JUDGEMENT RESERVED

AFR

Court No. - 7

Case :- HABEAS CORPUS WRIT PETITION No. - 458 of 2020
Petitioner :- Javed Siddiqui
Respondent :- Superintendent District Jail Jaunpur And 3 Others
Counsel for Petitioner :- Chandrakesh Mishra
Counsel for Respondent :- GA, Prem Shanker Prasad, Santosh Kumar Singh

Hon'ble Pritinker Diwaker,J.
Hon'ble Pradeep Kumar Srivastava,J.

(Delivered by Hon'ble Pradeep Kumar Srivastava, J.)

1. Heard Sri Daya Shankar Mishra, learned Senior Advocate, assisted by Sri Chandrakesh Mishra, learned counsel for the petitioner, Sri Prem Shanker Prasad, learned counsel for Union of India and Sri Amit Sinha, learned A.G.A. for the State.

2. Petitioner, Javed Siddiqui has filed this habeas corpus writ petition against the detention order passed on 10.07.2020, under Section 3(2) of the National Security Act and requested to issue direction for producing the corpus in the Court and also for setting aside the impugned detention order.

3. The facts of the case are that the petitioner, along with 56 known and 25 other unknown persons, on 09.06.2020 at about 06:00 PM, came to the slum locality of Village Bhadethi, Police Station Saraikhwaza, District Jaunpur and committed rioting, arson, used castist words against the inhabitants of the slum locality, abused them and caused injuries by doing *maar-peet* by lathi and danda due to which many of the persons sustained injuries. The petitioner and other persons entered into the houses of inhabitants of slum locality, chased

and assaulted themselves, caused damages to their households. Their houses were burnt and the cattle which were tied inside their houses were also burnt and died. A serious law and order situation accrued at the place of occurrence and the inhabitants of slum locality out of terror and fear, in order to hide them, went to other villages.

4. Regarding incident complainant Rajesh, gave a written report in the concerned police station on the basis of which Crime No. 154 of 2020, under Sections 147, 148, 149, 307, 452, 323, 504, 506, 436, 427, 429/34, 188, 269 I.P.C. and 7 Criminal Law Amendment Act along with Section 3(2)(5) SC/ST Act, Section 3 of the Prevention of Damage to Public Property Act, Section 3 of the Epidemic Disease Act and Section 51 of the Disaster Management Act was registered against the petitioner and others.

5. According to the first information report, on 09.06.2010 at about 05:00 PM, when Ravi Kumar, Pawan and Atul were grazing their buffalos, one Tabiz and his three friends came there with their goats for grazing their cattle and asked them to look after the goats, so that they could not escape away and in case they do escape, they shall bring them back. This was refused by Ravi, Pawan and Atul at which Tabiz and his friends used castist words saying "*Sala Chamar Tum Logo Ka Dimag Kharab Ho Gaya Hai*". This was refused by Ravi, Pawan and Atul, upon which Tabiz and his friends started beating them. They came back to their houses and complained about it. Soorsati, mother of Ravi, mother of Pawan, namely Satti Devi and brother of Atul, namely Virendra went and inquired about the incident from Tabiz and his friends and complained why did they beat their children. Tabiz and his friends became very angry and started abusing them and threatened them, hence, they came back to slum locality. At about 06:00 PM, petitioner and about 75 to 80 companions came in group with lathi, danda and weapons and attacked on the slum locality

and used castiest words against everybody who came in the way and abused them. They chased the inhabitants of the slum locality, committed *maar-peet* after entering into their houses, damaged the household goods and lit fire in the houses. Consequently, many houses were burnt and certain cattle were also burnt. The accused persons were firing in order to kill the inhabitants of slum locality. The inhabitants of slum locality, due to apprehension from the accused, saved their lives by hiding themselves in neighboring villages. Thereafter also, the accused persons continued their lawless activities. In the incident, household goods of ten houses were burnt to ashes and goats and buffaloes were also burnt and died. Several persons, including Vinod Kumar, Kamlesh, Ratan Lal, Nand Lal, Firtu, Foolchand, Ravi, Kundan, Rajesh and other saw the incident. The incident created serious problem to law and order and peace and tranquility in the period of pandemic and several persons sustained injuries.

6. On the basis of written report given by Rajesh, the Investigating Officer entered into investigation and recorded the statements of the complainant and witnesses under Section 161 Cr.P.C. They specifically stated that the petitioner came with his associates along with lathi and danda and other weapons and created fearful situation in the inhabitants of slum locality by committing the aforesaid illegal and criminal acts. The witnesses stated that the whole offence was committed by accused Javed Siddiqui and his associates. They also stated that the petitioner Javed Siddiqui instigated his associates using castiest words to kill the inhabitants of slum locality and to lit fire in their houses upon which the whole incident took place in which several persons sustained injuries, houses were burnt and cattle were also burnt and there became a completely lawless situation.

