(2004) 03 BOM CK 0132

Bombay High Court

Case No: Criminal W.P. No. 1474 of 2003

Kirti Kumar Narulla		APPELLANT
	Vs	
State of Maharashtra and Others		RESPONDENT

Date of Decision: March 24, 2004

Acts Referred:

- Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Section 3, 3(1), 8
- Constitution of India, 1950 - Article 22(4), 22(5)
- Customs Act, 1962 - Section 24

Citation: (2004) 3 MhLj 505

Hon'ble Judges: S.S. Parkar, J; Ranjana Desai, J

Bench: Division Bench

Advocate: Maqsood Khan and A.M.Z. Ansari, for the Appellant; D.S. Mhaispurkar, for the Respondent

Final Decision: Dismissed

Judgement

S.S. Parkar, J.

This petition is filed challenging the order of detention dated 18th January 2003 issued against the Rajinder Narula under the provisions of Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the COFEPOSA Act").

2. The officers of the Directorate of Revenue Intelligence (DRI), Mumbai had, on receiving the information, kept watch over the activities of the passengers in transit lounge of CST Airport, Mumbai on the night of 31st July 2002. The detenu who had to go to Ahmedahad had come from Delhi to Bombay by Indian Airlines flight. He was apprehended when he handed over foreign currency of 700 notes of US $ in denomination of 100 totalling to US $ 70,000 equivalent to Indian Rs. 35 lakhs along with four mobile phones to one Tilak Raj Sharma in the transit lounge at Sahar

Airport that night. The detenu had come from Delhi to Bombay by Indian Airlines flight and was to go to Ahmedabad from Bombay by international flight. Both the detenu and the co-accused Tilak Raj Sharma, who was also later on detained, were arrested after their statements u/s 108 of the Customs Act were recorded. The detenu had retracted his confessional statement on 2-8-2002 when he was produced before the Magistrate to which rebuttal was filed by the DRI. The detenu was granted bail by the order dated 14-8-2002. The order of detention u/s 3 of the COFEPOSA Act was issued against the detenu on 18-1-2002. After the steps were taken by the Detaining Authority u/s 7 of the COFEPOSA Act for securing his custody the detenu ultimately surrendered on 30th September 2003 when the order of detention, the grounds of detention including the documents relied on by the Detaining Authority were served on him. Before the detenu had surrendered on 30th September 2003 pursuant to the order of detention, show cause notice was issued on 24-1-2003 by the Department u/s 124 of the Customs Act which was contested by the detenu through his Advocate. The detenu had filed reply dated 25-2-2003 to the show cause notice through his Advocate.

3. The meeting of the Advisory Board constituted under the provisions of the COFEPOSA Act had taken place on 6-11-2003 when the detenu was personally present and was heard by the Advisory Board and at the time of meeting the detenu handed over his representation dated nil which was addressed to the Advisory Board, the Detaining Authority and the State of Maharashtra. After the report of the Advisory Board was sent to the Government, the State Government had confirmed the order of detention issued against the detenu.

4. The petitioner, who is the brother of the detenu, filed this petition in this Court challenging the order of detention issued against the detenu on various grounds to which reply affidavits have been filed. At later stage the petition was amended and additional points were raised to which also the reply affidavits have been filed on behalf of the respondents.

5. Though in the petition the order of detention has been challenged on several grounds. Mr. Khan appearing for the petitioner raised, three contentions before us. Firstly he contended that there was non-application of mind by the Detaining Authority and, therefore, the order of detention is vitiated for referring to the foreign currency seized from the detenu as assorted foreign currency in the grounds of detention. Secondly he contended that confirmation of the order of detention by the State Government is vitiated because the Advisory Board did not consider the show cause notice issued to the detenu under the provisions of the Customs Act and the reply given thereto and for not giving copies thereof to the detenu. Lastly on the basis of the reply affidavit dated 25th February 2004 filed by the Detaining Authority and in particular contents of paragraph 4 of the said affidavit it was contended that the order of detention was not passed in accordance with law inasmuch as the Detaining Authority did not pass the order after the

documents were placed before it by the Sponsoring Authority at the initial stage but went on changing the draft grounds of detention on the basis of the further material placed before it.

