Naeem Abdulla Khan vs The Commissioner Of Police And Ors on 18 November, 2016

Author: V.K. Tahilramani

Bench: V.K. Tahilramani, Mridula Bhatkar

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2312 OF 2016

Naeem Abdulla Khan
Age 38 Years, residing at Room No. 7,
Mujahid Chawl, Gulshan Nagar,
Jogeshwari (W), Mumbai - 400 102. .. Petitioner

(Brother o

Versus

1. The Commissioner of Police

Mumbai.

2. The State of Maharashtra

(Through Addl. Chief Secretary to
Government of Maharashtra (Home),

Home Department, Mantralaya,

Mumbai.

3. The Superintendent
Nashik Road Central Prison,

Nashik. .. Respondent

.....

Appearances
Mr. Udaynath Tripathi Advocate for the Petitioner

Ms. M.H. Mhatre APP for the State

.....

CORAM : SMT. V.K. TAHILRAMANI &
MRS. MRIDULA BHATKAR, JJ.

RESERVED ON : OCTOBER 26th, 2016.
PRONOUNCED ON : NOVEMBER 18th, 2016

ORAL JUDGMENT [PER SMT. V.K. TAHILRAMANI, J.] :

1. Heard learned counsel for the parties.

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2. The petitioner who is the brother of the detenu -

Sanaullah Abdul Khan has preferred this petition questioning the preventive detention order passed against him on 23.12.2015 by Commissioner of Police, Brihan Mumbai. The said detention order has been passed in exercise of the powers under Section 3(1) of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-

offenders and Dangerous Persons Act, 1981 ('MPDA Act' for short) as the detenu is a dangerous person whose activities are prejudicial to the maintenance of public order. The order of detention is based on one C.R. i.e C.R. No. 402/2015 and two in-camera statements of witnesses "A" and "B". The order of detention, grounds of detention along with accompanying documents were served on the detenu on 23.12.2015.

3. Though a number of grounds have been raised in the present petition whereby the detention order has been assailed, however, the learned counsel appearing for the jfoanz vkacsjdj 2 of 40 cri wp 2312-16 (j).doc petitioner has pressed only three grounds before us. The said grounds are ground Nos. 8(b), 8(e) and 8(f).

4. The first ground i.e ground 8(b), briefly stated, is that the detenu was already in judicial custody in C.R. No. 402/2015 as his bail application was rejected by the Sessions Court. Thereafter, the detenu had not preferred any application for bail. In such case, the detaining authority has not disclosed any material to come to the conclusion that there is imminent / real possibility of his release on bail.

There is no compelling necessity to detain a person when he is already in custody. This shows total non-application of mind of the detaining authority. The order is illegal since the satisfaction recorded is illegal, hence, detention order is liable to be quashed and set aside. In view of the contention raised by Mr. Tripahti, we proceed to examine whether there was reliable material before the detaining authority on the basis of which he had reason to believe that it is likely that the detenu would be released on bail.

5. As far as the above ground is concerned, the detaining authority in the grounds of detention had showed his awareness that the detenu was in custody. The detaining authority in paragraph 7 of the grounds of detention has further stated as under :-

> " ..... I am aware that as on today, you are not granted bail in connection with Oshiwara Police Station C.R. No. 402/2015.

> You had made a bail application in the Hon'ble Sessions Court which was rejected. Now that you have been charge-sheeted and there is likelihood for you being offered bail in this case. Since the offence is not punishable with death penalty or life term imprisonment, you are likely to be released on bail in the aforesaid case also and you may avail of the bail facility and will be a free person. In view of your tendencies and inclinations reflected in the offences committed by you as stated above, I am further satisfied that after your being granted bail and after release on bail and your becoming a free person and in the event of your being at large, you being a criminal, are likely to indulge in activities prejudicial to the maintenance of public order in future and that with a view to prevent you from acting in such a prejudicial manner in future, it is necessary to detain you....."

The above mentioned portion which is found in paragraph 7 of the grounds of detention leaves no manner of doubt that the detaining authority was fully aware of the fact that the detenu was in custody in C.R. No. 402/2015. The said case is mainly under Section 394 of IPC. The said jfoanz vkacsjdj 4 of 40 cri wp 2312-16 (j).doc offence is not punishable with death but the said offence is punishable with life imprisonment or imprisonment upto 10 years. This means that punishment ranging from one day to 10 years can be imposed. The detaining authority in paragraph 5(a)(viii) has showed his awareness that the charge-sheet has been filed in C.R. No. 402/2015. It is well known that once the charge-sheet is filed, an application for bail can be made before the Sessions Court or a person can also move the High Court against the order of Sessions Court rejecting the application for bail. In the present case, the facts relating to C.R. No. 402/2015 are that on 18.9.2015 at 01.30 p.m., the detenu stopped the complainant and abused him. The detenu then slapped the complainant. The detenu then whipped out a knife and again abused the complainant and snatched away cash of about Rs. 900/- from the shirt pocket of the complainant. Thereafter, the detenu pushed the complainant on the ground due to which the complainant received abrasions. If the facts relating to C.R. No. 402/2015 are seen, it becomes quite evident that once the charge-

sheet is filed, it is a case in which normally bail would be granted. In any event, normally in any offence of such nature after the investigation is over and the charge sheet is filed, bail is normally granted as the offence is not compulsorily punishable with death or life imprisonment. Thus, it cannot be said that there was no material before the detaining authority to come to the conclusion that there was every likelihood of the detenu being released on bail in C.R. No. 402/2015 as contended in the ground raised by the petitioner.

