THE HIGH COURT OF JUDICATURE FOR MADHYA PRADESH AT JABALPUR

(Full Bench)

W.P. No.22290/2019

Kamal Khare ..... Petitioner

Vs.

The State of M.P. and others ..... Respondents

WITH

W.P. No. 717/2020

Laduram ..... Petitioner

Vs.

The State of M.P. and others ..... Respondents

&

W.P. No. 28804/2019

Manish ..... Petitioner

Vs.

The State of M.P. and others ..... Respondents

Coram:

Hon'ble Shri Justice Mohammad Rafiq, Chief Justice
Hon'ble Shri Justice Rajeev Kumar Dubey, Judge
Hon'ble Shri Justice Vijay Kumar Shukla, Judge

Presence:

Shri Naman Nagrath, Senior Advocate with Shri Jubin Prasad, Advocate for the petitioner in WP-22290-2019.

Shri Sankalp Kochar, Advocate for the petitioner in WP-717-2020.

Shri Sankalp Kochar and Shri Rahul Diwaker, Advocates for the petitioner in WP-28804-2019.

Shri Ajay Pratap Singh, Deputy Advocate General with Shri Akshay Pawar, Panel Lawyer for the respondents/State.

Whether approved for reporting : Yes

Law laid down:

Question under reference in WP-22290-2019	**HELD**: ➢ While the Food Safety and Standards Act, 2006 ***(FSSA)*** only provides for penalty for the offence made out under the provisions of the said Act, the *National Security Act, 1980* **(NSA)** provides for the preventive detention if parameter enumerated in sub-Section (2) of Section 3 of the NSA are attracted. These two Acts have been enacted to achieve different object and for difference purpose. The provisions which makes the offence punishable under the FSSA is intended to punish the offender for the offence committed by him, but the object which the NSA seeks to achieve is to put the person concerned in detention so as to prevent him from doing an act but not to punish him for something which he has done. While the former is based on the act already done by him, the latter is based on the likelihood of his acting in a manner similar to his past acts and preventing him for repeating the same. We are therefore not persuaded to approve of the line of reasoning taken by the Division Bench in paragraph No.19 of the judgment in ***Sudeep Jain Vs. State of M.P.*** (W. P. No.21768/2019) decided on 8.11.2019 to that effect and paragraph No.8 of the dissenting order (dated 04.12.2019 in WP-22290-2019 – ***Kamal Khare vs. State of M.P.***) by one of the Hon'ble Judges referred to above. Accordingly, judgment of the Division Bench in **Sudeep Jain** (supra) to the extent of what was held in its paragraph No.19 is ***overruled***. ➢ In **Principles of Statutory Interpretation** by Justice G. P. Singh, the principles for resolving a conflict between two different Acts and in the construction of statutory rules have been discussed (*See : page 146 13th Edition, 2012*). They are: the maxims *generalia specialibus non derogant* (general things do not derogate from special things) *and specialia generalibus derogant* (special things derogate from general things). Considering thus, the Supreme Court in **P. V. Hemalatha Vs. Kattamkandi Puthiya Maliackal Saheeda and another** (2002) 5 SCC 548, in paragraph No.33 of the report held that: "When the Courts are confronted with such a situation, the Courts' approach should be "to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific". ***Referred to***: AIR 1964 SC 260, (**Kaushalya Rani Vs. Gopal Singh)** (1981) 1 SCC 315 (**Life Insurance Corporation of India v. D.J. Bahadur)** (2002) 5 SCC 548 (**P. V. Hemalatha Vs. Kattamkandi Puthiya)** ➢ Degree of disturbance upon the life of the community would determine whether it affects public order. An act by itself may not be a determinative factor of its gravity, but it is potentiality of its effect on the even tempo of the life of

	community that makes it prejudicial to the maintenance of public order. If the effect of act is restricted to certain individuals or a group of individuals, it merely creates a law and order problem but if the effect, reach and potentiality of the act is so deep and pervasive that it affects the community at large and disturb the even tempo of the community that it becomes a breach of the public order. It therefore cannot be said that a single act would in all and every circumstances not be sufficient to affect public order or even tempo of the society. What is material is the effect of the act and not the number of acts and therefore what has to be seen is the effect of the act on even tempo of life of the people and the extent of its reach upon society and its impact. ***Reliance placed upon:*** AIR 1966 SC 740 (**Dr. Ram Manohar Lohia Vs. State of Bihar)** (1972) 3 SCC 816 (**S. K. Kedar Vs. State of West Bengal)** (1972) 3 SCC 831 (**Kanu Biswas Vs. State of West Bengal)** (1979)4 SCC 14 (**Kanchanlal Meneklal Chokshi Vs. State of Gujarat)** (1982) 2 SCC 403 (**Ashok Kumar Vs. Delhi Administration and ors.)** (1982) 2 SCC 469 (**Smt. Bimla Dewan vs. Lt. Governor of Delhi)** (1987) 2 SCC 490 (**State of U.P. Vs. Hari Shankar Tewari)** (2004) 8 SCC 591 **(State of U.P. Vs. Sanjai Pratap Gupta Alias Pappu)**
Three Questions under reference in **WP-28804-2019** (Manish vs. State) **& WP-717-2020** (Laduram vs. State) **Question No.(a)**	➢ All the three following questions which the Division Bench has formulated and referred for our consideration stands answered in the affirmative by the judgment of the Constitution Bench of the Supreme Court in **Kamlesh Kumar Ishwardas Patel vs. Union of India and others** (1995) 4 SCC 51: - a) Whether a detainee, who is detained under the National Security Act, 1980 has got a right to make a representation to the District Magistrate who acts on behalf of the State Government as the State Government is the appropriate Government within the meaning of Section 2(a) of National Security Act, 1980 ? b) Whether the order of detention is a nullity in absence of such a communication informing the detainee about his right of making representation to the District Magistrate, even though the Detainee has been informed by the District Magistrate to make a representation to the State Government/to the Union of India/ Advisory Board ? c) Whether the District Magistrate keeping in view the scheme of the Act i.e. the National Security Act, 1980 has the power to revoke the order of detention once passed by him in view of Section 10 and Section 14 of the National Security Act, 1980 ? ➢ Individual liberty is a cherished right which is one of the most valuable fundamental rights guaranteed by our constitution to the citizens of the country. In the scheme of Constitution, utmost importance has been given to life and personal liberty of the individual. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established. In the matter of preventive detention there is deprivation of liberty, therefore, safeguards provided by Article 22 of the Constitution of the India have to be scrupulously adhered to.

Question No.(b)	The detaining authority i.e. the District Magistrate or the Commissioner of Police, is obliged to communicate to the detenu about detenu's right to make representation to him until detention order passed by him is approved by the State Government within 12 days and non-communication thereof would vitiate the detention order. The Constitution Bench of the Supreme Court in **Kamlesh Kumar Ishwardas Patel** (supra) also 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.
Question No. (c)	➢ So long as the detenu remains under preventive detention under the authority of the order passed by the detaining authority i.e. the District Magistrate or the Commissioner of Police, i.e. for a period of 12 days or till the approval of the preventive detention by the State Government, whichever is earlier, such District Magistrate/ Commissioner of Police continues to be the detaining authority. If and when the further detention of the detenu is approved by the order of the State Government, then onwards, it is the State Government which becomes the detaining authority. Therefore, till the detention has not been approved by the State Government, the District Magistrate/Commissioner of Police, under whose order the detenu has been kept under preventive detention, retains the authority to revoke the order made by him by virtue of Section 21 of the General Clauses Act as envisaged by Section 14 of the NSA.

