have been considered by the Supreme Court in the case of State of Maharashtra and others vs. Santosh Shankar Acharya (2000) 7 SCC 463 in para 5 and 6 in particular. **The Supreme Court following the dictum in the case of Kamleshkumar restated that non-communication of the fact to the detenu that he could make a representation to the detaining Authority so long as order of detention has not been approved by the State Government in case the order of detention has been issued by the Officer other than the State Government, would constitute infringement of right guaranteed under Article 22(5) of the Constitution and this ratio of the Constitution Bench of the Supreme Court in Kamlesh kumar would apply notwithstanding the fact that same has been made in the context of provisions of COFEPOSA Act.** In para 6 of the reported decision, the Supreme Court rejected the similar objection canvassed by the learned counsel for the State relying on Veeramanâ case and noted that the said decision does not help the respondents in any manner. Inasmuch as, in that case the Court was called upon to consider the matter in the context of situation that emerged subsequent to the date of approval of the order of detention by the State Government and not prior thereto. In none of the cases on hand the observation in the case of Veeramani will have any application. **Suffice it to observe that the detention order and the disclosure of the fact that detenu could make representation to the detaining Authority before the State Government considered the proposal for approval has abridged the right of detenu under Article 22(5) of the Constitution. As a result, the continued detention of the detenu on the basis of such infirm order cannot be countenanced.**

> **These petitions, therefore, must succeed. The impugned detention orders in the respective petitions are quashed and set aside and respondents are directed to set the petitioners/detenu at liberty forthwith unless required in connection with any other criminal case**."
>
> ***Emphasis supplied***

36) In view of these authoritative pronouncements, there is no manner of doubt that the detenu had a valuable right to make a representation to the detaining authority and denial of this opportunity vitiates the impugned order. Resultantly, impugned order of detention dated 10/05/2021 is set aside.

37) In view of foregoing analysis, the impugned order of detention cannot sustain judicial scrutiny.

38) Before parting with the matter, we deem it proper to observe that the main grievance of detenue/complainant was that the District Magistrate while passing the order of detention did not inform him about his valuable right to prefer a representation against the detention order before the same authority namely District Magistrate. Full Bench recognized the said right of the detenue in light of the constitutional bench judgment in the case of ***Kamleshkumar Ishwardas Patel*** **(supra)**. Thus, in the fitness of things, it will be proper for the State to ensure that henceforth in the order of detention, it must be mentioned that the detenue has a right to prefer a representation before the same authority.

39) In addition, we deem it proper to draw the attention of State Government on the observations made in para 20, 26 & 27 of this order.

40) The Registry of this Court shall sent a copy of this order to the Chief Secretary and Principal Secretary (Home), Government of Madhya Pradesh for compliance of this order.

The petition is partly allowed.

(SUJOY PAUL)
JUDGE

(SHAILENDRA SHUKLA)
JUDGE

soumya