6. While considering the possibility whether bail can be granted, the nature of offence has also to be seen i.e type of crime. The detenu was in custody in C.R. No. 402/2015 which is a case which was mainly under Section 394 of IPC.

We have already set out the facts relating to this C.R. in the earlier paragraph. Looking to the facts of the case, the apprehension of the detaining authority that there was every likelihood of the detenu being released on bail cannot be jfoanz vkacsjdj 6 of 40 cri wp 2312-16 (j).doc faulted. In view of the facts relating to C.R. No. 402/2015, the fact that the investigation was over and the charge-sheet was filed and the punishment which can be imposed for the said offence, it cannot be said that there was no cogent and tangible material before the detaining authority to arrive at its subjective satisfaction that there was every likelihood of the detenu being released on bail. Further granting of bail in such case after filing of the charge sheet is a normal practice of most of the Courts. A priori, it cannot be argued that this is a case of mere ipse dixit of the detaining authority regarding the likelihood of the detenu being released on bail.

Thus, there was reliable material before the detaining authority on the basis of which, the detaining authority would have reason to believe that it was likely that the detenu would be released on bail.

7. Learned counsel for the petitioner placed reliance on the decision of the Supreme Court in the case of A. Shanthi (Smt) Vs. Govt. of T.N. & Ors.1 . Mr. Tripathi pointed out 1 (2006) 9 SCC 711 jfoanz vkacsjdj 7 of 40 cri wp 2312-16 (j).doc that in the said case also, the detenu was in custody and his bail applications had been rejected. The detaining authority in the said case observed that the detenu had moved an application for bail which was dismissed and the detaining authority had further stated that the detaining authority was aware that there is eminent possibility of the detenu coming out on bail by filing another application before the Sessions Court or High Court since in similar cases, bail is granted after a lapse of time. In the case of A. Shanthi (supra), not one bail application but many bail applications had been moved by the detenu which had been rejected. In the present case, only one bail application was filed which was rejected that too, before filing of the charge sheet.

8. From the fact that many bail applications were rejected in the case of A. Shanthi (supra), it appears that the offence was serious in nature which is not so in the present case.

From the material available on record which was before the detaining authority, it can be said that the detaining jfoanz vkacsjdj 8 of 40 cri wp 2312-16 (j).doc authority had enough reason to be subjectively satisfied that there was likelihood that the detenu would be released on bail. Thus, the decision in the case of A. Shanthi (supra) would not apply to the facts of the present case.

9. Thereafter, reliance was placed by Mr. Tripathi on the decision of the Supreme Court in the case of Rajesh Gulati Vs. Govt. of NCT of Delhi & Anr.2. Mr. Tripathi pointed out that in the said case, the detenu was in custody when the detention order was passed. The detaining authority recorded its subjective satisfaction that there was likelihood of the detenu being released on bail "as bail is normally granted in such case" and if granted bail, the detenu would again indulge in smuggling activities by travelling abroad.

The Supreme Court observed that it cannot be said that it was a normal case because the detenu in the case of Rajesh Gulati (supra) had preferred five applications for bail which had been rejected. In addition, the detenu's passport was in custody of the Customs Authorities in which case, it would 2 2002 SCC (Cri) 627 jfoanz vkacsjdj 9 of 40 cri wp 2312-16 (j).doc not have been possible for the detenu to travel abroad and indulge in smuggling activities. In the present case, only one application had been preferred by the detenu that too when the investigation was going on and charge-sheet had not been filed. After filing of the charge-sheet, the detenu could have again approached the Sessions Court or could have even moved before the High Court against the earlier rejection of bail by the Sessions Court. Looking to the nature of the offence in which the present detenu is involved and the fact that it was not punishable only with life imprisonment or death and if found guilty, any punishment could be imposed on the detenu upto a period of 10 years, the case of the detenu cannot be equated with the case of Rajesh Gulati (supra).

10. The detention order in the case of Rajesh Gulati (supra) was quashed on two grounds. One of the main grounds was that the passport of the detenu was in custody of the Customs Authorities, hence, it was felt that there was no jfoanz vkacsjdj 10 of 40 cri wp 2312-16 (j).doc reliable material before the detaining authority to come to the conclusion that the detenu, if released, would again indulge in similar prejudicial activities of smuggling. This is what weighed heavily with the Court while quashing the detention order, such are not the facts in the present case.