Significant paragraphs : 18 to 48

Heard on: 24.03.2021

O R D E R

(Passed on this 22nd day of April, 2021)

Per Mohammad Rafiq, Chief Justice:

These three matters have been placed before the Larger Bench upon a reference by two separate orders passed by a Division Bench of this Court at Principal Seat at Jabalpur and another Division Bench of this Court at Indore Bench. The first order was passed by Division Bench at Principal Seat, Jabalpur on 04.12.2019 in W.P. No.22290/2019

(*Kamal Khare vs. State of M.P. and others*) which is a writ petition filed in the nature of Habeas Corpus against an order dated 13.08.2019 passed by District Magistrate, Jabalpur in exercise of his powers under Section 3(2) of the National Security Act, 1980 (for short "the NSA") whereby the petitioner was directed to be detained for a period of three months from the date of his detention. When the matter was listed before the Division Bench on 04.12.2019, there was a difference of opinion between two Hon'ble Judges constituting the Division Bench. They have therefore made a reference to the Larger Bench for answering the following questions of law:-

> "Where the offence is committed under Regulatory Act such as Food Safety and Standards Act, 2006 which contains penalty clause, under no circumstances, an action can be taken against a person whose activities are prejudicial to maintenance of public order under the National Security Act, 1980."

2. Subsequently, a Division Bench of this Court at Indore Bench in W.P. No.28804/2019 (*Manish vs. State of M.P. and others*) and W.P. No.717/2020 (*Laduram vs. State of M.P. and others*) vide order dated 13.02.2020 also made a reference to the Larger Bench for answering the following questions of law:

a) Whether a detainee, who is detained under the National Security Act, 1980 has got a right to make a representation to the District Magistrate who acts on behalf of the State Government as the State Government is the appropriate Government within the meaning of Section 2(a) of National Security Act, 1980?

b) Whether the order of detention is a nullity in absence of such a communication informing the detainee about his

right of making representation to the District Magistrate, even though the Detainee has been informed by the District Magistrate to make a representation to the State Government/to the Union of India/ Advisory Board?

c) Whether the District Magistrate keeping in view the scheme of the Act i.e. the National Security Act, 1980 has the power to revoke the order of detention once passed by him in view of Section 10 and Section 14 of the National Security Act, 1980?

3. Both these matters i.e. Writ Petition No.22290/2019 of Principal Seat, Jabalpur and Writ Petition Nos.28804/2019 and 717/2020 of Indore Bench, were ordered to be combined and listed together by order of the Chief Justice of this Court on administrative side dated 14.02.2020. Arguments in both the sets of cases therefore were heard simultaneously. Referred questions are being answered by this common judgment.

4. We have heard Shri Naman Nagrath, learned Senior Counsel for the petitioner in WP No.22290/2019, Shri Sankalp Kochar, learned counsel for the petitioner in WP No.717/2020 and WP No.28804/2019 and Shri Ajay Pratap Singh, learned Deputy Advocate General for the respondents/State.

5. Shri Naman Nagrath, learned Senior Counsel appearing for the petitioner in W.P. No.22290/2019 submitted that the power under Section 3(2) of the NSA has been invoked by the respondents for preventive detention of the petitioner for a petty offence inasmuch as the petitioner has been running the business of retail sale of milk and milk products in the name and style as “P.K. Paneerwala”. He has got registration/permission issued by the Food and Safety Administration

under the Food Safety and Standards Act, 2006 (hereinafter referred to as “the FSSA”) as well as by the Municipal Corporation, Jabalpur. A sample of cottage cheese (Paneer) was collected from the shop of the petitioner on 10.07.2019 by the designated officer under the FSSA. As per the respondents, the said sample was found to be of sub-standard quality and therefore a criminal case was registered against the petitioner for an offence under Section 26(2)(ii) and Section 52 of the FSSA. A newspaper report was published in Dainik Bhaskar, Jabalpur edition on 14.08.2019 that the proceedings have been initiated against the petitioner by the respondent No.2 – District Magistrate, Jabalpur under the provisions of the NSA. The petitioner was neither served with any notice nor was it otherwise brought to his knowledge that the proceedings against him have been initiated under the NSA. Upon learning this, the petitioner sought relevant information from the District Magistrate, Jabalpur under the Right to Information Act, 2005, which request was however rejected by him vide order dated 24.08.2019. It is submitted that the petitioner thereafter obtained another report of food analyst which shows the sample as conforming to the prescribed standard. There was absolutely no justification for invoking the provisions of NSA for the offence alleged to have been committed by the petitioner, which is not grave enough to warrant such an extreme step. Apart from this minor offence, there is not even a single criminal case ever registered against the petitioner inasmuch as he has no criminal antecedents. The order of preventive detention under Section 3 of the NSA has been mechanically passed by the District Magistrate, Jabalpur merely on the alleged offence

under the FSSA. The petitioner was neither informed about the grounds for detention nor was he provided with the copy of detention order despite demand. There did not exist any ground for invoking the powers of preventive detention under Section 3 of the NSA. Learned Senior Counsel further submitted that the Article 22 of the Constitution of India which provides for the protection against arrest and detention has been violated. Reliance in support of the arguments is placed on the Division Bench judgment of this Court in **Rinku @ Kuldeep Shukla vs. State of M.P. and others,** 2015(3) MPLJ 157.

6. Shri Naman Nagrath, learned Senior Counsel further argued that the District Magistrate before detaining the petitioner was under an obligation to inform him that he (detenu) has a right to make a representation, apart from the State Government or the Union of India or the Advisory Board, to the District Magistrate himself. Since the District Magistrate has failed to do so, the order of detention stood vitiated and is liable to be quashed and set aside. It is submitted that before the approval of the detention order by the appropriate Government, which in this case, would be the State Government, the order of detention would be liable to be set aside/revoked even by the District Magistrate himself, in his capacity as the detaining authority, keeping in view the provisions of Section 10 and 14 of the NSA. It is submitted that provisions of the NSA can be invoked only on the parameters envisaged in Sub-section (2) of Section 3 of the NSA i.e. with a view to preventing any person (i) from acting in any manner prejudicial to the security of the State or (ii) from acting in any manner prejudicial to the maintenance of public order

or (iii) from acting in any manner prejudicial to the maintenance of supplies and services essential to the community. While the first parameter i.e. the security of the State is not at all attracted in the present case, the third parameter i.e. maintenance of supplies and services essential to the community would stand excluded by virtue of Explanation to Sub-section (2) of Section 3 of the NSA, which specifically provides that for the purposes of this sub-section, "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to sub-section (1) of Section 3 of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980. On that basis, learned Senior Counsel argued that the only ground which the respondents can invoke for preventive detention of the petitioner is with regard to maintenance of public order. He however urged that the mere fact that certain sample of cottage cheese (Paneer) has been found to be of sub-standard quality, cannot be held to have such a wider ramification inasmuch as, this can neither be said to have caused disturbance to the maintenance of public order nor otherwise affected the tempo of the society. Thus the power of preventive detention in the present case has been grossly misused.