7. After the incident, the local police and senior police personnel, including SP, Jaunpur, DM, Jaunpur, IG Police, Lucknow Region and Commissioner, Varanasi inspected the place of occurrence and gave instruction in order to maintain peace and harmony. Huge number of police and P.A.C. personnel were deployed in the slum locality and efforts were made for restoration of law, order and peace and also to restore the confidence of inhabitants of slum locality, so that they could come back. After completion of the investigation, charge sheet was filed for the offences under the aforesaid sections.

8. The petitioner was released on bail in the aforesaid case on 20.06.2020 by the Special Judge, but he remained in jail under Crime No. 156 of 2020, under Section 3(1) U.P. Gangster Act. The District Magistrate found that the petitioner is making all efforts to obtain bail and it was felt by the DM that after coming out from jail, the petitioner will again start similar kind of lawless activities and it will not be possible to maintain law and order and communal harmony and, therefore, after being satisfied, it was decided to initiate action for preventive detention under Section 3(2) of the National Security Act.

9. By order dated 10.07.2020, the District Magistrate passed the detention order and directed the petitioner to be detained in district jail under Section 3(2) of the National Security Act. The petitioner was intimated by the preventive detention order that he has a right to give representation to the State Government against the detention order and also expected him to make such representation to the District Magistrate through the Jail Superintendent as early as possible and it was made clear that such representation, if received after expiry of 12 days from the date of order of detention or after approval by the State Government, the same shall not be considered. It was also made

clear that if the petitioner wants to give a representation before State Advisory Board, Lucknow, he may give the representation as early as possible, through the Jail Superintendent. It was also made clear that under Section 10 of the National Security Act, the matter shall be referred to the Advisory Board within three weeks from the date of detention order and if the representation of the petitioner will not be given in time, the same shall not be considered. He was also informed about his right of personal hearing before the Advisory Board and for that he was expected to specifically mention this fact in the representation. He was also informed that he has right to give representation to the Central Government also through Secretary, Government of India, Home Ministry (National Security Department), North Block, New Delhi. This detention order was subsequently approved by the Central Government on the basis of recommendation made by the Advisory Board.

10. The submission of the learned counsel for the petitioner is that on 13.07.2020, the petitioner made a representation with a request to set aside the detention order and in the alternative, also made request to make available the relevant documents to him as early as possible. The submission of the learned counsel for the petitioner is that despite he made representation against the detention order, the same was not forwarded in time and the same was rejected on the basis that it was not received in time. He was not supplied with relevant documents for which he made specific mention in his representation and therefore he could not make effective representation against the detention order. The offence on the basis of which, the National Security Act was imposed, he was released on bail by the Special Judge at district level. When the detention order was passed, it was not possible that soon the petitioner shall be released on bail as he was also detained under the UP Gangster Act.

11. It has been further submitted that the hearing before the Advisory Board was not fair and was in violation of the right of equality. He was not given opportunity to put his case before the Advisory Board through his legal adviser. The detention order is in complete violation of Articles 22(5), 14 and 21 of the Constitution of India and Section 3(2), 3(4), 3(5), 8, 10, 12 and 14 of the National Security Act and he is entitled for immediate release from jail. His representation was not disposed of in legal manner by the District Magistrate. The Central Government also disposed of his representation dated 27.07.2020 after much delay on 01.09.2020.

12. In the counter affidavit filed by the State, it has been mentioned that the detention order dated 10.07.2020 along with grounds of detention with other connected documents was forwarded by DM on the same day which was received by the State Government on 16.07.2020 and the detention order was approved on 20.07.2020 and the same was communicated to the petitioner on 21.07.2020 within 12 days from the date of detention as required under section 3(4) of the Act. Further, the detention order dated 10.07.2020 along with grounds of detention with other connected documents were also sent to the Central Government within seven days from the date of approval as required under section 3(5) of the Act. The copy of the petitioner's representation dated 27.07.2020 along with para wise comments was received in the concerned Section of State Government on 17.08.2020 along with letter of District Magistrate, Jaunpur dated 13.08.2020. The State Government sent the copy of representation and para wise comments thereon to the Central Government, New Delhi on 18.08.2020. The representation and para wise comments were not sent to the U.P. Advisory Board because hearing had already taken place on 12.08.2020. Thereafter the concerned Section of the State Government examined the representation on 19.08.2020. The Joint Secretary has examined the representation on 20.08.2020, the Special

Secretary on 21.08.2020; 22.08.2020 and 23.08.2020 being holiday; the Secretary Government of U.P. examined the said representation on 24.08.2020 and thereafter the file was submitted to the higher authorities for final order and was finally rejected by the State Government on 25.08.2020. The information of rejection order was communicated to the petitioner through district authorities by the State Government Radiogram dated 26.08.2020. Thus, the representation of the petitioner was dealt with expeditiously at several stages of the State Government.