In the present case, the facts relating to C.R. No. 402/2015 are such that there is enough material to come to the conclusion that bail would be granted in the near future.

11. Thereafter, Mr. Tripathi placed reliance on the decision of the Supreme Court in the case of Rivadeneyta Ricardo Agustin Vs. Government of the National Capital Territory of Delhi & Ors.3. Mr. Tripathi placed reliance on paragraph 7, 8, 10 and 11 of the said decision which read thus:-

> 7. In the grounds of detention, the following statement occurs in para 9 :
>
> "The Administrator of the National Capital Territory of Delhi is aware that you are in judicial custody and had not moved any bail application in the Court(s) after June 9, 1992 but nothing 3 1994 Supp (1) SCC 597 jfoanz vkacsjdj 11 of 40 cri wp 2312-16 (j).doc prevents you from moving bail applications and possibility of your release on bail cannot be ruled out in the near future. Keeping in view your modus operandi to smuggle gold into India and frequent visits to India, the Administrator of the National Capital Territory of Delhi is satisfied that unless prevented you will continue to engage yourself in prejudicial activities once you are released."

8. The above statement merely speaks of a "possibility" of the detenu's release in case he moves a bail petition. It neither says that such release 'was likely' or that it was imminent. Evidently, the statement falls short of the requirement enunciated by this Court in Kamarunissa. ig Even in the return filed in this petition, the authority has not stated (in response to Ground 'B' of the writ petition) that there was material before him upon which he was satisfied that the petitioner was likely to be released or that such release was imminent....."

9. .....

10. The learned Additional Solicitor-General placed before us the relevant file but he could not bring to our notice any material indicating that the release of the petitioner was likely or that there was a real possibility of his being released and/or that the authority was satisfied about the said aspect.

11. In the circumstances, we must hold that the principle enunciated by this Court in Kamarunnissa v. Union of India squarely applies and the order is liable to be quashed....."

In the case of Agustin (supra), it was not stated that the release of the detenu was likely or that it was eminent, jfoanz vkacsjdj 12 of 40 cri wp 2312-16 (j).doc hence, it was felt that the statement falls short of the requirement enunciated by the Supreme Court in the case of Kamarunissa (supra), however, in the present case, the detaining authority has clearly stated in paragraph 7 of the grounds of detention that the detenu is "likely" to be released on bail in the aforesaid case. Not only in the grounds of detention but in the reply also, the detaining authority has shown its awareness that the detenu was in custody and his bail application was rejected on 20.10.2015.

Thereafter, the charge-sheet was filed in C.R. No. 402/2015 on 19.11.2015. The entire charge-sheet relating to C.R. No. 402/2015 was placed before the detaining authority. The detaining authority had gone through the entire charge-

sheet and the nature of allegations made against the detenu in the charge-sheet. On the basis of the material placed before the detaining authority and as the offence was not punishable with death penalty or life imprisonment only, the detaining authority averred in the affidavit that in such circumstances, there was every likelihood that the detenu jfoanz vkacsjdj 13 of 40 cri wp 2312-16 (j).doc would be released on bail.

12. The Supreme Court in an earlier decision in the case of Kamarunnissa Vs. Union of India 4 has discussed the law relating to when a detention order can be passed when the detenu is in custody. Paragraph 13 of the said decision reads thus:

"13.

From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition, to question it before a higher court. What this Court stated in the case of Ramesh Yadav was that ordinarily a detention order should not be passed merely to pre-empt or circumvent enlargement on bail in cases which are essentially criminal in nature and can be dealt with under the

ordinary law. It seems to us well settled that even in a case where a person is in custody, if the facts and circumstances of the case so demand, resort can be had to the 4 (1991) 1 SCC 128 jfoanz vkacsjdj 14 of 40 cri wp 2312-16 (j).doc law of preventive detention. This seems to be quite clear from the case law discussed above and there is no need to refer to the High Court decisions to which our attention was drawn since they do not hold otherwise. We, therefore, find it difficult to accept the contention of the counsel for the petitioners that there was no valid and compelling reason for passing the impugned orders of detention because the detenus were in custody".

In the present case, the criteria as set out in paragraph 13 of Kamarunnissa (supra) is met with. Thus, as far as ground 8(b) is concerned, we find no merit in the said ground.

13. Thereafter, Mr. Tripathi raised the second ground which is found in ground 8(e) of the petition. In the said ground, it is stated that incorrect translation of injury certificate of the injured in C.R. No. 402/2016 has been furnished to the detenu. The said document is vital document and also relied upon by the detaining authority. As wrong translation of the said document has been furnished to the detenu, his right to make an effective representation is violated, hence, the detention order is vitiated.

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14. To support the above contention, reliance was placed by Mr. Tripathi on two decisions of this Court. The first decision is in the case of Yogesh Nandu Pujari Vs. Commissioner of Police, Thane & Ors.5. Mr. Tripathi pointed out that in the said case, Marathi translation of English documents were supplied to the detenu and as there was discrepancy and variations between the two versions, this Court held that the right of detenu to make an effective representation was affected, hence, the detention order was held to be illegal and was quashed.