7. Shri Naman Nagrath, learned Senior Counsel relying upon the judgment of Constitution Bench of the Supreme Court in the case of **Kamlesh Kumar Ishwardas Patel vs. Union of India and others**

(1995) 4 SCC 51 submitted that the Supreme Court therein held that although Article 22(5) of the Constitution of India does not indicate the authority to whom the representation is to be made but 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. Therefore, the representation has to be made to the authority which can grant such relief and revoke the order of detention and set him at liberty. Therefore, the authority that has made the order of detention can also revoke it. Such right is inherent in the power to make the order by virtue of Section 21of the General Clauses Act, 1897 which has also been recognized by Section 14 of the NSA. Learned Senior Counsel also relied upon the recent judgment of the Supreme Court in **Ankit Ashok Jalan Vs. Union of India and others** (2020) 16 SCC 127 and submitted that the Supreme Court in this case followed the verdict of the Constitution Bench of the Supreme Court in **Kamlesh Kumar Ishwardas Patel** (supra) and held that where the detention order is made by an specially empowered officer under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the COFEPOSA Act"), who is the detaining authority, he is required to independently consider the representation without waiting for consideration of representations by appropriate government or the Advisory Board.

8. Shri Naman Nagrath, learned Senior Counsel also argued that though he would not canvass such a spacious argument that even if supply of adulterated food article in a given case in bulk may be

hazardous to the public health, thereby adversely affecting the public order, yet under no circumstances the action can be taken under the NSA, but there was absolutely no justification whatsoever for the detaining authority to invoke the extreme provision of NSA in the present case for the reason of sample of *Paneer* being found to be of sub-standard quality. It is further argued that the view expressed by one of the learned Judges (Hon'ble Shri Justice Atul Sreedharan) in para 8 of the order dated 04.12.2019 passed in W.P. No.22290/2019 invoking the principle *Generalia Specialibus Non-Derogant*, namely, the general law shall not prevail over the provisions of the special law, would not be attracted in the facts of the present case. While the FSSA only provides for penalty for the offence made out under any of the provisions of the said Act, the NSA provides for preventive detention on the above referred to three grounds. Both the enactments operate in different spheres and have been enacted for different purposes. Therefore, neither of them can be said to be a special or general law in that sense.

9. Shri Naman Nagrath, learned Senior Counsel, in support of his arguments, placed reliance upon various judgments of the Supreme Court in **Smt. Bimla Dewan vs. Lt. Governor of Delhi** (1982) 2 SCC 469; **Gulab Mehra vs. State of U.P. and others** (1987) 4 SCC 302; **Victoria Fernandes (Smt.) vs. Lalmal Sawma and others** (1992) 2 SCC 97; **Kamalbai (Smt) vs. Commissioner of Police, Nagpur and others** (1993) 3 SCC 384; **State of U.P. and another vs. Sanjai Pratap Gupta and others** (2004) 8 SCC 591; **Pebam Ningol Mikoi Devi vs. State of Manipur and others** (2010) 9 SCC 618; **Rekha vs. State of**

Tamil Nadu and another (2011) 5 SCC 244; **Yumman Ongbi Lembi Leima vs. State of Manipur and others** (2012) 2 SCC 176; **Munagala Yadamma vs. State of A.P. and others** (2012) 2 SCC 386; **G. Reddeiah vs. Government of Andhra Pradesh and another** (2012) 2 SCC 389; **State of Tamil Nadu vs. Nabila and another** (2015) 12 SCC 127 and **Ankit Ashok Jalan vs. Union of India and others** (2020) 16 SCC 127. Learned Senior Counsel also relied upon a Division Bench decision of this Court in **Mueen @ Mubeen Kha vs. The State of M.P.** (2012 SCC Online MP 4361).

10. Shri Sankalp Kochar, learned counsel for the petitioners (in W.P. Nos.28804/2019 and W.P. No.717/2020), in respect of the first question as to whether a detainee, who is detained under the NSA, has a right to make a representation to the District Magistrate also relying upon the judgment of the Supreme Court in **Kamlesh Kumar Ishwardas Patel (supra)**, argued that Article 22(5) of the Constitution of India has to be construed to mean that the person detained has a right to make a representation not only to the Advisory Board but also to the detaining authority, who is competent to give immediate relief by revoking the detention order. In this regard, learned counsel also placed reliance upon two judgments of the Supreme Court in **Ibrahim Bachu Bafan vs. State of Gujarat**, (1985) 2 SCC 24 and **Amir Shad Khan vs. L. Hmingliana and others** (1991) 4 SCC 39. The argument of the learned counsel for the petitioners therefore is that the conferment of power of revocation on the Central Government and the State Government does not have the effect of diluting the power of the detaining authority himself is

competent under Section 14 of the NSA to revoke the order of detention till it is not approved by the appropriate Government.

11. Relying upon the judgment of the Supreme Court in **State of Maharashtra and others vs. Santosh Shankar Acharya**, (2000) 7 SCC 463, wherein the Supreme Court was dealing with the case of preventive detention under Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders and Dangerous Persons Act, 1981, which is *pari materia* to Section 8(1) of the NSA, learned counsel argued that the Supreme Court therein held that although it provides that the representation must be made to the State Government, the detaining authority continues to be the detaining authority until the order of detention issued by him is approved by the State Government within a period of twelve days from the date of issuance of detention order. Consequently, until the said detention order is approved by the State Government, the detaining authority can entertain a representation from a detenu and in exercise of its power under the provisions of Section 21 of the Bombay General Clauses Act could amend, vary or rescind the order, as is provided under Section 14 of the Maharashtra Act. Such a construction of powers would give a full play to the provisions of Section 8(1) as well as Section 14 and also Section 3 of the Maharashtra Act.

12. Shri Sankalp Kochar, learned counsel for the petitioners, relying upon the judgment of the Supreme Court in **Veeramani vs. State of Tamil Nadu** (1994) 2 SCC 337, argued that the Supreme Court in that

case was dealing with the situation which emerged by order of the State Government and not prior thereto. The Supreme Court in that case discussed its earlier judgment in **Raj Kishore Prasad vs. State of Bihar**, (1982) 3 SCC 10, which pertained to NSA and reiterated the same law but did not entertain this argument in the facts of the case considering representation reached the detaining authority only after the detention order had been approved by the State Government and not before. Learned counsel also placed reliance upon the judgment of the Supreme Court in **Sri Anand Hanumathsa Katare vs. Additional District Magistrate and others**, (2006) 10 SCC 725 and a Full Bench judgment of Gauhati High Court in **Konsam Brojen Singh vs. State of Manipur and others** (2006) 2 Gauhati Law Reports 452. Relying upon the judgments in **Kamlesh Kumar Ishwardas Patel** (supra), **Santosh Shankar Acharya** (supra) and **Konsam Brojen Singh** (supra), learned counsel for the petitioners argued that failure of the detaining authority to inform the detenu about his right to make a representation to the detaining authority himself, apart from the State Government or the Central Government/Advisory Board, would have the effect of vitiating the order of detention. The argument that such a representation can be made to the detaining authority and accepted before the detention is approved by the appropriate Government, finds support from the various decisions of this Court in the cases of **Ram Niwas Urmalia vs. Union of India** (2016 SCC OnLine MP 9868), **Narayan Ju Singh Chouhan vs. State of M.P.** (2016 SCC OnLine MP 1272); **Salma vs. State of M.P.** rendered on 04.06.2015 in W.P. No.5866/2015 and **Abhinav**

Dwivedi vs. State of M.P. passed in W.P. No.1830/2015 decided on 01.04.2015. Learned counsel further placed reliance upon the judgment of Allahabad High Court in **Nadim Khan vs. State of U.P.** (2002 SCC Online All 371), decision of Rajasthan High Court in **Sujiya @ Suje Khan and others vs. State of Rajasthan** (2001 SCC Online Raj 1268); and three judgments of Gauhati High Court in **Konsam Brojen Singh** (supra), **Akheto Sumi vs. Union of India** (2014) 3 Gauhati Law Reports 760, and **Akhil Gogoi vs. State of Assam and others** (2018) 2 Gauhati Law Reports 453.