13. The U.P. Advisory Board, Lucknow, vide its letter dated 06.08.2020 informed the State Government that the case of the petitioner would be taken up for hearing on 12.08.2020 and directed that the petitioner to be informed that, if he desires to attend the hearing before the U.P. Advisory Board along with his next friend (non-advocate), he could do so and he be allowed to take his next friend along with him. This was accordingly, communicated to the petitioner through the district authorities by radiogram dated 07.08.2020. The petitioner appeared for personal hearing before the U.P. Advisory Board on the date fixed for hearing on 12.08.2020. The Advisory Board heard the petitioner in person and submitted its report to the State Government that there is sufficient cause for the preventive detention of the petitioner under, the National Security Act. This report was received in the concerned Section on 20.08.2020 through the letter of Registrar, U.P. Advisory Board letter dated 19.08.2020 well within seven weeks from the date of detention of the petitioner as provided under Section 11(1) of the Act.

14. The State Government once again examined afresh the entire case of the petitioner along with the opinion of the U.P. Advisory Board and took decision to confirm the detention order for a period of three months at first instance from the date of actual

detention of the petitioner i.e. since 10.07.2020. Accordingly, the orders of confirmation for petitioner's preventive detention for three months were issued by the State Government through radio-gram dated 01.09.2020.

15. On the report/recommendation dated 01.10.2020, received from the District Magistrate, Jaunpur, after taking into consideration the facts and circumstances of the case, the State Government was satisfied that it is necessary to extend the above detention period for further three months. Therefore, the State Government amended the above order and extended the detention for six months since 10.07.2020. Accordingly, the detention order dated 01.09.2020 was granted and the order was issued on 08.10.2020. The information of extension of detention period was communicated to the petitioner through district authorities by radiogram and letter dated 08.10.2020.

16. Respondent no.1, the Superintendent Jail, Jaunpur has submitted in his counter affidavit, that while the petitioner was in judicial custody vide order dated 10.06.2020/23.6.2020/06.07.2020 in Crime No. 154 of 2020, under Sections 147, 148, 149, 307, 452, 323, 504, 506, 436, 427, 429/34, 188, 269 I.P.C. and 7 Criminal Law Amendment Act along with Section 3(2)(5) SC/ST Act, Section 3 of the Prevention of Damage to Public Property Act, Section 3 of the Epidemic Disease Act and Section 51 of the Disaster Management Act, vide order dated 19.06.2020/18.08.2020, he was further sent to judicial custody in jail in crime no. 156 of 2020 under section 3(1) of UP Gangster Act. He was in jail, detention order dated 10.07.2020 was received on the same day which was served on the petitioner on the same day and was informed about the grounds of preventive detention and his right of representation to the different authorities and if he desires to give representation to DM, he should submit within 12 days or before approval of the detention order, whichever is

earlier. On 20.07.2020, he submitted his representation of same date and on the same day, the representation was sent to DM. The detention order was approved by the State Government on 21.07.2020. Petitioner again submitted his representation on 27.07.2020 addressed to the Principal Secretary (Home), UP Government, Home Government, New Delhi and Advisory Board, New Delhi which was sent to the above authorities through DM on 28.07.2020. Representation dated 20.07.2020 was rejected by DM on 15.08.2020 which was received and communicated by the Jail authority on the same day to the petitioner. The State Government rejected the representation on 26.08.2020 and the same was communicated to the petitioner on 27.08.2020. The Central Government rejected the representation on 01.09.2020 which was received and communicated on 03.09.2020 to the petitioner. The petitioner was informed about the date, time and place of hearing on 07.08.2020, which was 12.08.2020. No request for hearing was made through non advocate next friend. He was produced before the Advisory Board through video-conferencing. It has been further mentioned in the counter affidavit that in crime no. 154 of 2020, vide order dated 23.06.2020 and in crime no. 156 of 2020, vide order dated 26.08.2020, the petitioner has been released on bail.

17. Union of India/Respondent no.4 has filed counter affidavit stating that the report under Section 3(5) of Act and representation dated 27.07.2020 of the detenu with para-wise comments was forwarded on 13/14.08.2020, which was received on 21.08.2020 in the Ministry of Home Affairs and on 24.08.2020, the same was processed for consideration and on careful consideration, finding no justifiable ground for revocation of the detention order and 22nd, 23rd, 29th and 30th August, 2020 being holiday, with all promptitude, rejected the same on 01.09.2020 and communicated to the petitioner.

18. In the two rejoinder affidavits, the petitioner hss submitted that the State has extended the detention period for six months from 10.07.2020 vide order dated 08.10.2020. No hearing was given before extending and it was illegal to extend the period of detention for 6 months at a time on same ground on the basis of which, the original order was passed. The petitioner has denied the contents of counter affidavit filed by the Union of India and State and has stated that the mandatory requirement of Section 3(5) of the Act was not complied, nor relevant documents were not provided nor his representation was promptly disposed nor communicated to him. The detention order is in complete violation of Articles 21and 22(5) of the Constitution.