We have carefully gone through the said decision. In the said case, it was argued by the learned prosecutor that the injury certificate was not relied upon document, hence, the same cannot be considered as a vital document, hence, it cannot be said that the detenu was deprived of making an effective representation, however, in paragraph 6, the Court observed that the detaining authority had in fact relied upon the injury certificate to arrive at his subjective satisfaction relating to issuance of the order of detention. The Court 5 2013 ALL MR (Cri) 1779 jfoanz vkacsjdj 16 of 40 cri wp 2312-16 (j).doc came to this conclusion based on paragraph 1 of the grounds of detention which read as under:-

> " ..... The copies of documents placed before me on which I relied upon and formed by subjective satisfaction, are enclosed, except the names and identifying particulars

of witnesses/victims in connection with the grounds as mentioned in para No. 5(a)(i) and (ii) below, which are not furnished to you in the public interest for which I claim privilege."

[emphasis supplied] This Court in the case of Yogesh Pujari (supra) observed that the detaining authority himself has stated that the documents were relied upon for forming his subjective satisfaction that it is imperative to detain the detenu. As the document was relied upon by the detaining authority to arrive at his subjective satisfaction, it was held that it was a vital document, hence, furnishing of wrong translation of a document relied upon by the detaining authority would certainly affect the right of the detenu to make an effective representation. In the present case, neither does the affidavit of the detaining authority state that the injury certificate was relied upon document nor do the grounds of detention state so. In fact, in paragraph 1 of the grounds of jfoanz vkacsjdj 17 of 40 cri wp 2312-16 (j).doc detention, it is stated that the copies of the documents placed before me are enclosed. We have carefully gone through the grounds of detention and we find that there is no reference therein to the injury certificate. From the very fact that there is no reference to the injury certificate in the grounds of detention, it can be seen that the document was not relied upon by the detaining authority to issue the order of detention. As the injury certificate was not relied upon by the detaining authority in the present case, the decision in the case of Yogesh Pujari (supra) would not apply to the facts of the present case.

15. The Supreme Court in the case of Ibrahim Ahmad Batti Alias Mohd. Akhtar Hussain Alias Kandar Ahmed Wagher Alias Iqbal Alias Gulam Vs. State of Gujarat & Ors.6 has held that it is for the Court to decide whether the document is relevant or not. We have carefully perused the injury certificate and we find that in the facts and circumstances of this case, the said document cannot be said 6 AIR 1982 SC 1500 jfoanz vkacsjdj 18 of 40 cri wp 2312-16 (j).doc to be a relevant or vital document. In the present case, it is not the nature of injuries on which the detention order has been passed but the detention order is based only on the activities of the detenu as mentioned in the three incidents.

16. The second decision relied upon by Mr. Tripathi relating to the ground of furnishing wrong translation is the decision of this Court in the case of Sandip Suresh Ghag Vs. The Commissioner of Police, Mumbai & Ors.7. Mr. Tripathi pointed out that in the said case as wrong translation of injury certificate was furnished to the detenu, the detention order was quashed. On going through the decision in the case of Sandip Ghag (supra), specially paragraph 7 thereof, we find that in the case of Sandip Ghag (supra), the detaining authority had categorically stated in its reply that the material relied upon by him for issuing the order of detention has been furnished to the detenu. In view of this fact, the Court came to the conclusion that the said document was relied upon by the detaining authority to form 7 2014 ALL MR (Cri) 707 jfoanz vkacsjdj 19 of 40 cri wp 2312-16 (j).doc his subjective satisfaction. In the present case, as stated earlier, the detaining authority nowhere in his reply has stated that he had relied upon the injury certificate to form his subjective satisfaction relating to issuance of detention order. Neither the reply of the detaining authority nor the grounds of detention show that the injury certificate was relied upon in any manner by the detaining authority to arrive at its subjective satisfaction that it was necessary to issue the order of detention.

17. At this juncture it is also necessary to note that such of those documents which are not material and to which a casual or passing reference is made in the grounds, need not be supplied. In Mst. L.M.S. Ummu Saleema v. Shri B.B. Gujaral and Anr.8 after referring to some of the earlier decisions, the Supreme Court held as under :

> It is, therefore, clear that every failure to furnish copy of a document to which reference is made in the grounds of detention is not an infringement of Article 22(5), fatal to the order of detention. It is only failure to furnish copies of such documents as were relied upon by the detaining authority, 8 [1981] 3 SCR 647 jfoanz vkacsjdj 20 of 40 cri wp 2312-16 (j).doc making it difficult for the detenu to make an effective representation, that amounts to a violation of the fundamental rights guaranteed by Article 22(5). In our view it is unnecessary to furnish copies of documents to which casual or passing reference may be made in the course of narration of facts and which are not relied upon by the detaining authority in making the order of detention.

