High Court of Madhya Pradesh Bench at Indore

Case Number	**WP No.9264/2021**
Parties Name	Smt.Sandhya Parmar Vs State of MP & Ors.
Case Number	**WP No.9267/2021**
Parties Name	Preeti Parmar Vs. State of MP & Ors.
Date of Order	24th June, 2021
Bench	**Division Bench:** Justice Sujoy Paul Justice Shailendra Shukla
Judgment delivered by	Justice Sujoy Paul
Whether approved for reporting	NO
Name of counsel for parties	Shri. Rishi Tiwari, learned counsel for petitioner. Shri Pushyamitra Bhargava, learned A.A.G for respondent/ State.

O R D E R
(Passed on 24th June, 2021)

Sujoy Paul, J:-

This order will dispose of both the writ petitions which are founded upon similar set of facts and allegations.

WP No.9264/2021

2. This petition is filed by mother of corpus namely Shubham Parmar against whom an order of detention has been passed by the District Magistrate (DM), Indore u/S.3(2) read with sub-section (3) of National Security Act, 1980 (NSA Act) against petitioner's younger son for acting in a manner prejudicial to the maintenance of public order. It is averred that detention order has been passed by DM founded upon an information of one Nilesh Chauhan against whom an FIR was registered by police station Rajendra Nagar at Crime No.356/2021 for allegedly selling fake Remdesivir injections and black marketing the said injunctions.

WP No.9267/2021.

3. This petition is filed by Preeti Parmar wife of Bhupendra Parmar against whom impugned order dated 20/4/2021 is passed detaining him under the NSA Act. The factual foundation in both the matters are same. It is contended that on the basis of FIR against said Nilesh Chouhan, Bhupendra Parmar was also detained under the NSA Act.

4. To elaborate, Shri Rishi Tiwari, learned counsel for petitioners submits that a plain reading of impugned orders of detention makes it clear that the same are passed without any time limit. In other words, the outer limit upto which order will remain in force is not mentioned in the impugned order. Thus, impugned order runs contrary to catena of judgments namely ***Lahu Shrirang Gatkal Vs. State of Maharashtra & Ors. (2017) 13 SCC 519***, ***WP No.23109/2019: Ashish Pandey Vs. State of MP & Ors.***, ***WP No.19729/2019: Gopal Dewani Vs. State of MP & Ors.***, ***WP No.19532/2019: Lochan Singh Vs. State of MP & Ors.*** and ***WP No.2695/2019: Akash Yadav Vs. State of MP & Ors.*** Reference is made to the order of ***Akash Yadav*** (supra) wherein the judgment of Supreme Court in **Ashok Kumar** was considered. The government in its reply has placed reliance on the judgment of ***Ashok Kumar*** (supra) to wriggle out of the illegality of not mentioning the time limit upto which detention order will remain in force. It is urged that the similar argument of State could not find favour in aforesaid judgments of this Court and after considering the dicta of ***Ashok Kumar*** (supra), this Court opined that detention order stands vitiated if it does not contain any time limit.

5. The next contention is that impugned orders are examples of non application of mind and acting in a mechanical manner. The report of Superintendent of Police (SP) dated 19/4/2021 (Annexure R/7) is relied upon to contend that report of SP became the reason and foundation for DM to pass the impugned order. This report of SP

only talks about black marketing of Remdesivir injections. There is no iota of averment in this report that the aforesaid Remdesivir injections which were actually containing distill water were being sold by the applicants. However, the detention order contains an allegation that the injection/vile so recovered from corpus contained distilled water.

6. Shri Rishi Tiwari has taken pains to contend that from both the corpus one Vial was recovered. If allegations against Nilesh Chauhan reproduced in the FIR are examined with the findings and allegations given in the impugned detention orders, it will be crystal clear that the allegations against Nilesh Chauhan were copy pasted in the impugned detention orders without application of mind. Thus, the impugned order deserves to be interfered with on this ground alone.

7. The corpus in these cases are medical representatives and Homeo Doctor respectively. The documentary evidence to support these submissions are filed with the petitions. By taking this Court to the prescriptions of Doctor, it is submitted that the relatives/family members of corpus were suffering from Covid. The prescription shows that Remdesivir injection was prescribed by the treating Doctor. The receipt of Shanti Medicos shows that the Remdesivir injections were indeed purchased by the corpus. This factual backdrop shows that in a high handed manner a drastic provision of NSA is pressed against the corpus which were wholly unwarranted, uncalled for and unjustifiable. The impugned orders are therefore, contrary to the mandate of NSA Act and hits Article 14 and 21 of the Constitution. The right to life with dignity of corpus is infringed by issuance of mechanical orders of detention.