19. Arguments have been advanced by the learned counsel for the petitioner. The first one is that the representation of the petitioner was not forwarded in time, even though he had made the representation at an early date. It has further been submitted that the representation was dealt with by the State Government and Central Government in such a way that it would reach only after the recommendation of the Advisory Board and it gave rise to the preliminary rejection of the representation. Another submission is that the petitioner was not given adequate opportunity of hearing before the Advisory Board and his representation was not referred to the Advisory Board. He was also not given opportunity to put his case through a counsel or through a legal expert. Further submission is that, in the case on the basis of which the National Security Act has been imposed on the petitioner, the petitioner was granted bail by the Special Judge, District Jaunpur.

20. Several reference have been taken from the side of the petitioner in support of the the above arguments. The first reference is **Habeas Corpus Writ Petition No. 3293 of 2018** decided by a coordinate Bench of this Court vide order dated 19.09.2018 in which

on the basis of judgments of **A.K. Roy v Union of India (1982) 1 SCC 271** and **Choith Nanikram Harchandani v State of Maharashtra, 2015, volume 17 SCC 688** with **Bittu Choith Harchandani vs. State of Maharashtra (2018) 2 Supreme Court Cases (Cri) 403**, learned counsel for the petitioner has submitted that it is settled view of the Apex Court that the detenue has right to appear through legal practitioner in the proceedings before the Advisory Board, if so claimed by him and if the petitioner has not been allowed to be represented through legal practitioner despite request made by him before the Board, it is denial of the opportunity of fair hearing before the Advisory Board and is in violation of Article 14 of the Constitution of India and such detention order is not sustainable.

21. On the same point, another reference has also been taken which is **Habeas Corpus Writ Petition No. 3652 of 2018** decided by the coordinate Bench of this Court, vide its order dated 01.02.2019. In addition to above, this judgment has also been taken in support of the contention that despite the demand, the petitioner was not supplied with the documents, which have been required in his representation. Similar view has been taken in the **Habeas Corpus Writ Petition No. 3653 of 2018** decided by the coordinate Bench of this Court vide its order dated 19.12.2018.

22. The judgment of the Supreme Court in **Choith Nanikram Harchandani vs. State of Maharashtra** with **Bittu Choith Harchandani vs. State of Maharashtra (2018) 2 Supreme Court Cases (Cri) 403** and **(2015) 17 Supreme Court Cases 688** has also been referred on the point, submitting that if opportunity of fair hearing by not giving opportunity to the detenue to put his case through a counsel, is not given, the same shall be the violation of opportunity of fair hearing and such detention order shall not be sustainable. It is pertinent to mention that these judgments have been referred to in all the three

cases decided by the coordinate Benches as referred above. The judgment of the coordinate Bench in **Habeas Corpus Writ Petition No. 58274 of 2017** decided on 30.03.2018 has also been referred in which, it has been held as under :-

> *"An order of detention passed in respect of a person under judicial custody must satisfy the three conditions spelt out by the Apex Court in the case of* ***Kamarunnissa vs. Union of India and another, 1990 SCR Suppl (1) 457*** *and one of such conditions is that the authority passing the order of detention in respect of a person in custody should have the reason to believe that there was real possibility of his release on bail and further on being released, he would probably indulge in activities which are prejudicial to public order. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus, the basis of the order under Section 3(2) of the National Security Act and tis basis is clearly absent in the present case."*

23. Learned counsel for the petitioner has submitted that there is nothing on record to show that the above three conditions were objectively assessed by the District Magistrate before passing the detention order. Similar view has been taken by a subsequent judgment passed by the coordinate Bench of this Court in **Habeas Corpus Writ Petition No. 55243 of 2017** decided on 30.03.2018.

24. In regard to the contention that where there is unexplained, unreasonable and improper delay in forwarding the representation of the detenue resulting in its rejection, such detention order shall be vitiated, the references of the judgment of Supreme Court in **Rajammalvs v State of Tamil Nadu** (1999) 1 SCC 417 and **Virendrs Kumar Nayak v The Superintendent of Naini Central Jail, Allahabad, 1982 Cri. L.J. 1** have been taken.

25. Learned counsel for the petitioner has submitted that the representation of petitioner was rejected on a technical ground which is not permissible in law as opined in **Lallan Goswami @ Ajaynath**

Goswami vs. Superintendent, Central Jail, Naini, Allahabad, 2002 (45) ACC 1089. The District Magistrate must apply his mind and decide the representation.

26. With reference to **Inamul Haq Engineer vs. Superintendent, Division/Sistrict Jail, Azamgarh, 2001 CBC 411**, it has been argued that if counter version of the case and bail order has not been placed before the detaining authority when the detention order was passed and in absence of such document the detention order has been passed, the same shall not be sustainable and shall be liable to be quashed.