18. The Supreme Court in the case of Abdul Sathar Ibrahim Manik Vs. Union of India & Ors. 9 has observed that failure to supply each and every document merely referred to and not relied upon will not amount to infringement of the rights guaranteed under Article 22(5) of the Constitution. It was further observed that whether the document is casually or passingly referred to or whether it has also formed the material for arriving at the subjective satisfaction, depends upon the facts and grounds in each case. In the instant case, we are satisfied that the injury certificate was not relied upon by the detaining authority to issue the order of detention.

9 AIR 1991 SC 2261

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19. We have also observed that the two decisions relied upon by Mr. Tripathi are the decisions of this Court whereas the Supreme Court in various decisions have stated that non-

furnishing of documents which are not referred to or relied upon by the detaining authority would not vitiate the detention order. Non-furnishing of correct translation would amount to non-supply of the document. The Supreme Court in the case of Syed Farooq Mohammad Vs. Union of India and Anr.10 has observed that when a document is neither considered by the detaining authority nor referred to by the detaining authority, non-supply of such document does not cause prejudice and

would not vitiate the order of detention. The Supreme Court in the case of Abdul Sathar Ibrahim Manik Vs. Union of India has observed that when a document is not relied upon by the detaining authority, non-

supply of such a document would not vitiate the order of detention.

10 AIR 1990 SC 1597

20. Moreover, the decisions of the Supreme Court in the case of Syed Farooq, Abdul Sathar Manik and Mst. L.M.S. Ummu Saleema (supra) were not pointed out to the Division Bench of this Court in the case of Yogesh Pujari and Sandip Ghag, hence, the Division Bench did not have the benefit of going through the same before arriving at its decision.

21. The last ground raised by Mr. Tripathi is ground 8(f). In the said ground, it is stated that the representation of the detenu was submitted to the State Government on 27.6.2016 by the lawyer of the petitioner by speed post, however, till filing of the petition (30.6.2016), no communication was received, hence, the State Government is called to explain the delay to the satisfaction of the Court failing which the continued detention would be illegal.

22. The said ground has been replied by the State Government by filing affidavit of the Deputy Secretary, Home Department (Special), Mantralaya, Mumbai. In the said jfoanz vkacsjdj 23 of 40 cri wp 2312-16 (j).doc affidavit, it is stated that the representation of the detenu was received in the MPDA desk on 4.7.2016. On the same day, by letter dated 4.7.2016, the remarks were called for regarding the representation of the detenu. The said remarks were received on 14.7.2016. The office of the Detaining Authority was closed on 6.7.2016, 9.7.2016 and 10.7.2016 being public holiday, Saturday and Sunday respectively.

The concerned Assistant submitted the file containing remarks of the Detaining Authority along with representation of the detenu to the Section Officer on 14.7.2016. The Section Officer endorsed it on 14.7.2016 and forwarded it to the Deputy Secretary. The Deputy Secretary endorsed it on 15.7.2016 and forwarded it to the Additional Chief Secretary (Home) on the same day. The Additional Chief Secretary (Home) considered the representation of the detenu and the remarks of the Detaining Authority and has rejected the representation on 15.7.2016 by applying his mind. The

rejection of representation was communicated to the detenu vide letter dated 15.7.2016.

23. The Affidavit of the Home Department shows that the parawise remarks were called on the representation by letter dated 4.7.2016 and the said remarks were received on 14.7.2016. As far as the period from 4.7.2016 to 14.7.2016 is concerned, the same is explained by the sponsoring authority. Shri. Subhash Abasaheb Khanvilkar, Senior Inspector of Police, Oshiwara Police Station, Mumbai who is the sponsoring authority, in his affidavit, has stated that the representation dated 27.6.2016 was received on 4.7.2016 at 6.00 p.m. in the office of the Commissioner of Police. The same was immediately forwarded to the Inspector of Police (Preventive Branch), C.I.D., Mumbai to forward the said representation to Oshiwara Police Station, Mumbai i.e the sponsoring authority for its parawise comments. The representation was collected by the officer of Oshiwara Police Station on 4.7.2016 at 7.15 p.m. from the office of Preventive Crime Branch, C.I.D., Mumbai. Shri. Subhash Khanvilkar, the Senior P.I. of Oshiwara Police Station, in his affidavit, has further stated that on 5.7.2016, he personally jfoanz vkacsjdj 25 of 40 cri wp 2312-16 (j).doc went through the representation and gave dictation of parawise comments on the representation. On 6.7.2016, there was a public holiday. The parawise comments were kept ready on 7.7.2016. On 7.7.2016, the parawise comments were forwarded to the Assistant Commissioner of Police, D.N. Nagar Division for his consideration. On 8.7.2016, the Assistant Commissioner of Police forwarded the parawise comments to the Deputy Commissioner of Police, Zone - IX for his perusal and consideration. On the same day, the Deputy Commissioner of Police, Zone - IX has forwarded the comments to the Deputy Commissioner of Police, PCB CID to submit it before the appropriate authority.