6. So far as the first ground urged by Mr. Khan is concerned, the same has been taken in paragraphs 3(iii) and (iv) of the grounds of detention. It is pointed out by Mr. Khan that though the currency allegedly seized from the detenu was US $ 70,000 which were 700 currency notes of 100 denomination, in paragraph 3 of the grounds of detention the said currency has been described as "assorted foreign currencies". According to Mr. Khan this shows non application of mind by the Detaining Authority inasmuch as though the seized currency was not assorted foreign currency, it has been wrongly described so. After perusal of the grounds of detention we found that the said description is given at only one place i.e. in the beginning of para 3 of the grounds of detention dated 18th January 2003. In other places in the grounds of detention undisputedly it is correctly mentioned. In para 2 of the grounds it is described as follows:

"...foreign currency of US $ denomination 100 x 700 Notes totalling 70,000 US $ equivalent to Indian Rs. 35,00,000/- along with 4 mobile phones..."

Similarly in para 6 also the currency is referred to as 70,000 US$. It is not disputed by Mr. Khan that the mistaken or wrong description appears only once at the beginning of para 3 of the grounds of detention. So far as this contention is concerned it is replied to by the Detaining Authority in para 3 of the affidavit dated 25th February 2004 that the reference to the currency as assorted foreign currency was a mere typographical error and that in other paragraphs there is clear reference to the foreign currency of US $ totalling to 70,000.

7. Mr. Khan, however, relies on the decision of the Division Bench of this Court dated 19-9-2003 to which one of us (Smt. Desai, J.) was a party in Criminal Writ Petition No. 1739 of 2002 filed on behalf of the co-accused and co-detenu Tilak Raj Sharma. From the said judgment it appears that the detention order of the co-detenu was set aside on two grounds, one of the grounds being non-application of mind for referring to the currency notes seized from the detenu as assorted currency notes in the grounds of detention though they were not so. The relevant observations of the Bench in paragraph 24 of the judgment are as follows :

"...The other submission of the learned counsel is that in paragraph 3 of the order of detention the detaining authority has referred to assorted currency notes being seized which also is admittedly incorrect and though a specific ground regarding non-application of mind also has been raised in the petition. No reply has been given to the said ground in the reply which is filed and a bald statement is made that the said reply would be given at the time of arguments."

From the aforesaid observations it is quite clear that the said contention was not rebutted in the reply affidavit though reply affidavit was filed in that case. Moreover,

the order of detention was set aside in that case mainly on the ground that the order of detention was issued on the basis of a solitary instance and the ground of non-application of mind was mentioned incidentally without considering the judgment of the Supreme Court in the case of Pushpadevi Jatia which is considered by us hereinafter. As against that in this case the said argument has been dealt with in paragraph 3 of the reply affidavit filed by the Detaining Authority in this case in which it is averred that the detention order was passed on the basis of seizure of foreign currency of 70,000 US $ from the detenu and reference to the said foreign currency in para 3 of the grounds of detention as assorted foreign currency was a mere typographical error. We are of the view that though the said mistake may not be a typographical error but it is so described through inadvertence which is clear from the fact that in other paragraphs of the grounds of detention it is referred to as 70,000 US $ and in paragraph 2 of the grounds of detention the break-up of currency of 70,000 US $ has been given specifically to show that what was seized was 700 currency notes of US $ in denomination of 100. This goes to show that the reference to the said currency as assorted currency notes at one place was a mistake and was described so through oversight.

8. In support of his contention Mr. Khan has also cited some other judgments of this Court and the Apex Court. Firstly he referred to the judgment of the Supreme Court in the case of Dwarika Prasad Sahu Vs. The State of Bihar and Others, . That was a case where the grounds of detention made a reference 10,200 litres of diesel instead of 1200 litres. There were two cash memos, one in respect of sale of 200 litres high speed diesel oil to Griffiths and another for sale of 1000 litres of said oil but the grounds of detention referred only to the sale of 200 litres of the oil. In that context, the Supreme Court observed that the said circumstance was indicative of the rather casual manner in which the District Magistrate proceeded to pass the order of detention without proper application of mind and it could have invalidating consequences on the order of detention. Thus though there were two cash memos of 200 litres of oil and 1000 litres of oil, the Detaining Authority had made reference to only one cash memo of 200 litres of oil. In this case the grounds of detention give the break-up of the foreign currency which was seized from the detenu which leaves no doubt about the kind of currency seized from the detenu.

9. Another judgment relied on by Mr. Khan on behalf of the detenu is in the case of Shoilen Dey reported in AIR 1949 Bom 75 where the order of detention was passed under the provisions of the Bombay Public Security Measures Act and the reference was made by the Detaining Authority in the grounds to Tata Air India, Bombay instead of Air India Ltd. The Division Bench of this Court held that there was an error and the said error was by no means trivial and it showed want of due care and caution on the part of the Detaining Authority and consequently the order of detention was set aside. Surely referring to an Airline not in existence was not a small error and it would have affected the right of the detenu to deal with the grounds of detention. That is not the case here as pointed out earlier.