27. The learned Senior Advocate has also submitted that in **Satyapriya Sonkar v Superintendent Central Jail Nani, LAWS (ALL) - 1999-10-11,** it has been held that where the representation of the detenu was not placed before the Advisory Board, the detention is rendered invalid. Even a supplementary representation ought to be placed before the Advisory Board. This view has been further reiterated in **Irfan alias Gama v State of UP, 1985 (Suppl) 195 (All)**. In **Devendra Kumar v State, 1985 All. LJ 518**, this Court observed as below:

> *"After examining the various provisions of the National Security Act, there is no doubt that the two obligations of the Government to refer the case of the detenu and his representation filed under S. 8 of the Act to the Advisory Board and to consider that representation on the other are two distinct obligations independent of each other. In view of S. 10, the representation of a detenu if filed within this stipulated period has to be placed before the Advisory Board within that period and it is not dependent on the decision of the appropriate authority of that representation."*

28. The learned Senior Advocate has also referred to the judgment in **Bundu v State of UP, 1985 All.LJ 514** in which also similar observation has been made by this Court. In **Bheem Singh v Union of India,1985 All.LJ 1404**, where the representation of detenu was sent to the Advisory Board beyond 3 weeks of the date of detention, the provisions of Section 10 of the Act is clearly violated and the detention order is illegal. In **Smt Gracy v State of Kerala, AIR 1991 SC 1090**, the Supreme Court held:

> *"It being settled that this dual obligation flows from Art. 22(5) when only one representation is made and addressed to the detaining authority, there is no reason to hold that the detaining authority is relieved of this obligation merely because the representation is addressed to the Advisory Board instead of the detaining authority and submitted to the Advisory Board during pendency of the reference before it. So long as there is a representation made by the detenu against the order of detention, the dual obligation under Article 22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the Advisory Board or to both."*

29. Reiterating the same view, the Supreme Court laid down in **K.M. Abdulla Kunhi & B.L. Abdul v Union of India, AIR 1991 SC 574** that an unexplained delay in disposal of representation would be a breach of constitutional imperative and would render the detention illegal. It was also remarked that the representation might have been received after the case was referred to the Board, even then the same should be placed before the Board provided the proceeding was not concluded before the Board.

30. In **Mohinuddin v District Magistrate, AIR 1987 SC 1977**, reiterating that unexplained delay in disposal of representation would render the detention illegal, the Court said:

> *"When the life and liberty of a citizen is involved, it is expected that the Government will ensure that the constitutional safeguards embodied in Art. 22(5) are strictly observed. We say and we think it necessary to repeat that the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of personal liberty is largely the history of insistence on observation of the procedural safeguards."*

31. Now, in the background of the arguments advanced and case laws relied upon by the learned Senior Advocate, we roughly find certain issues which emerge in this case on the basis of which, this writ petition is required to be decided. The first issue is with regard to the plea of petitioner regarding non-supply of relevant documents even though he demanded the same. The counter affidavits filed on behalf of the respondents deny it and they have stated that the detention order was served on the petitioner along with all relevant papers. Neither in the petition nor in the rejoinder affidavits, the petitioner has made specific mention about those documents which were not given to him. The affidavits of the respondents, who are public officers cannot be easily disbelieved merely on the saying of the petitioner. We find no force in this argument advanced from the side of

petitioner.

32. The second issue for determination is that the detaining authority did not consider the fact that the case on the basis of which NSA was imposed, in that case, the petitioner was already granted bail and even then there was no possibility of his early release as the offence under the UP Gangster Act was imposed on him and he was sent to judicial custody and was in jail when NSA was imposed on him. The detaining authority has mentioned in the detention order that in Crime no. 154 of 2020, the petitioner obtained bail from the court of Special Judge and there is every possibility that he will soon obtain bail in the case under the UP Gangster Act. Needless to mention that the petitioner was granted bail in crime no. 156 of 2020, under the UP Gangster Act vide order dated 26.08.2020. Therefore, the opinion of the detaining authority that there is every possibility that the petitioner will obtain bail very soon was based on sound apprehension. Taking into consideration all the facts and attending circumstances, the detaining authority was of the view that in order to prevent the petitioner from indulging in similar type of activities, his preventing detention was necessary. Therefore, this issue, in our view, is liable to be disposed against the petitioner.

33. The next issue is with regard to the opportunity of hearing before the Advisory Board through legal representative. It has been submitted that despite his request, he was denied this opportunity and it renders the detention illegal. The learned counsel for the respondents have referred to Article 22 of the Constitution which is as follows:

> *"22. Protection against arrest and detention in certain cases*

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate

(3) Nothing in clauses (1) and (2) shall apply -
(a) to any person who for the time being is an enemy alien; or
(b) to any person who is arrested or detained under any law providing for preventive detention
(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless -
(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:
Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clauses (b) of clause (7); or
(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order
(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be

against the public interest to disclose.
(7) Parliament may by law prescribe -
(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause (4);
(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause (4).”

34. The NSA provides as follows:

“Section 11. Procedure of Advisory Board. -

(1) The Advisory Board shall, after considering the materials placed before it and, after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report to the appropriate Government within seven weeks from the date of detention of the person concerned.