After the parawise comments were received by PCB CID, the same was placed before the Law Officer for his perusal. The concerned Law Officer has checked the parawise comments and after finalizing the same, on 13.7.2016, the same was forwarded to the Additional Chief Secretary, Home Department, Mumbai. On 9.7.2016 and 10.7.2016, the office was closed due to second Saturday and Sunday. Thus, it is jfoanz vkacsjdj 26 of 40 cri wp 2312-16 (j).doc seen that the representation was dealt with at the earliest.

24. Mr. Tripathi submitted that first of all, it was not necessary to call for parawise comments because of that about ten days time was lost in obtaining the parawise comments. He further submitted that after the parawise comments were called, the file had been travelling from table to table for a period of about 10 days. He submitted that the representation was received by the Sponsoring Authority on 4.7.2016. On 5.7.2016, the representation was considered by the Senior P.I. of Oshiwara Police Station i.e sponsoring authority. Thereafter, the file was put up before the Assistant Commissioner of Police. Thereafter, before the Deputy Commissioner of Police Zone - IX.

Thereafter, the file travelled to the Deputy Commissioner of Police, PCB CID.

Thereafter, the file was placed before the Law Officer.

Thereafter, it was forwarded to the Additional C
Secretary, Home Department and it was rejected
15.7.2016. Mr. Tripathi submitted that it was to

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unnecessary for the representation to travel from table to table for a period of almost 10 days when it was the Additional Chief Secretary who was the only authority to consider the representation. He submitted that on account of the file travelling from table to table, inordinate delay was caused in considering the representation and on this count, the detention order is liable to be quashed. To support his contention, he placed reliance on the decision of the Supreme Court in the case of Harish Pahwa Vs. State of U.P.11 wherein it is observed as under:-

> " In our opinion, the manner in which the representation made by the appellant has been dealt with reveals a sorry state of affairs in the matter of consideration of representations made by persons detained without trial. There is no explanation at all as to why no action was taken in reference to the representation on 4th, 5th and 25th of June, 1980. It is also not clear what consideration was given by the Government to the representation from 13th June, 1980 to 16th June, 1980 when we find that it culminated only in a reference to the Law Department, nor it is apparent why the Law Department had to be consulted at all. Again, we fail to understand why the representation had to travel from table to 'table for six days before reaching the Chief Minister who was the only authority to decide the representation. We may make it clear, as we have done on numerous earlier occasions, 11 AIR 1981 SC 1126 jfoanz vkacsjdj 28 of 40 cri wp 2312-16 (j).doc that this Court does not look with equanimity upon such delays when the liberty of a person is concerned. Calling comments from other departments, seeking the opinion of Secretary after Secretary and allowing the representation to lie without being attended to is not the type of action which the State is expected to take in a matter of such vital import. We would emphasize that it is the duty of the State to proceed to determine representations of the character

> above mentioned with the utmost expedition, which means that the matter must be taken up for consideration as soon as such a representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu. This not having been done in the present case we have no option but to declare the detention unconstitutional. We order accordingly, allow the appeal and direct that the appellant be set at liberty forthwith."

(Emphasis supplied) Mr. Tripathi submitted that similar view was taken by this Court in the case of Riyaz Ahmed Batatawala Vs The State of Maharashtra & Ors.12.

25. Thereafter, Mr. Tripathi relied on the decision of the Supreme Court in the case of R. Paulsamy Vs. Union of India & Anr.13. Mr. Tripathi relied on paragraph 6 of the decision which reads thus:-

> 12 2016 ALL MR (Cri) 2784 13 1999 CRI.L.J. 2897 jfoanz vkacsjdj 29 of 40 cri wp 2312-16 (j).doc " Examining the present case in hand, in the light of the ratio laid down above, we find that though the representation was received on 28.10.1998, comments of Sponsoring Authority were called for on 29.10.1998 which were received on 10.11.1998. From the records we find that the order for calling for comments of the Sponsoring Authority was not passed by any of the Officers empowered by the above orders of Minister dated 7th July, 1995. Therefore, we hold that the representation was dealt with in a routine manner and there was no application of mind by the competent officer as to whether it was necessary to call for comments of the Sponsoring Authority. In other words, this delay from 28.10.98 to 10.11.98 being uncalled for has to be regarded as unreasonable and, therefore, fatal in view of the ratio laid down by this Court in Venmathi Selvarm (Mrs.) (1998(5) SCC 510)."