13. *Per-contra*, Shri A.P. Singh, learned Deputy Advocate General appearing for the respondents/State argued that the questions referred to the Larger Bench have to be considered in the light of the scheme of the NSA relating to preventive detention contained in Article 22 of the Constitution of India. Section 8 of the NSA specifically provides that the detenu shall be afforded opportunity of making a representation against the order to the appropriate Government. Clause (5) of Article 22 of the Constitution provides for earliest opportunity of making a representation against the order. Under the scheme of NSA, the detention order made by the detaining authority has to be approved by the appropriate Government within twelve days of its making. The earliest opportunity as per the provision contained in Section 10 of the NSA is provided to the detenu to make a representation before the Advisory Board or the State Government or the Central Government. The petitioner was very much informed of this right. The District Magistrate being subordinate to the State Government, having once reported the factum of detention

to the appropriate Government and sought approval of the order of detention, does not have the authority to revoke such order. It is the appropriate Government alone, which can then revoke the order of detention either on its own or on the opinion of the Advisory Board.

14. Learned Deputy Advocate General argued that the judgment of the Supreme Court in **Kamlesh Kumar Ishwardas Patel** (**supra**) is distinguishable, since under the COFEPOSA Act there is no provision relating to approval of the detention by the Central Government within twelve days. The scheme of the NSA also does not provide for making a representation to the District Magistrate. Once the order of the preventive detention passed by the District Magistrate has been approved by the State Government, he becomes *functus officio*. Relying upon the judgment of the Supreme Court in **Amir Mohammed Qureshi Vs. Commissioner of Police, Greater Bombay (1994) 2 SCC 355**, learned Deputy Advocate General argued that the Supreme Court in that case has held that the competent authority to whom the representation could be made under the NSA, would be the Central Government or the State Government and not the detaining authority itself. The detaining authority i.e. the District Magistrate in this case, would not be obliged to inform the detenu that he can also make a representation to him. It is further contended that relying upon the judgment in **State of Maharashtra and another Vs. Smt. Sushila Mafatlal Shah and others** (1988) 4 SCC 490, the Supreme Court in **Veermani** (**supra**) has also held that there is no specific provision relating to approval of detention order by the appropriate Government under the COFEPOSA

Act and the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (hereinafter referred to as "the PIT NDPS Act"). Learned Deputy Advocate General further contended that neither the COFEPOSA Act nor the PIT NDPS Act require that the authority making the order of detention shall afford an opportunity of hearing to make a representation to the detaining authority himself. As per the scheme of the COFEPOSA Act, a detention order passed by an officer acquires deemed approval by the Government from the time of its issuance and by reason of the same, the appropriate government becomes detaining authority thereby constitutionally obliged to consider the representation made by the detenu. Such would not be a position with regard to detention under the NSA. Learned Deputy Advocate General in support of his argument, has placed heavy reliance upon the judgment of the Supreme Court in **Amir Mohammed Qureshi (supra**) and Division Bench judgment of this Court in **Akash Yadav vs. State of M.P.** passed in W.P. No.2695/2019 on 12.04.2019.

15. On the question whether the provision of preventive detention under the NSA can be invoked in a case of trading or manufacturing of adulterated food stuff, harmful and dangerous to the large number of citizens, learned Deputy Advocate General argued that the adulterated food article sold in public being an offense under the FSSA, would have the the magnitudinal effect on the society and be prejudicial to the maintenance of public order, as it affects the health of general public in a big way thereby causing disturbance to the tempo of the society and public order. The power of preventive detention can therefore be very

much invoked in such a case. It is contended that the adulteration of food stuff in a systematic way creates fear psychosis in the minds of the citizens thereby proving to be prejudicial to the public order and has the effect of disturbing the tempo of the society. It is a settled position of law that the order of detention can be made in anticipation or after discharge or even after acquittal. Learned Deputy Advocate General further argued that the Division Bench judgment in **Sudeep Jain vs. State of M.P**. in W.P. No.2168/2019 decided on 8.11.2019 does not lay down correct law and is rather contrary to the settled proposition of law. The Division Bench in that case failed to comprehend the nature of the scheme of preventive detention law contained in the NSA, which power is invoked only for the welfare of the people, security of the State and is devised to offer protection to society by preventing certain persons from committing the acts prejudicial to the public order and is not by way of punishment.

16. Learned Deputy Advocate General in support of his arguments has also placed reliance upon the judgments of the Supreme Court in **Haradhan Saha vs. State of West Bengal** (1975) 3 SCC 198; **A.K. Roy vs. Union of India**, AIR 1982 SC 710; **Ashok Kumar vs. Delhi Administration and others** (1982) 2 SCC 403, **State of U.P. vs. Hari Shankar Tewari**, (1982) 2 SCC 490; **State of U.P. vs. Sanjai Pratap Gupta** (2004) 8 SCC 591; and **Bankat Lal vs. State of Rajasthan** (1995) 4 SCC 598. Reliance is also placed on the Division Bench judgment of this Court in **Brijesh Dubey vs. State of M.P. and others,** 2011 (4) MPLJ 252; Division Bench judgment of Gwalior Bench of this

Court in **Rajeev Gupta vs. State of M.P. And others**, 2020 Cr.L.J. 1423 Manu/MP/2117/2019; Division Bench judgments of this Court in **Vikky Chandwani vs. Union of India and others** in W.P. No.16954/2020 decided on 21.12.2020 and **Vivek Khurana vs. State of M.P.** in W.P. No.1362/2020 decided on 20.05.2020.

17. We have given our anxious consideration to the rival submissions and respectively cited judgments.

18. Before embarking on the examination of the arguments advanced by learned counsel for both the sides on the referred questions, we must clarify that the invocation of the principle *generalia specialibus non-derogant* by one of the learned Judges (Mr. Justice Atul Sreedharan) in paragraph No.8 of the dissenting order that the general law shall not prevail over the provisions of the special law, on the basis of what was held in paragraph No.19 of the judgment of **Sudeep Jain Vs. State of Madhya Pradesh and others** (W. P. No.21768/2019) decided on 8.11.2019, does not stand on sound legal foundation and has no relevance to the question that we are dealing with. That principle, in our considered opinion, would not be attracted to the facts of the present case. The order of preventive detention under NSA does not overlap with the panel provisions under the FSSA as it is not in lieu of that but is rather in addition to that. The preventive detention law can operate side by side the law which makes the offences punishable under the substantive offences under the IPC or the FSSA. The preventive detention under the NSA is only anticipatory action and is not a punitive

measure. The law that is generally applied to the cases of preventive detention is that if an offence committed by an offender, which merely effect the law and order situation, can be dealt with under ordinary penal laws, the extraordinary provisions of preventive detention ought not to be invoked, but it cannot deduced from this that the ordinary penal laws, would for that purpose, be considered general law and the relevant laws of the preventive detention, which in this case would be NSA, would be considered as a special law or vice versa. While FSSA only provides for penalty for the offence made out under the provisions of the said Act, the NSA provides for the preventive detention if parameter enumerated in sub-Section (2) of Section 3 are attracted. These two Acts have been enacted to achieve different object and for difference purpose. The provisions which makes the offence punishable under the FSSA is intended to punish the offender for the offence committed by him, but the object which the NSA seeks to achieve is to put the person concerned in detention so as to prevent him from doing an act but not to punish him for something which he has done. While the former is based on the act already done by him, the latter is based on the likelihood of his acting in a manner similar to his past acts and preventing him for repeating the same. We are therefore not persuaded to approve of the line of reasoning taken by the Division Bench in paragraph No.19 of the judgment in **Sudeep Jain** (supra) to that effect and paragraph No.8 of the dissenting order by one of the Hon'ble Judges referred to above.