(2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.
(3) When there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(4) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board; and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.”

35. Article 22 of the Constitution does not provide any right in favor of detenue to be represented through a legal practitioner or advocate. Section 11(4) of NSA clearly incorporates that the detenue is not entitled to be represented through a legal practitioner or advocate before Advisory Board. He can be represented before the Advisory Board through a non-advocate next friend. The learned Senior Advocate has taken reference of certain judgments to support his argument that the detenue was entitled to be defended and represented through a legal practitioner or advocate. The judgments in **A.K. Roy vs. Union of India (1982) 1 SCC 271** and **Choith Nanikram Harchandani vs. State of Maharashtra, 2015, volume 17 SCC 688** have been referred to in support.

36. The issue, whether the detenu has right to appear through a legal practitioner in the proceedings before the Advisory Board stands settled by the decision of the Constitution Bench of the Apex Court in **A. K. Roy (supra)** where the Court held as below:

> *"We must therefore hold, regretfully though, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Article 22 (3) (b) of the Constitution clearly is that a legal practitioner should not be permitted to appear before the Advisory Board for any party. The Constitution does not contemplate that the detaining authority or the Government should have the facility of appearing before the Advisory Board with the aid of a legal practitioner but that the said facility should be denied to the detenu. In any case, that is not what the Constitution says and it would be wholly inappropriate to read any such meaning into the provisions of Article 22. Permitting the detaining authority or the Government to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be in breach of Article 14, if a similar facility is denied to the detenu. We must therefore make it clear that if*

> *the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner."*

37. Similarly, in **Choith Nanikram Harchandani (supra)** with **Bittu Choith Harchandani Vs. State of Maharashtra (2018) 2 SCC (Cri) 403, (2015) 17 Supreme Court Cases 688** it was held as under :

> *"In our considered opinion, since the detaining authority was represented by the officers at the time of hearing of the petitioner's case before the Advisory Board, the petitioner too was entitled to be represented through legal practitioner. Since no such opportunity was afforded to the petitioner though claimed by him, he was denied an opportunity of a fair hearing before the Advisory Board, which eventually resulted in passing an adverse order."*

38. We find that, in this petition, it has been neither alleged nor shown by the petitioner that, at any stage, the State was assisted by any legal practitioner or advocate before the Advisory Board and in view of above referred judgments, the petitioner is not entitled to be represented through legal practitioner or advocate. This point is therefore disposed accordingly.

39. Next submission is that the satisfaction of the detaining authority is not based on sound reasons, as the alleged offence/case which was made basis for imposing NSA, in that offence/case, the petitioner was released on bail by Special Judge at district level and it goes to show that the alleged offence was not of that magnitude where bail could be

denied. Section 3 of NSA is as follows:

> ***"Section 3. Power to make orders detaining certain persons. -***
> *(1) The Central Government or the State Government may,—*
> *(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India, or*
> *(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,*
> *it is necessary so to do, make an order directing that such person be detained.*
> *(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.*
> *Explanation.—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 (7 of 1980), and accordingly, no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act.*
>
> *(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers*

conferred by the said sub-section:
Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

(4) When any order is made under this section by an officer mentioned in sub-section (3), he shall forthwith report the fact 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 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:
Provided that where under section 8 the grounds of detention are communicated by the officer making the order after five days but not later than ten days from the date of detentions, this sub-section shall apply subject to the modification, that, for the words "twelve days", the words "fifteen days" shall be substituted.

(5) When any order is made or approved by the State Government under this section, the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order."

40. Thus, preventive detention of a person is possible for 'preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order....' In our opinion, the grounds of detention disclose not only "law and order" problem, but also the problem of "public order" which is likely to be caused by the activities of the petitioner. It is trite to mention here that preventive detention is a device to offer protection to the society and the executive can

always take recourse to it where it is satisfied that no other method would succeed in preventing a person from disturbing the "public order" situation. The subjective satisfaction of the detaining authority with regard to the action of preventive detention has to be taken keeping in mind the danger to liberties of the people and if the actions or the activities of the person have serious repercussions not merely on "law and order" but on "public order", the satisfaction so recorded cannot be lightly interfered by the Court of Law unless it is arbitrary or unreasonable.

41. Satisfaction of the State Government that it is necessary to detain a person in order to prevent him from acting in any manner prejudicial to the "public order" is an essential condition for passing such a preventive order. The "public order" has not been defined under the Act but it was a matter of consideration before the Apex Court in the case of **Ashok Kumar v Delhi Administration, AIR 1982 SC 1143** which was also a case under the aforesaid Act. The Court therein made a distinction between the two concepts of "public order" and "law and order" and held that in the case of "law and order", it affects specific individuals only, while in the case of "public order", it has the potentiality of disturbing the normal tempo of the life of the community. The Supreme Court observed as under:

> *"The true distinction between the areas of 'public order' and 'law and order' lies not in the nature or 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, while in another it might affect public 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. The meaning of "public order" again came up for consideration in **Smt. Angoori Devi for Ram Ratan v Union of India, AIR 1989 SC 371** and it was opined that if the act is confined to individual without directly or indirectly affecting the life of the community, it may be a matter of "law and order" only but where the gravity of the act is otherwise and likely to endanger the public tranquility, it may fall within the orbit of "public order".