26. In reply, the learned APP submitted that the decision of the Supreme Court in the case of Paulsamy was referred to a bench of three Judges to examine the correctness of the decision in the case of Paulsamy. A bench of three Judges of the Supreme Court examined the correctness of the decision in the case of Paulsamy in the case of Kantilal Hirji Shah Vs. State of T.N. & Ors. 14. After considering the decision in the case of R. Paulsamy, in the case of Kantilal Hirji Shah, 14 (2000) 7 SCC 606 jfoanz vkacsjdj 30 of 40 cri wp 2312-16 (j).doc it was observed in paragraph 4 as under:-

> " .....
>
> It appears to us that the very fact that on receipt of the representation a comment was sought for from the sponsoring authority by an officer who had not passed the order of detention was itself treated to be the grounds for the conclusion that the representation has been dealt with in a routine manner and there was no application of mind by the competent officer. We cannot subscribe to the aforesaid conclusion expressed by the learned Judges in the aforesaid case. When a representation is received in the department of the concerned authority it is not necessary for the

> authority to whom the representation is made, himself to make entry in the diary and immediately deal with the matter without taking the assistance of any other subordinate officers. A detenu under Article 22(5) has a right that his representation should be considered by the appropriate authority as expeditiously as possible and there should not be unexplained delay in the matter of disposal of the representation. A Subordinate Officer calling for comments from any other authority does not, in fact, deal with the representation nor does it express any view on the representation and acts clerically only to get the necessary comments for being considered by the persons on whom the power to dispose of the representation vest. That being the position, and taking into account the system through which the Government functions, it is difficult for us to sustain the conclusion of this Court in Paulsamy's case in paragraph 6 jfoanz vkacsjdj 31 of 40 cri wp 2312-16 (j).doc quoted above. In our view, therefore, the fact that on receipt of the representation, the Joint Secretary of the department called for the comments of the sponsoring authority immediately and on receipt of the same had forwarded to the higher authority which was dealt with by the appropriate authority, would not constitute any infringement of the constitutional right of the detenu under Article 22(5) nor it can be said that the representation has been dealt with mechanically without application of mind. We therefore hold that the law laid down by this Court in aforesaid case is not correct."

[Emphasis supplied] Thus, from the decision in the case of Kantilal Hirji Shah which is by a bench of three Judges, it is clear that calling for parawise comments is not a futile exercise and the file travelling from table to table or from officer to officer and the time involved for the file travelling from table to table cannot be said to be unnecessarily delay in considering the representation. On account of the system through which the Government functions, it is necessary for the file to travel from table to table i.e from junior officer to the topmost officer. The Supreme Court in the case of Kantilal Hirji Shah (supra) has categorically observed that the law in the case of R. Paulsamy is not correct. Thus, the decision in the case of Paulsamy cannot be of any help to the petitioner.

27. The decision in the case of Harish Pahwa (supra) is a decision by a bench of two Judges of the Supreme Court.

The decision in the case of Kantilal Hirji Shah which is by a larger bench than the one in the case of Harish Pahwa is a complete answer to the decision in the case of Harish Pahwa.

It has been clearly held in the case of Kantilal Hirji Shah in paragraph 3 that calling for reports from sponsoring authority is absolutely necessary for effective disposal of the representation. It is also held that on account of the system through which the Government functions, files travel from table to table and this period consumed in the file travelling from table to table would not constitute any infringement of the constitutional right of the detenu under Article 22(5) nor can it be said that the representation has been dealt with mechanically without application of mind. We are bound by the decision of the larger bench in the case of Kantilal Shah.

In view of this decision, we are afraid we cannot place any reliance on the decision in the case of Harish Pahwa.

28. Mr. Tripathi also placed reliance on a decision of this Court in the case of Riyaz Ahmed Batatawala Vs. The State of Maharashtra & Ors.15. In the said decision, reliance was placed on the decision of the Supreme Court in the case of Harish Pahwa (supra). We have already observed that in view of the decision of the larger bench of the Supreme Court in the case of Kantilal Hirji Shah (supra), the decision in the case of Harish Pahwa cannot be relied upon.

In the decision in the case of Riyaz Batatawala, reliance was placed on the decision in the case of Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police & Ors. 16. This decision in relation to delay in considering representation was considered by the Supreme Court in a later decision in the case of Noor Salaman Makani Vs. Union of India & Ors.17. In the case of Rama Dhondu Borade, the gap between receipt and disposal of the representation was 28 days. The only explanation given in the said case for the delay was that some more information was called for and 15 2016 ALL MR (Cri) 2784 16 (1989) 3 SCC 173 17 (1994) 1 SCC 381 jfoanz vkacsjdj 34 of 40 cri wp 2312-16 (j).doc there was certain holidays in between, hence, the Court held that the delay was unreasonable and the explanation was unsatisfactory, hence, the detention order was quashed.

29. The Supreme Court in the case of Noor Salaman Makani, after considering the decision in the case of Rama Dhondu Borade observed that there was only unexplained delay of five days ig in considering the representation and delay of five days could not be said to be undue. By observing thus, the contention on behalf of the detenu that on account of the delay in considering the representation, the detention order ought to be quashed was rejected.

30. As stated earlier, Mr. Tripathi also placed reliance on the decision in the case of Riyaz Batatawala (supra), this Court held in paragraph 9 that there was no explanation as to why the sponsoring authority did not submit parawise comments from 14.2.2014 till 25.2.2014. Thus, the

delay in submitting parawise comments is not satisfactorily explained jfoanz vkacsjdj 35 of 40 cri wp 2312-16 (j).doc in the affidavit, therefore, continuation of the order of detention stands vitiated. However, such are not the facts in the present case. In the present case, the sponsoring authority has explained the time period involved in submitting the parawise comments. Thus, this decision would be of no help to the petitioner. Moreover, in Riyaz Batatawala, reliance was placed on Harish Pahwa and Rama Borade. The decision in the case of Rama Borade and Harish Pahwa are by a bench of two Judges. The decision of the Supreme Court in Kantilal Shah is by a bench of three Judges.