8. Lastly, it is urged that detention order is silent about the right of detenu to represent against the detention order before the same authority. This runs contrary to the recent Full Bench judgment in ***Kamal Khare v/s The State of Madhya Pradesh (W.P.***

No.22290/2019). The detention order deserves to be set aside on this score alone.

9. Shri Pushyamitra Bhargav, learned Additional Advocate General opposed the prayer of the petitioner by contending that the Full Bench decision is based on the judgment of Supreme Court in ***Kamleshkumar Ishwardas Patel v/s Union of India & Others, (1995) 4 SCC 51***. Kamlesh's judgment is an interpretation of different enactments namely COFEPOSA Act and PIT NDPS Act. Thus, Full Bench judgment is distinguishable.

10. We do not see any merit in this contention. A plain reading of para – 14 of judgment of Full Bench aforesaid leaves no room for any doubt that similar arguments were advanced before the Full Bench which could not find favour. Thus, we are unable to hold that the said judgment is distinguishable.

11. Indisputably, the detention orders passed by District Magistrate do not contain any stipulation that detenu may prefer representation before the same authority. This aspect was considered by Constitution Bench in ***Kamleshkumar Ishwardas Patel (supra)*** as under:-

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

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

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

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

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

(Emphasis supplied)

12. This aspect was dealt with by Full Bench in ***Kamal Khare (supra)***. Relevant paragraphs read as under:-

"22. We shall now deal with the reference order made by the Division Bench of this Court at Indore Bench in the case of **Manish Vs. State of M.P. and other** (W.P. No.28804/2019). In our considered opinion, all the three questions which Division Bench has formulated and referred for our consideration stands answered in the affirmative by the judgment of the Constitution Bench of the Supreme Court in **Kamlesh Kumar Ishwardas Patel** (supra). The Constitution Bench of Supreme Court in **Kamlesh Kumar Ishwardas Patel** (supra) was dealing with the question that when an order of preventive detention is passed by an officer especially empowered to do so by the Central Government or the State Government, whether such officer is required to consider the representation submitted by the detenu. The matter arose before the Supreme Court from the detention order passed by the officer specially empowered by the Central Government under Section 11 of the COFEPOSA Act and under Section 12 of the PIT NDPS Act. There was divergence of opinion in the decisions of the Supreme Court on this issue. In **Amar Shad Khan Vs. L. Hmingliana and others** (1991) 4 SCC 39, a three-judge Bench of the Supreme Court held that where an officer of the State Government or the Central Government has passed any detention order and on

receipt of a representation, he is convinced that the detention needs to be revoked, he can do so. However another two-judge Bench of the Supreme Court in **Smt. Sushila Mafatlal Shah** (supra) took a difference view and held that if an order of detention is made by an officer specially empowered by the Central Government or the State Government, the representation of the detenue is required to be considered only by the Central Government or the State Government and not by the officer who had made the order. The Constitution Bench of the Supreme Court upon consideration of the conflicting opinions of the two-judge Bench decisions and upon survey of the previous case laws on the subject and analysis of the mandate of Article 22(5) of the Constitution of India, in **Kamal Kumar Ishwardas Patel** (supra) held that the provisions in COFEPOSA Act and PIT NDPS Act differ from those contained in the National Security Act, 1980 as well as earlier preventive detention laws of the Preventive Detention Act, 1950, the Maintenance of Internal Security Act, 1971 in some respects. Under subsection (3) of Section 3 of the National Security Act, power has been conferred on the District Magistrate as well as the Commissioner of Police to make an order of detention, and sub-section (4) of Section 3 prescribes that the officer shall forthwith report the fact of making the order to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter, and that no such order shall remain in force for more than twelve days after the making thereof unless, in the meantime, it has been approved by the State Government. In Section 8 (1) of the NSA, it is prescribed that the authority making the order shall afford the person detained the earliest opportunity of making a representation against the order to the appropriate Government. Similar provisions were contained in the Preventive Detention Act, 1950 and the Maintenance of Internal Security Act, 1971. However, the COFEPOSA Act and the PIT NDPS Act do not provide for approval by the appropriate Government of the orders passed by the officer specially empowered to pass such an order under Section 3. The said Acts also do not lay down that the authority making the order shall afford an opportunity to make a representation to the appropriate

Government.