10. The next judgment cited on behalf of the detenu is in the case of Tulshi Rabidas Vs. The State of West Bengal, . The reliance is placed on the observations of the Supreme Court in para 8 of the judgment which are as follows :

"We must frankly admit that the nature of the economic offence has had some impact on our mind in examining the order and the source material sedulously. The facts are peculiar and other facts might have led to an opposite inference. The caution that absent-minded orders of detention unwittingly suffer electrocution in Court should however not be forgotten, notwithstanding the survival of the order in this case."

The Supreme Court had however, upheld the order of detention in the above case, notwithstanding the absent mindedness noticed on the part of the Detaining Authority. Similarly in this case we do not think that reference to the currency notes as assorted currency notes can be fatal to the detention order.

11. Mr. Khan then cited unreported judgment of the Division Bench of this Court (Coram: Pendse and Tipnis, JJ.) in the ease of Mackel Pereira v. State of Maharashtra in Criminal Writ Petition No, 246 of 1988 decided on 6th June 1988. In that case the raid was carried out on September 23, 1987 but it was stated in the grounds that the raid was carried out on 13th September 1987. The detention order was set aside on the ground of non-application of mind. He also relied on the unreported judgment of another Division Bench of this Court (Coram: Mrs. Sujata Manohar and B. N. Srikrishna, JJ.) in the case of Smt. Ayesha Abdul Rashid Ebrahim v. State of Maharashtra in Criminal Writ Petition No. 105 of 1991 decided on 2nd August 1991. In that judgment it was pointed out that the grounds of detention contained three mistakes. Firstly though there was import of one consignment the grounds referred to the import of two consignments. Secondly though the amount was given by the detenu to one Zahoor the grounds mentioned that the amount was given to the detenu by Zahoor. Thirdly the transaction had taken place in February/March 1990 but the grounds only referred to the months of February/March without mentioning the year. Undoubtedly three mistakes as pointed out above were not minor and, therefore, not ignorable. In that context it was rightly held, that the Detaining Authority had not applied its mind before issuing the order of detention.

12. It is, however, relevant to refer to the more recent judgment of the Supreme Court in the case of Pushpadevi Jatia v. M, L. Madhavan reported in : 1987CriLJ1888 . That was a case where the detenu was found to have a foreign account in the sum of US $ 2 lacs. However the grounds indicated that the foreign account of the detenu contained 20 lacs US $. Still the High Court had taken the view that it was a minor error and did not amount to non-application of mind and in any way did not affect the subjective satisfaction of the Detaining Authority, which view was confirmed by the Supreme Court. Following the ratio of the decision of the Supreme Court in the above case we are of the view that the mistaken reference to the seized currency notes as assorted foreign currency at one place in the grounds of

detention cannot be said to be a case of non-application of mind which affected the subjective satisfaction of the Detaining Authority as contended on behalf of the petitioner.

13. The second ground urged on behalf of the detenu is contained in paragraph, 3(vi) of the petition. It is submitted that it was incumbent upon the Sponsoring Authority to place the show cause notice dated 24-1-2003 issued to the detenu u/s 24 of the Customs Act and his reply dated 25-2-2003 before the Advisory Board and the confirming authority and furnish copies thereof to the detenu as they were documents of vital nature which were likely to influence the mind of the Advisory Board and the Confirming Authority one way or the other. In para 6 of the reply affidavit dated 8th March 2004 filed by the Under Secretary to the Government of Maharashtra, Home Department, it is stated that the show cause notice and reply given thereto by the detenu were forwarded to the State Government by the Sponsoring Authority and the same were placed before the Advisory Board. They were also placed before the Additional Chief Secretary along with the other documents and the report of the Advisory Board. It is further stated that those documents were not vital and the contents thereof were already there in other documents and hence they were neither referred to nor relied on nor had they influenced the issuance of the order confirming the order of detention. In para 2 of the reply affidavit dated 9th March 2004 filed by the Secretary of the Advisory Board it is stated that the show cause notice and the reply thereto were sent to the Advisory Board by the Government of Maharashtra, Home Department vide letter dated 27th October 2003 which was received on 28th October 2003. It is further stated that the Advisory Board had considered the representation of the detenu as well as the documents and additional documents including show cause notice and reply of the detenu and forwarded its opinion to the Government of Maharashtra on 12th December 2003 along with the detenu''s representation.