19. The Constitution Bench of the Supreme Court in **Kaushalya Rani Vs. Gopal Singh** AIR 1964 SC 260 held that special law means a law

enacted for special cases, in special circumstances, in contradistinction to the general rules of the law laid down, as applicable generally to all cases with which the general law deals. In the context of facts of that case, their Lordships held that in that sense, the Criminal Procedure Code is a general law regulating the procedure for the trial of criminal cases generally, but if it lays down any bar of time in respect of special cases in special circumstances, like those contemplated by Section 417 (3) & (4) of the Code of the Criminal Procedure, 1898, read together, it will be a special law contained within the general law. Therefore, as the Limitation Act has not defined 'special law', it is neither necessary nor expedient to attempt a definition, Their Lordships held that the Limitation Act is a general law laying down the general rules of limitation applicable to all cases dealt with by the Act, but there may be instances of a special law of limitation laid down in other statutes, though not dealing generally with the law of limitation.

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."

21. The principles that have also been applied in resolving a conflict between two different Acts and in the construction of statutory rules have been discussed in **Principles of Statutory Interpretation** by Justice G. P. Singh. These principles are known as the maxims *generalia specialibus non derogant* (general things do not derogate from special things) *and specialia generalibus derogant* (special things derogate from

general things) (*See : page 146 13th Edition, 2012*). The Supreme Court in **P. V. Hemalatha Vs. Kattamkandi Puthiya Maliackal Saheeda and another** (2002) 5 SCC 548, in paragraph No.33 of the report held that: "When the Courts are confronted with such a situation, the Courts' approach should be "to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific".

In view of the law enunciated above, the judgment of the Division Bench of this Court in **Sudeep Jain** (supra) to the extent of what was held in its paragraph No.19 is overruled.

22. We shall now deal with the reference order made by the Division Bench of this Court at Indore Bench in the case of **Manish Vs. State of M.P. and other** (W.P. No.28804/2019). In our considered opinion, all the three questions which Division Bench has formulated and referred for our consideration stands answered in the affirmative by the judgment of the Constitution Bench of the Supreme Court in **Kamlesh Kumar Ishwardas Patel** (supra). The Constitution Bench of Supreme Court in **Kamlesh Kumar Ishwardas Patel** (supra) was dealing with the question that when an order of preventive detention is passed by an officer especially empowered to do so by the Central Government or the State Government, whether such officer is required to consider the representation submitted by the detenu. The matter arose before the Supreme Court from the detention order passed by the officer specially empowered by the Central Government under Section 11 of the

COFEPOSA Act and under Section 12 of the PIT NDPS Act. There was divergence of opinion in the decisions of the Supreme Court on this issue. In **Amar Shad Khan Vs. L. Hmingliana and others** (1991) 4 SCC 39, a three-judge Bench of the Supreme Court held that where an officer of the State Government or the Central Government has passed any detention order and on receipt of a representation, he is convinced that the detention needs to be revoked, he can do so. However another two-judge Bench of the Supreme Court in **Smt. Sushila Mafatlal Shah** (supra) took a difference view and held that if an order of detention is made by an officer specially empowered by the Central Government or the State Government, the representation of the detenue is required to be considered only by the Central Government or the State Government and not by the officer who had made the order. The Constitution Bench of the Supreme Court upon consideration of the conflicting opinions of the two-judge Bench decisions and upon survey of the previous case laws on the subject and analysis of the mandate of Article 22(5) of the Constitution of India, in **Kamal Kumar Ishwardas Patel** (supra) held that the provisions in COFEPOSA Act and PIT NDPS Act differ from those contained in the National Security Act, 1980 as well as earlier preventive detention laws of the Preventive Detention Act, 1950, the Maintenance of Internal Security Act, 1971 in some respects. Under sub-section (3) of Section 3 of the National Security Act, power has been conferred on the District Magistrate as well as the Commissioner of Police to make an order of detention, and sub-section (4) of Section 3 prescribes that the officer shall forthwith report the fact of making the

order to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter, and that no such order shall remain in force for more than twelve days after the making thereof unless, in the meantime, it has been approved by the State Government. In Section 8 (1) of the NSA, it is prescribed that the authority making the order shall afford the person detained the earliest opportunity of making a representation against the order to the appropriate Government. Similar provisions were contained in the Preventive Detention Act, 1950 and the Maintenance of Internal Security Act, 1971. However, the COFEPOSA Act and the PIT NDPS Act do not provide for approval by the appropriate Government of the orders passed by the officer specially empowered to pass such an order under Section 3. The said Acts also do not lay down that the authority making the order shall afford an opportunity to make a representation to the appropriate Government.

23. The Constitution Bench of the Supreme Court in **Kamlesh Kumar Ishwardas Patel** (supra) however held that in view of Section 21 of the General Clauses Act, the authority which has made the order of detention would be competent to revoke the said order. Section 11 of the COFEPOSA Act and Section 12 of the PIT NDPS Act provide for revocation of such an order by authorities other than the authority which has made the order. Under clause (a) of sub-section (1) of both these sections, an order made by an officer specially empowered by the State Government can be revoked by the State Government as well as by the Central Government and under clause (b) of sub-section (1) an order

made by an officer specially empowered by the Central Government or an order made by the State Government, can be revoked by the Central Government. Similarly, the State Government has the power to revoke an order made by an officer specially empowered by the State Government. In other words, an order made by the officer specially empowered by the State Government can be revoked by the State Government as well as by the Central Government, an order made by the State Government can be revoked by the Central Government and an order made by an officer specially empowered by the Central Government can be revoked by the Central Government. Their Lordships however held that the conferment of this power on the Central Government and the State Government does not however detract from the power that is available to the authority that has made the order of detention to revoke it. The power of revocation that is conferred on the Central Government and the State Government under clauses (a) and (b) of sub-section (1) of Section 11 of the COFEPOSA Act and Section 12 of the PIT NDPS Act is in addition to the power of revocation that is available to the authority that has made the order of detention. This is ensured by the words "without prejudice to the provisions of Section 21 of the General Clauses Act, 1897" in sub-section (1) of both the provisions. The observations made by the Supreme Court in paragraph No.23 are worth quoting, which reads as under:-

> "23. If the power of revocation is to be treated as the criterion for ascertaining the authority to whom representation can be made, then the representation against an order of detention made by an officer specially empowered by the State Government can be

> made to the officer who has made the order as well as to the State Government and the Central Government who are competent to revoke the order. Similarly, the representation against an order made by the State Government can be made to the State Government as well as to the Central Government and the representation against an order made by an officer specially empowered by the Central Government can be made to the officer who has made the order as well as to the Central Government."

24. Disapproving the view taken by the two-judge Bench of the Supreme Court in the case of **Sushila Mafatlal Shah** (supra) that Article 22 (5) of the Constitution of India does not confer a right on detenu to make a representation to the officer specially empowered to make the order and under the provisions of the COFEPOSA Act when the order of detention is made by the officer specially empowered to do so, the detaining authority is the appropriate Government, namely, the Government which has empowered the officer to make the order, since such order acquires 'deemed approval' by the Government from the time of its inception, the Constitution Bench in **Kamlesh Kumar Ishwardas Patel** (supra) in paragraphs No.31 and 33 of the report held as under:-

> "31. With due respect we find it difficult to agree with both the premises. Construing the provisions of Article 22 (5) we have explained that the right of the person detained to make a representation against the order of detention comprehends the right to make such a representation to the authority which can grant such relief, i.e., the authority which can revoke the order of detention and set him at liberty and since the officer who has made the order of detention is competent to revoke it, the person detained has the right to make a representation to the officer who made the order of detention. The first premises that such right does not flow from Article 22 (5) cannot, therefore, be accepted.

xxx xxx xxx

> 33. The second premise that the Central Government becomes the detaining authority since there is deemed approval by the Government of the order made by the officer specially empowered in that regard from the time of its issue, runs counter to the scheme of the COFEPOSA Act and the PIT NDPS Act which differs from that of other preventive detention laws, namely, the National Security Act, 1980, the Maintenance of Internal Security Act, 1971, and the Preventive Detention Act, 1950."