43. In **Ayya alias Ayub v State of UP, AIR 1989 SC 364** it was observed that what might be otherwise simple "law and order" situation, it might assume the gravity and mischief of "public order" by reason alone of the manner or circumstances in which it is carried out. In other words, at times even simple acts of "law and order" problem on account of their gravity and the manner or circumstances in which they occur may result in disturbing the "public order" if they create a sense of insecurity in the public mind. Therefore, to invoke the provision of Section 3(2) of the Act, the satisfaction of the State Government so to prevent a person from acting in a manner prejudicial to the maintenance of "public order" are two essential conditions. Therefore, we are of the view that the distinction between "law and order" and "public order" is very fine and at times it may be overlapping.

44. In the case at hand, the grounds of detention elaborately narrate the facts leading to the order of detention and the grounds are precise, pertinent, proximate and relevant for recording subjective satisfaction and thus, it cannot be said that the detaining authority has not applied its judicious mind in coming to the conclusion that the activities of the petitioner are prejudicial in nature to the maintenance of "public order". Moreover, it has been settled in **Abhay Shridhar Ambulkar v S.V. Bhave, (1991) 1 SCC 500** and **Magan Gope v State**

of WB, (1975) 1 SCC 415 that subjective satisfaction of the detaining authority in passing the detention order cannot be lightly interfered with and the Court cannot go behind the satisfaction expressed on the face of detention order.

45. Another argument is that the detaining authority extended the detention order for 6 months at a time, which is illegal. It appears from the record that after taking into consideration the facts and circumstances of the case, the State Government was satisfied that it is necessary to extend the above detention period for further three months. Therefore, the State Government amended the above order and extended the detention for six months since 10.07.2020. Accordingly, the detention order on 08.10.2020. The information of extension of detention period was communicated to the petitioner through district authorities by radiogram and letter dated 08.10.2020. thus, it is not correct to say that the detention order was extended for six months. It was so extended for three months by order dated 08.10.2020 which means 6 months extension from the initial date of detention. Therefore, we do not find any force in this argument.

46. The last issue is with regard to the delay in forwarding representation of the petitioner and not placing the same before the Advisory Board. It has been submitted that no reasonable explanation has been given by the respondents. Case law has been referred to in support of this argument. The factual matrix in this regard needs to be mentioned and discussed at this stage. Admitted fact is that the detaining authority passed the detention order on 10.07.2020 against the petitioner and the petitioner gave his representation 20.07.2020 as stated in the counter affidavit of the State. The detention order was approved on 21.07.2020. It is evident that the representation so given by the petitioner was well within the prescribed period of 12 days. On 14.08.2020, his representation was rejected. Prior to that, the Advisory Board had already made recommendation for approval of the

detention order on 12.08.2020. The record shows that the representation of the petitioner was not placed before the Advisory Board till 12.08.2020 even though the same was filed on 20.07.2020. It remained pending with the State Government and after 2 days from the date the Advisory Board sent the recommendation, the same was rejected. The submission of the learned Senior Advocate is that the representation of the petitioner was not processed expeditiously without any reasonable explanation, and was not even placed before the Advisory Board for consideration. This inaction on the part of authorities resulted in denial of fair opportunity of hearing and on this ground alone, the impugned detention order is vitiated.

47. We are of the view that delay in taking decision on representation and not placing the same before the Advisory Board are important factors to adjudicate upon the legality or illegality of the order of detention. But such delay is not exclusive factor and depends upon the facts and circumstances of each case and availability of cogent and reasonable explanation to explain the delay. What will be a reasonable explanation would always depend upon the factual situation in that particular case. We are of the firm view that an uniform scale or parameter in this respect is not possible nor can be laid down. Therefore, without expressing a final opinion on law point on delay in such cases, on the basis of decision in **Rajammal (supra), Virendra Kumar Nayak (supra), Satyapriya Sonkar (supra), Bheem Singh (supra), Smt Gracy (supra), K.M. Abdulla Kunhi & B.L. Abdul (supra)** and **Mohinuddin (supra)**, which have been referred on behalf of petitioner and discussed by us here-in-above, in the factual context of this particular writ petition, we find that following observations made in the above referred judgments on the point of delay are relevant which can be taken into consideration for coming to a conclusion in this petition :

1. *Where the representation of the detenue was not*

placed before the Advisory Board, the detention is rendered invalid. Even a supplementary representation ought to be placed before the Advisory Board.