The decision in the case of Rama Borade was considered by the Supreme Court in Noor Salman Makani, hence, the decision in the case of Noor Salman Makani would prevail.

Thus, both these decisions i.e in the case of Harish Pahwa and Rama Borade, in view of the enunciations of the Supreme Court in Kantilal Shah & Noor Salman Makani, cannot come to the aid of the petitioner.

31. As stated earlier, the enunciation of law by the jfoanz vkacsjdj 36 of 40 cri wp 2312-16 (j).doc Supreme Court in the case of R. Paulsamy was held to be incorrect in the case of Kantilal Hirji Shah (supra). In the case of Kantilal Hirji Shah, it was observed that in the functioning of the Governmental system, it would be necessary for the officers who was subordinate to the authority empowered to consider the representation to call for some information from others without which the representation of the detenu possibly cannot be disposed of effectively and so long as these officers cannot take any decision on their own, it cannot be said that there has been an infringement of detenu's right under Article 22(5) merely because a subordinate officer called for some report from the sponsoring authority or any other appropriate authority. In the case of Kantilal Hirji Shah, it was further observed that in the functioning of the Governmental system, the file necessarily transfers from table to table before it is finally considered by the authority empowered to consider the representation. At this juncture, we would like to refer to the decision of the Supreme Court in the case of Kamarunnissa jfoanz vkacsjdj 37 of 40 cri wp 2312-16 (j).doc Vs. Union of India18 wherein it is observed in paragraph 7 as under:-

> " The contention that the views of the sponsoring authority were totally unnecessary and the time taken by that authority could have been saved does not appeal to us because consulting the authority which initiated the proposal can never be said to be an unwarranted exercise."

32. In order to appreciate whether there was delay in considering the representation in the present case, we give datewise details for easy reference. The dates are taken from the affidavit filed by Shri. Suresh Mahadev Khade, Deputy Secretary, Government of Maharashtra, Home Department (Special) and Shri. Subhash Abasaheb Khanvilkar, Senior Inspector of Police, Oshiwara Police Station, Mumbai (Sponsoring Authority).

Representation received in MPDA Desk	04.07.2016
Remarks called on the representation.	04.07.2016
Representation received by Oshiwara Police Station (Sponsoring Authority)	04.07.2016 at 07.15 p.m.

Dictation in relation to parawise comments given by 05.07.2016 Senior P.I. of Sponsoring Authority Public Holiday 06.07.2016 Parawise comments on representation kept ready and 07.07.2016 forwarded to Assistant Commissioner of Police 18 (1991) 1 SCC 128 jfoanz vkacsjdj 38 of 40 cri wp 2312-16 (j).doc Assistant. Commissioner of Police forwarded the 08.07.2016 parawise comments to Deputy Commissioner of Police, Zone - IX.

Deputy Commissioner of Police, Zone - IX forwarded 08.07.2016 the parawise comments to the Deputy Commissioner of Police, PCB CID Holidays 09.07.2016 & 10.07.2016 Law Officer checked and finalized the parawise 13.07.2016 comments and forwarded to the Home Department Received by Home Department, Mantralaya. 13.07.2016 The concerned Assistant in Home Department 14.07.2016 submitted the file to the Section Officer. Section Officer endorsed it and forwarded to the Deputy ig 14.07.2016 Secretary.

Deputy Secretary endorsed it and forwarded it to the 15.07.2016 Additional Chief Secretary (Home).

Representation rejected by Addl. Chief Secretary (Home) 15.07.2016 Communication sent to the detenu regarding rejection 15.07.2016 of representation.

From the above dates, it is clear that there is no explanation only for two dates i.e 11.7.2016 and 12.7.2016.

The Supreme Court in the case of Noor Salman Makani (supra) has held in paragraph 4 that unexplained delay of five days cannot be said to be undue. In the present case, unexplained delay is only of two days in which case it cannot be said that the representation was not dealt with reasonable dispatch. The above dates clearly indicate as to how the detenu's representation has been dealt with day to jfoanz vkacsjdj 39 of 40 cri wp 2312-16 (j).doc day till it was finally disposed of on 15.7.2016. Taking into account the above dates and the intervening holidays, we hold that the representation has been dealt with utmost expedition and there has been no undue delay in the matter of disposal of representation of the detenu.

33. In view of the above, in our opinion, the grounds raised by the learned counsel for the petitioner to espouse the case of the detenu, are of no avail. Accordingly, the petition is dismissed. Rule is discharged.

[MRS. MRIDULA BHATKAR, J] [SMT. V.K. TAHILRAMANI, J.]

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