25. Clarifying the distinction between the nature of power of the detaining authority in COFEPOSA Act and the PIT NDPS Act viz a viz the powers given under Section 3(4) of the NSA, the Constitution Bench of the Supreme Court **Kamlesh Kumar Ishwardas Patel** (supra) in paragraph No.34 of the report held as under:-

> "34. In the National Security Act there is an express provision [Section 3(4)] in respect of orders made by the District Magistrate or the Commissioner of Police under Section 3(3) and the District Magistrate or the Commissioner of Police who has made the order is required to forthwith report the fact to the State Government to which he is subordinate. The said provision further prescribes that no such order shall remain in force for more than twelve days after the making thereof, unless, in the meantime, it has been approved by the State Government. This would show that it is the approval of the State Government which gives further life to the order which would otherwise die its natural death on the expiry of twelve days after its making. It is also the requirement of Section 3(4) that the report should be accompanied by the grounds on which the order has been made and such other particulars as, in the opinion of the said officer, have a bearing on the matter which means that the State Government has to take into consideration the grounds and the said material while giving its

> approval to the order of detention. The effect of the approval by the State Government is that from the date of such approval the detention is authorised by the order of the State Government approving the order of detention and the State Government is the detaining authority from the date of the order of approval. That appears to be the reason why Section 8(1) envisages that the representation against the order of detention is to be made to the State Government. The COFEPOSA Act and the PIT NDPS Act do not require the approval of an order made by the officer specially empowered by the State Government or by the Central Government. The order passed by such an officer operates on its own force. All that is required by Section 3(2) of COFEPOSA Act and PIT NDPS Act is that the State Government shall within 10 days forward to the Central Government a report in respect of an order that is made by the State Government or an officer specially empowered by the State Government. An order made by the officer specially empowered by the State Government is placed on the same footing as an order made by the State Government because the report has to be forwarded to the Central Government in respect of both such orders. No such report is required to be forwarded to the Central Government in respect of an order made by an officer specially empowered by the Central Government. Requirement regarding forwarding of the report contained in Section 3(2) of the COFEPOSA Act and the PIT NDPS Act cannot, therefore, afford the basis for holding that an order made by an officer specially empowered by the central Government or the State Government acquires deemed approval of that government from the date of its issue……..”

26. In view of the above referred to enunciation of law on the subject by the Constitution Bench of the Supreme Court, it can be held that the life of the order passed by the District Magistrate or the Commissioner of Police under Section 3(3) of the NSA, is only up to twelve days and that such order gets further life only upon approval of the State

Government, otherwise it would die its natural death on the expiry of twelve days after its making. Section 3 (4) of the NSA casts a duty on the District Magistrate or the Commissioner of Police, whoever has made the order of detention, to forthwith report the factum about such detention to the State Government together with the grounds on which such order has been made and other particulars as, in his opinion, have bearing on the matter. It is then for the State Government who has to take into consideration the grounds and material while giving its approval to the order of detention. So long as the detenu remains under preventive detention under the authority of the order passed by the detaining authority i.e. the District Magistrate or the Commissioner of Police, i.e. for a period of 12 days or till the approval of the preventive detention by the State Government, whichever is earlier, such District Magistrate/Commissioner of Police continues to be the detaining authority. If and when the further detention of the detenu is approved by the order of the State Government, then onwards, it is the State Government which becomes the detaining authority. Therefore, till the detention has not been approved by the State Government, the District Magistrate/Commissioner of Police, under whose order the detenu has been kept under preventive detention, retains the authority to revoke the order made by him by virtue of Section 21 of the General Clauses Act as envisaged by Section 14 of the NSA.

27. The Supreme Court in a recently delivered judgment in **Ankit Ashok Jalan** (supra), has followed the judgment of Constitution Bench

of Supreme Court in **Kamlesh Kumar Ishwardas Patel** (supra) and has held as under:-

> "13.With the judgment of the Constitution Bench of this Court in **Kamlesh Kumar Ishwardas Patel** (supra), the law on the first issue is well settled that where the detention order is made inter alia under Section 3 of the COFEPOSA Act by an officer specially empowered for that purpose either by the Central Government or the State Government, *the person detained has a right to make a representation to the said officer; and the said officer is obliged to consider the said representation; and the failure on his part to do so would result in denial of the right conferred on the person detained to make a representation*. Further, such right of the detenue has been taken to be in addition to the right to make the representation to the State Government and the Central Government. It must be stated that para 12 of the grounds of detention in the instant case, as quoted hereinabove, is in tune with the law so declared by this Court."

28. Reference on the question which we are considering was made to a Full Bench constituting of five-judges of Gauhati High Court in **Konsam Brojen Singh Vs. State of Manipur and others** reported in (2006) 2 Gauhati Law Reports 452, upon doubt being expressed about the correctness of a Full Bench decision of the same Court consisting of three-judges. The Full Bench upon examination of a series of case law on the subject and relying on the Constitution Bench judgment of the Supreme Court in **Kamlesh Kumar Ishwardas Patel** (supra) in paragraph No.57 of the report, held as under:-

> "57. For all the aforesaid reasons, we hold :
>
> (1) That a detenue has two rights under Article 22(5) of the

Constitution :

(i) to be informed, as soon as may be, the grounds on which the order of detention is passed, i.e., the grounds which led to the subjective satisfaction of the detaining authority, and

(ii) to be afforded the earliest opportunity of making a representation against the order of detention. The twin rights are available to a detenu whether they are provided for or not in the preventive detention laws.

(2) The right to make representation to the detaining authority by a detenue in addition to his right to file representation to the Central Government or appropriate Government is also guaranteed under Article 22(5) of the Constitution which forms part of package of guaranteed fundamental right. No distinction as such could be made in this regard in respect of the detention orders made either under COFEPOSA, PIT NDPS or national Security Act, 1980, as the case may be.

(3) The detaining authority is under the constitutional obligation to inform the detenue of his right to make such a representation to the detaining authority.

(4) The failure to inform the detenue of such right to make representation to the detaining authority vitiates the detention order made even under the provisions of the National Security Act, 1980."