2. Where there is unexplained, unreasonable and improper delay in forwarding the representation of the detenue resulting in rejection of the representation, such detention order shall be vitiated.

3. The representation should not be rejected on technical grounds and the detaining authority must apply his mind.

4. There are two obligations of the Government to refer the case of the detenue and his representation filed under S. 8 of the Act to the Advisory Board and to consider that representation independent of each other. In view of S. 10, the representation of a detenue if filed within stipulated period has to be placed before the Advisory Board within that period and it is not dependent on the decision of the appropriate authority of that representation."

5. Where the representation of detenu was sent to the Advisory Board beyond 3 weeks of the date of detention, the provisions of S.10 of the Act is clearly violated and the detention order is illegal.

6. When only one representation is made and addressed to the detaining authority, he is not relieved of the obligation merely because the representation is addressed to the Advisory Board instead of the detaining authority and submitted to the Advisory Board during pendency of the reference before it. So long as there is a representation made by the detenue against the order of detention, the dual obligation continues.

7. an unexplained delay in disposal of representation would be a breach of constitutional imperative and would render the detention illegal. Even if the representation might have been received after the case was referred to the Board, even then the same should be placed before the Board provided the proceeding was not concluded before the Board.

48. It needs to be pertinently mentioned that no judgment has been referred by the opposite parties in which any contrary observation has been expressed. Therefore, in view of the aforesaid observations, we find that in this instant case, a breach thereof is

evident. The representation was kept pending for more than 3 weeks and was never placed before the Advisory Board. After the recommendation was made by the Advisory Board on 12.08.2020, the representation was rejected by the Authority. In respect of delay in processing the representation, the counter affidavit contains the following explanation in para 26:

> *"That the contents of paragraph no.28 of the writ petition are false, hence denied. In reply, it is submitted that having received the representation same was sent to Superintendent of Police, Jaunpur for comments and on 24.07.2020 English Record Keeper was found corona positive and office was closed for 25.07.2020 and 26.07.2020 and thereafter, again on 27.07.2020, 5 employees and one official was found corona positive the office was again closed on 28.07.2020, 29.07.2020 Collectrate office was closed and 1st, 2nd and 3rd August, 2020 was government holiday and concerned employee was busy in B.ed examination 2020-22 on 09.08.2020, so could not put up the file and thereafter, on 3 days the file was delayed on the part of Officiating judicial Assistant Kamlesh Kumar Maurya, who was suspended for negligence and file was put up before deponent on 14.08.2020 and on the same day it was rejected and same was communicated to detenue on 15.08.2020 through Jail Authority "*

49. In our view, the above explanation itself speaks in volume about the reluctance on the part of opposite parties in delaying and keeping the representation pending and not placing the same before the Advisory Board. The plea of Covid-19, officials suffering from pendemic, intervening holiday or negligence on the part of an official on account of which he was suspended, are no reason, which could be attributed towards any fault or lapse on the part of the petitioner. Even on the date when the case was fixed before Advisory Board, the authorities could have placed the representation of the petitioner before the Board. Thus, we find that no reasonable explanation has been given for delay and not placing the representation before the

Board.

50. On the contrary, it is evident from the record that, while extra ordinary haste was shown in taking action against the petitioner, the authorities remained reluctant and there was complete inaction on their part causing unjustified delay in processing the representation of the detenue and in not placing the representation before the Advisory Board. This inaction on the part of the authorities certainly resulted in deprivation on the right of the petitioner of fair opportunity of hearing and it also resulted in denial of the opportunity of fair hearing to the petitioner as provided under law. This is not permissible and is in gross violation of established legal and procedural norms and legal and constitutional protection.

51. Where the law confers extra-ordinary power on the executive to detain a person without recourse to the ordinary law of land and to trial by courts, such a law has to be strictly construed and the executive must exercise the power with extreme care. The history of personal liberty is largely the history of insistence on observation of the procedural safeguards. The law of preventive detention, though is not punitive, but only preventive, heavily affects the personal liberty of individual enshrined under Article 21 of the Constitution of India and, therefore, the Authority is under obligation to pass detention order according to procedure established by law and will ensure that the constitutional safeguards have been followed.

52. In view of above discussion, we find that the impugned detention order dated 10.07.2020 and its subsequent extension orders passed against the petitioner is arbitrary and illegal and is liable to be quashed.

53. The writ petition is **allowed** and the impugned detention order of the petitioner **Javed Siddiqui** is quashed. The petitioner /detenue **Javed Siddiqui** is directed to be released forthwith, if not required in any other case.

54. The party shall file computer generated copy of this order

downloaded from the official website of High Court Allahabad, self attested by the petitioners along with a self attested identity proof of the said person (s) (preferably Aadhar Card) mentioning the mobile number (s) to which the said Aadhar Card is linked.

55. The concerned Court/Authority/Official Shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

Order Date : 07.12.2020
sailesh

(Justice Pradeep Kumar Srivastava) (Justice Pritinker Diwaker)