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

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

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

> "47. In both the appeals the orders of detention were made under Section 3 of the PIT NDPS Act by the officer specially empowered by the Central Government to make such an order. In the grounds of detention the detenu was only informed that he can make a representation to the Central Government or the Advisory Board. The detenu was not informed that he can make a representation to the officer who had made the order of detention. As a result the detenu could

not make a representation to the officer who made the order of detention. The Madras High Court, by the judgments under appeal dated 18-11-1994 and 17.1.1994, allowed the writ petitions filed by the detenus and has set aside the order of detention on the view that the failure on the part of the detaining authority to inform the detenu that he has a **right to make a representation to the detaining authority himself has resulted in denial of the constitutional right guaranteed under Article 22(5) of the Constitution. In view of our answer to the common question posed the said decisions of the Madras High Court setting aside the order of detention of the detenus must be** **matters upheld and these appeals are liable to be dismissed**."

(emphasis supplied)

13. Another Division Bench in ***W.P. No.5866/2015 (Salma v/s The State of Madhya Pradesh)*** opined as under:-

"The Supreme Court following the dictum in the case of Kamleshkumar restated that non-communication of the fact to the detenue that he could make a representation to the detaining Authority so long as order of detention has not been approved by the State Government in case the order of detention has been issued by the Officer other than the State Government, would constitute infringement of right guaranteed under Article 22(5) of the Constitution and this ratio of the Constitution Bench of the Supreme Court in Kamlesh kumar would apply notwithstanding the fact that same has been made in the context of provisions of COFEPOSA Act.

……..Suffice it to observe that the detention order and the disclosure of the fact that detenu could make representation to the detaining Authority before the State Government considered the proposal for approval has abridged the right of detenu under Article 22(5) of the Constitution. As a result, the continued detention of the detenu on the basis of such infirm order cannot be countenanced.

These petitions, therefore, must succeed. The impugned detention orders in the respective petitions are quashed and set aside and respondents are directed

to set the petitioners/detenu at liberty forthwith unless required in connection with any other criminal case."

(emphasis supplied)

14. In the light of these pronouncement, there is no manner of doubt that detention order has become vulnerable because detenus were not made aware about their valuable right to prefer representation against the detention order before the same authority i.e. District Magistrate.

15. So far as argument of time limit in the detention order is concerned, we have dealt with this aspect in W.P. No. 9529/2021 *(Smt. Monica Tripathi Vs. State of MP)* and opined as under:-

"**12)** A Division Bench of this Court in ***Akash Yadav*** (supra) came to hold that in absence of mentioning the period of detention, detention order becomes illegal. A careful reading of the order of ***Akash Yadav*** shows that the authoritative pronouncement of Supreme Court on this aspect in ***T. Devki*** (supra) was not brought to the notice of the Division Bench. In ***T. Devki*** (supra), Apex Court held as under:-

"12. Section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug Offenders Act, 1981 is identical in terms to Section 3 of the Tamil Nadu Act. Section 3 of Maharashtra Act does not require the State Government, District Magistrate or a Commissioner of Police to specify period of detention in the order made by them for detaining any person with a view to preventing the detenu from acting in any manner prejudicial to the maintenance of public order. Section 3(1) which confers power on the State Government to make order directing detention of a person, does not require the State Government to specify the period of detention. Similarly, sub-sections (2) or (3) of Section 3 do not require the District Magistrate or the Commissioner of Police to specify period of detention while exercising their powers under sub-section (1) of Section 3. The observations made in Gurbux Bhiryani case [1988 Supp SCC 568 : 1988 SCC (Cri) 914] that the scheme of the Maharashtra Act was different from the provisions contained in other similar Acts and that Section 3 of the Act contemplated

> initial period of detention for three months at a time are not correct. The scheme as contained in other Acts providing for the detention of a person without trial, is similar. In this connection **we have scrutinised**, the Preventive Detention Act, 1950, the Maintenance of Internal Security Act, 1971, COFEPOSA Act, 1974, **National Security Act, 1980, but in none of these Acts the detaining authority is required to specify the period of detention while making the order of detention against a person**."
>
> (***emphasis supplied)***

13) Pertinently, the judgment of ***Akash Yadav*** (supra) was pressed into service before another Division Bench of this Court in the case of ***Narendra Verma*** (supra). The Division Bench opined as under:-