29. Reliance has been placed by the learned Deputy Advocate General on the judgment of two-judge Bench of the Supreme Court in **Amin Mohammed Qureshi Vs. Commissioner of Police, Greater Bombay** (1994) 2 SCC 355 to argue that in view of the provisions contained in Section 8 of the NSA, the detaining authority is not under an obligation to tell the detenu that he can make a representation to it also and that the competent Authority to whom the presentation could be made would be

the Central Government or the State Government and not the detaining authority. No doubt, the Supreme Court in the aforesaid judgment in the context of the facts of that case made the aforesaid observations. The detaining authority in that case while supplying the copies of the documents and the grounds of detention alongwith the order of detention informed him that he had a right to make representation to the Central Government or the State Government against the detention order. Reliance on behalf of the detenu in that case was placed on the judgment of three-judge Bench of Supreme Court in **Amir Shad Khan** (supra) which judgment was later approved by the Constitution Bench of the Supreme Court in **Kamlesh Kumar Ishwardas Patel** (supra) but the two-judge Bench of the Supreme Court in **Amin Mohammed Qureshi** (supra), preferred to follow earlier two-judge Bench decision consisting of same Hon'ble Judges in **Veeramani** (supra) and took the aforesaid view. **Veeramani** (supra) however was the case in which even on facts the Supreme Court observed that within a period of 12 days from the date of detention order the detaining authority had power to revoke the order and, therefore, the detenu could make representation before it, but this argument does not stand on facts since no representation either by the detenu or by his wife addressed to the detaining authority reached within 12 days from the date of order of detention and that in the meanwhile the Government had approved the detention. The judgment of **Veeramani** (supra) was, thus, distinguishable even on facts and has not been correctly relied in subsequent judgment in **Amin Mohammad Qureshi** (supra). There is another reason why the judgment of **Amin**

Mohammad Qureshi (supra) cannot be followed which is that the Supreme Court in **Veeramani** (supra) has followed earlier two-judge Bench judgment in **Sushila Mafatlal Shah** (supra) and it was this judgment which has been overruled by the Constitution Bench of the Supreme Court in **Kamlesh Kumar Ishwardas Patel** (supra). Therefore, the judgment of **Amin Mohammad Shah** (supra) should also be taken to have been impliedly overruled.

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."

31. The Constitution Bench in **Kamlesh Kumar Ishwardas Patel**

(supra) categorically negatived the argument, albeit in the context of the provisions of the COFEPOSA Act and PIT NDPS Act, that the detention therein does not require approval of an order made by the officer specially empowered by the State Government or by the Central Government and that the order passed by such officer has to be placed on the same footing as an order made by the State Government because the report has to be forwarded to the Central Government, therefore the order of detention would acquire deemed approval of the Government from the date of its issue. Repelling such argument, the Supreme Court held that approval, actual or deemed, postulates application of mind to the action being approved by the authority giving approval. Approval of an order of detention would require consideration by the approving authority of the grounds and the supporting material on the basis of which the officer making the order had arrived at the requisite satisfaction for the purpose of making the order of detention. Unlike Section 3(4) of the National Security Act, there is no requirement in the COFEPOSA Act and the PIT NDPS Act that the officer specially empowered for the purpose of making of an order of detention must forthwith send to the Government concerned the grounds and the supporting material on the basis of which the order of detention has been made. Nor is it prescribed in the said enactments that after the order of detention has been made by the officer specially empowered for that purpose the Government concerned is not required to apply its mind to the grounds and the supporting material on the basis of which the order of detention was made. The only circumstances from which inference

about deemed approval is sought to be drawn is that the order is made by the officer specially empowered for that purpose by the concerned Government. Merely because the order of detention has been made by the officer who has been specially empowered for that purpose would not, the Supreme Court held, justify the inference that the said order acquires deemed approval of the government that has so empowered him, from the date of the issue of the order so as to make the said government the detaining authority.

32. The Constitution Bench of Supreme Court in **Kamlesh Kumar Ishwardas Patel** (supra) held that by specially empowering a particular officer under Section 3(2) of the COFEPOSA Act and Section 3(2) of the PIT NDPS Act, the Central Government or the State Government, confers an independent power on the said officer to make an order of detention after arriving at his own satisfaction about the activities of the person sought to be detained. Since the detention of the person detained draws its legal sanction from the order passed by such officer, the officer is the detaining authority in respect of the said person and he continues to be the detaining authority so long as the order of detention remains operative. The distinction between the detention order passed under COFEPOSA Act and PIT NDPS Act viz a viz those under NSA is that while in the former enactments the detaining authority ceases to be the detaining authority only when the order of detention ceases to operate, which would happen on expiry of the period of detention as prescribed by law or on the order being revoked by the officer himself or by the authority mentioned in Section 11 of the COFEPOSA Act and Section

12 of the PIT NDPS Act but in NSA he continues to be the detaining authority till the detention has not been approved by the appropriate Government. Once the detention order is approved by the Government, he ceases to be the detaining authority and it is the appropriate Government which then assumes the role of the detaining authority.

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."

34. This issue again came up for consideration before the Supreme Court later in **Santosh Shankar Acharya** (supra), in the context of order of preventive detention passed under Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders and dangerous Persons Act, 1981. Following the ratio of the Constitution Bench in **Kamlesh Kumar Ishwardas Patel** (supra), it was held that the detaining authority i.e. the District Magistrate or the Commissioner of Police, is obliged to communicate to the detenu about detenu's right to make representation to him until detention order passed by him is approved by the State Government within 12 days and non-communication thereof would vitiate the detention order.

35. Adverting now to the question whether the offence committed under Food Safety and Standards Act, 2006, which contains penalty clause, under no circumstances can form basis to make an order of preventive detention of the offender whose activities are prejudicial to maintenance of public order under the National Security Act, 1980, the question referred to the larger Bench itself contains the answer to it that if an offence committed by an accused under Food Safety and Standards Act, 2006 whose activities are prejudicial to maintenance of public order, can be detained under NSA. It would however depend on the facts and situation of a given case. What has been argued before us in the present case is that the petitioner – Kamal Khare was booked for committing an offence under Section 26(2)(ii) and Section 52 of the

FSSA on the basis of solitary incident in which certain sample of cottage cheese (Paneer) collected from his shop as per the report of food analyst was found not confirming to the prescribed standard. In facts like this, it could be then for the detaining authority to arrive at the subjective satisfaction whether the activities of the person sought to be detained under the NSA are prejudicial to maintenance of public order. In other words, whether the material grounds on which such inference is sought to be drawn is really so compelling as to arrive at the subjective satisfaction which is envisaged in sub-section (2) of Section 3 of NSA that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, his detention would be necessary.

36. What would constitute the prejudice to the maintenance of public order has been a matter of debate ever since the inception of the law of preventive detention. We shall now try to analyse the concept of public order by survey of the decided case law on the subject. In **Dr. Ram Manohar Lohia Vs. State of Bihar** AIR 1966 SC 740 it has been observed by the Supreme Court that :

> "The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. There are three concepts according to the learned Judge (Hidayatullah, J) i.e. "law and order", "public order" and "security of the State". It has been observed that to appreciate the scope and extent of each of them, one should imagine three concentric circles. The largest of them represented law and order, next represented public order and the smallest represented the security of the State. An act might affect law and order but not public order just as an act might affect public order but not the security of the State."

37. The Supreme Court in **Smt. Bimla Dewan** (supra), following the observations in **Arun Ghosh Vs. State of West Bengal** (1970) 1 SCC 98 has held as under:-

> "7. Before considering the other instances, it is necessary to note what Hidayatullah, C.J. has observed in Arun Ghosh v. State of West Bengal (supra) It is this: (SCC p. 100, para 3)
> "……Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being way-laid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its effect upon the public tranquility there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies….."

38. In **S. K. Kedar Vs. State of West Bengal** (1972) 3 SCC 816 the Supreme Court has observed as under:-

> "The question whether a person has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is one of degree and the extent of the reach of the act upon the society. An act by itself is not determinative of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Similar acts in different contexts affect differently law and

> order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. It is the degree of disturbance upon the life of the community which determines whether the disturbance amounts only to a breach of the law and order".

39. In **Kanu Biswas Vs. State of West Bengal** (1972) 3 SCC 831 while discussing the meaning of word 'public order' the Supreme Court held that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order, is a question of degree and extent of the reach of the act upon the Society. Public order is what the French call "*ordre publique*" and is something more than ordinary maintenance of law and order.