> "16. From the discussion herein before, it is evident that T. Devki's case was earlier in point of time and it is a decision of Apex Court by three Hon'ble Judges holding that it is not necessary to specify the period of detention in the detention order. The subsequent decision of Apex Court is also delivered by two Hon'ble Judges but there is no reference or mention of the earlier decision of T. Devki's case therein. It appears that the same was not brought to the notice of Hon'ble Judges of the Apex Court. As stated herein before that in case of conflict as held in the case of Jabalpur Bus Operator (supra), the earlier decision will prevail hence as per decision in T. Devki's case, we hold that it is not necessary to specify the period in the detention order and detention order cannot be held illegal for not specifying the period of detention in detention order."
>
> (***emphasis supplied)***

14) We are in respectful agreement with view taken by Division Bench in ***Narendra Verma*** (supra) because it is based on the binding judgment of 3 Judges Bench of Supreme Court in the case of *T. Devki*. Interestingly, the judgment of *T. Devki* was not brought to the notice of subsequent Benches in the case of ***Lahu Shrirang Gatkal*** and in ***Sama Aruna***. These two

judgments are delivered by two Judges Bench of Supreme Court. In both these matters, on which heavy reliance is placed by Shri Dhanodkar, a different statute was subject matter of interpretation. NSA Act was not the subject matter nor the judgment of *T. Devki* in which NSA Act was interpreted was considered. Thus, we are unable to hold that for not mentioning the period of detention, detention order will vanish in thin air. In ***R.P. No.1372/2019 (State vs. Sahil Khan)***, the Division Bench further held as under:-

> "7. In light of the aforesaid and also keeping in view the judgment delivered in the case of *Secretary to Government of Tamil Nadu Public (Law and Order) Revenue Department* (supra), as the judgement delivered in the case of *Gurbux Anandram Bhiryani* (supra) was overruled and the aforesaid fact was not brought to the attention of this Court by either side, order passed in W.P. No.17650/2019 is hereby recalled.
> 8. The writ petition No.17650/2019 is restored to its original number. The same be listed on **04.11.2019.**
> 9. The review petition stands disposed of accordingly."
>
> **(emphasis supplied)**

15) In view of foregoing analysis, the detention order cannot be interfered with for not mentioning the period of detention. Thus, this contention of Shri Dhanodkar must fail."

16. The order of detention deprives detenu's Freedom flowing from Article 21 of the Constitution of India. The freedom of a citizen cannot be snatched and taken away in a mechanical manner. Whether in a given case detention of a person is necessary or not needs to be examined with accuracy and precision. We deem it proper to remind ourself to unique exposition on this aspect by R.S. Sarkaria, J. that:-

> "it is the duty of the Court to see that efficacy of the limited, yet crucial safeguards provided in the **law of preventive detention is not lost in mechanical routine, dull casualness and chill indifference on the part of the authorities entrusted with their application**."

(See: Shaik Hanif v/s State of W.B. (1974) 1 SCC 637, para 10)

17. In the instant case, the detention orders passed by District Magistrate are based solely on the basis of information given by the Superintendent of Police, Indore. The recommendation of S.P. dated 19.04.2021 shows that allegations against both the detenues were relating to blackmarketing of Remdesivir injection. There is no iota of finding regarding use of distill water in Remdesivir injection. This allegation of using distilled water in Remdesivir injection was made in fact against one Nilesh Chouhan which is evident from bare perusal of his F.I.R. However, District Magistrate in the impugned detention orders mentioned that one Remdesivir injection so recovered from both the detenues was containing distill water. It is difficult to gather as to from where the District Magistrate gathered this fact. The decision making process adopted by District Magistrate appears to be faulty and this finding of recovery of Remdesivir injection filled with distilled water against present detenus is without there being any basis. We deprecate the action of District Magistrate in mechanically passing the detention orders by cut copying the reasons from F.I.R. of some other person namely Nilesh Chouhan. This mechanical exercise on the part of District Magistrate runs contrary to the constitutional scheme ingrained in Article 14 and 21 of the Constitution of India and also the provisions of NSA Act.

18. In view of foregoing analysis, the impugned orders of detention dated 20.04.2021 in both the cases are set aside.

19. The writ petitions are **allowed.**

(SUJOY PAUL)
J U D G E

(SHAILENDRA SHUKLA)
J U D G E

Vm/Ravi