40. The Supreme Court in **Kanchanlal Meneklal Chokshi Vs. State of Gujarat and others** (1979) 4 SCC 14 on the issue observed thus:-

> "The ordinary criminal process is not to be circumvented or short circuited by ready resort to preventive detention. But, the possibility of launching a criminal prosecution is not an absolute bar to an order of preventive detention. Nor is it correct to say that if such possibility is not present to the mind of the detaining authority the order of detention is necessarily bad. However, the failure of the detaining authority to consider the possibility of launching a criminal prosecution may, in the circumstances of a case, lead to the conclusion that the detaining authority had not applied its mind to the vital question whether it was necessary to make an order of preventive detention. Where an express allegation is made that the order of detention was issued in a mechanical fashion without keeping present to its mind the question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose, the detaining authority must satisfy the Court that question too was

> borne in mind before the order of detention was made. If the detaining authority fails to satisfy the Court that the detaining authority so bore the question in mind the Court would be justified in drawing the inference that there was no application of the mind by the detaining authority to the vital question whether it was necessary to preventively detain the detenu."

41. The Supreme Court has further observed in **Ashok Kumar Vs. Delhi Administration and others** (1982) 2 SCC 403 as under: -

> "The true distinction between the areas of 'public order and 'law and order' lies not in the nature of quality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of 'law and order' and 'public order' is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order".

42. In **State of U.P. Vs. Hari Shankar Tewari** (1987) 2 SCC 490 the Supreme Court held as under:-

> "Conceptually there is difference between law and order and public order but what in a given situation may be a matter covered by law and order may really turn out to be one of public order. One has to turn to the facts of each case to ascertain whether the matter relates to the larger circle or the smaller circle."

43. The Supreme Court in **State of U.P. and another Vs. Sanjai Pratap Gupta Alias Pappu and others** (2004) 8 SCC 591 has held as under:-

“7. The crucial issue is whether the activities of the detenu were prejudicial to public order. While the expression 'law and order' is wider in scope inasmuch as contravention of law always affects order. 'Public order' has a narrower ambit, and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality. The distinction between the areas of 'law and order' and 'public order' is one of the degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise problem of law and order only. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps to distinguish it as an act affecting 'public order' from that concerning 'law and order'. The question to ask is: "Does it lead to disturbance of the current life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed"? This question has to be faced in every case on its facts.

8. “Public order” is what the French call 'ordre publique' and is something more than ordinary maintenance of law and order. The test to be adopted in determining whether an act affects law and order or public order, is: Does it lead to disturbance of the current life of the community so as to amount to disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? (See *Kanu Biswas v. State of West Bengal*) (supra).

9. "Public order" is synonymous with public safety and tranquility: "it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State". Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two

> drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum, which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. (*See Dr. Ram Manohar Lohia v. State of Bihar and Ors* (1966 (1) SCR 709).
>
> 10. "'Public Order", "law and order" and the "security of the State" fictionally draw three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the State. Every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect public order, but not necessarily the security of the State. The true test is not the kind, but the potentiality of the act in question. One act may affect only individuals while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for instance, affecting public order may have an impact that it would affect both public order and the security of the State. [*See Kishori Mohan Bera v. The State of West Bengal* (1972 (3) SCC 845); *Pushkar Mukherjee v. State of West Bengal* (1969 (2) SCR 635); *Arun Ghosh v. State of West Bengal* (1970 (3) SCR 288); *Nagendra Nath Mondal v. State of West Bengal* (1972 (1) SCC 498)."

44. What can therefore be culled out from all the afore-discussed judgments is that whether an act would constitute simple breach of law and order, or breach of public order, would solely depend on the degree and extent of its reach and effect upon the society. Public order is even tempo of the life of the community of an area or even a locality, as a whole. Degree of disturbance upon the life of the community would

determine whether it affects public order. An act by itself may not be a determinative factor of its gravity, but it is potentiality of its effect on the even tempo of the life of community that makes it prejudicial to the maintenance of public order. If the effect of act is restricted to certain individuals or a group of individuals, it merely creates a law and order problem but if the effect, reach and potentiality of the act is so deep and pervasive that it affects the community at large and disturbs the even tempo of the community that it becomes a breach of the public order. It therefore cannot be said that a single act would in all and every circumstances not be sufficient to affect public order or even tempo of the society. What is material is the effect of the act and not the number of acts and therefore what has to be seen is the effect of the act on even tempo of life of the people and the extent of its reach upon society and its impact.

45. The Supreme Court in **Hardhan Saha Vs. State of West Bengal** (1975) 3 SCC 198 while dealing with a case of preventive detention order passed under Maintenance of Internal Security Act, 1971 succinctly described the distinction between preventive detention and criminal prosecution and held that procedural reasonableness, which is invoked, cannot have any abstract standard or general pattern of reasonableness. The nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, all provide the basis for considering the reasonableness of a particular provisions. The procedure embodied in

the Act has to be judged in the context of the urgency and the magnitude of the problem, the underlying purpose of the restrictions and the prevailing conditions. The Supreme Court further held that :-

> "19. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it."

The Supreme Court in that case has also held that:-

> "19…..The basis of detention is the satisfaction of the executive of a reasonable probability or the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. The criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence."

46. The Supreme Court in **Union of India Vs. Paul Manickam and another** (2003) 8 SCC 342 held that the history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the Court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is of great importance. Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. However, the Constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of States' security, public order, disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions.

In a case of preventive detention no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. But at the same time, when a person's greatest of human freedoms, i.e., personal liberty is deprived, the laws of preventive detention are required to be strictly construed, and a meticulous compliance with the procedural safeguards, howsoever technical, has to be mandatorily made.

47. The Supreme Court in **State of Tamil Nadu and another Vs. Nabila and another** (2015) 12 SCC 127 relying on its earlier judgment in the case of **Hardhan Saha** (supra) held that:-

> "32. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be, made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.
>
> 33. Article 14 is inapplicable because preventive detention and prosecution are not synonymous. The purposes are different. The authorities are different. The nature of proceedings is different. In a prosecution an accused is sought to be punished for a past act. In preventive detention, the past act is merely the material for inference about the future course of probable conduct on the part of the detenu."

48. While therefore keeping the above referred to principles of law in view, the detaining authority is under an obligation to ensure that personal liberty of an individual is the most precious and prized right guaranteed under the Constitution. The State has been granted the power to curb such rights under criminal laws as also under the laws of preventive detention which are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are indeed in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order. If the offences complained of against the person are of a nature which can be dealt with under the ordinary law of land, taking recourse to the provisions of prevention detention would be contrary to the Constitutional guarantees enshrined in Articles 19 and 21 of the Constitution of India. It is trite that personal liberty protected under Article 21 of the Constitution of India is so sacrosanct and so high on the scale of Constitution values that it casts an obligation on the detaining authority to show that the order of preventive detention it has passed meticulously accord with the procedure established by law. Individual liberty is a cherished right which is one of the most valuable fundamental rights guaranteed by our Constitution to the citizens of the country. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established. Therefore, in the scheme of the Constitution, utmost importance has been given to life and personal liberty of the individual.

In the matter of preventive detention there is deprivation of liberty, therefore, safeguards provided by Article 22 of the Constitution of the India have to be scrupulously adhered to.

Referred questions are accordingly answered. Let the writ petitions be now laid before the Division Bench for hearing as per Roster.

(Mohammad Rafiq) (Rajeev Kumar Dubey) (Vijay Kumar Shukla)
Chief Justice Judge Judge

Anchal

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