14. In support of his contention Mr. Khan relied on the decision of the Supreme Court in the case of State of Tamil Nadu Vs. Senthil Kumar and Anr, . That was a case where certain documents like anticipatory bail application of co-accused, counter affidavit of Customs Department and the application filed by the detenu before the learned Chief Metropolitan Magistrate came into existence after the issue of the detention order but before the Advisory Board meeting had taken place. Those documents were not placed before the Advisory Board as the meeting of the Board had taken place on 8-7-97 but they were sent by the Sponsoring Authority to the Government on 14-7-1997 and copies thereof were sent to the detenu. However, the Supreme Court found that the manner in which the documents were served on the detenu caused confusion to the detenu and he was kept in darkness about the purpose of furnishing those documents to him which deprived him of the chance of making representation and consequently resulted in infringement of his right guaranteed under Article 22(5) of the Constitution. From para 12 of the judgment of the Supreme Court it does not appear that the documents in question had come

into existence after issue of the detention order but it is clear that the said documents were served on the detenu after service of the detention order on him and without informing him the purpose for which they were sent to him and whether they were placed before the Advisory Board as well as the Government in connection with the order of detention and, therefore, it was held that he was deprived of his right to take effective representation to the Government. In the aforesaid facts we do not think that in the above case the Supreme Court has laid down a preposition of law that the documents which come into existence subsequent to the issuance of order of detention are required to be considered and copies thereof served on the detenu. In the present case the documents in question i.e. show cause notice dated 24-1-2003 and reply dated 25-2-2003 had come into existence after the issuance of the order of detention on 18-1-2003 copies whereof were in the possession of the detenu and he was heard by the Advisory Board personally on 6-11-2003 when he tendered his representation in which he could have raised the points which were taken by him in his reply filed on 25-2-2003 when he was not incarcerated.

15. Mr. Khan also relied on the decision of the Division Bench of this Court in the case of Nirmala Bharat Keshwani v. State of Maharashtra reported in 2000 ALL MR 1092 to which one of us (Parkar, J.) was a party. That was a case where the detention order was passed on 2nd November 1999 and thereafter show cause notice was issued on 3-11-1999 which was placed before the Advisory Board when it met on 24th December 1999. However the reply to the show cause notice dated 7-12-1999 was not placed before the Advisory Board though copy of the show cause notice was placed before the Advisory Board and, therefore, it was held that non-placement of the reply before the Advisory Board on the basis of whose report the order of confirmation of the detention order was issued by the Government vitiated the order of detention. It is pertinent to note that in that case the show cause notice which consists of allegations made against the detenu was placed before the Advisory Board but not the reply of the detenu which must have sought to meet the allegations made in the show cause notice and, therefore, it was likely that the Advisory Board might have been swayed in its decision by the show cause notice against the detenu as it did not have the benefit of going through the reply of the detenu which was already filed before the meeting of the Advisory Board. The ratio of the above decision cannot therefore apply to this case where even reply of the detenu was placed before the Advisory Board and the Government.

16. Reliance is then placed by Mr. Khan on the unreported judgment of the Division Bench of this Court (Coram : A. V. Savant and D. K. Deshmukh, JJ.) dated 11th July 1996 in Criminal Writ Petition No. 713 of 1995 in the case of Mohammed Hussain Abhrani v. Union of India. In that case copy of the statement of the detenu dated 7th August 1995 was not supplied to the detenu so as to enable him to make effective representation before the Advisory Board which was considered to be a material and vital document and, therefore, it was held that the confirmation of the order of

detention was vitiated. It is relevant to point out that the statement of the detenu recorded u/s 108 of the Customs Act in the above case was in the possession of the prosecuting agency copy whereof is not furnished to the accused except along with the complaint or charge-sheet. It cannot be disputed that the statement of the accused recorded u/s 108 of the Customs Act, which is relevant and admissible, is a material document and, therefore, non-supply of a copy thereof to the detenu was likely to affect his right to make an effective representation. Secondly it is pertinent to note that the statement recorded u/s 108 of the Customs Act is in possessions of the prosecuting agency and copy thereof is furnished to the accused only along with the complaint or the charge-sheet. So far as the present case is concerned it cannot be disputed that both the show cause notice as well as copy of the reply to the show cause notice was in the possession of the detenu. The detenu was not in custody when the show cause notice was served on him nor when his reply was filed. He was taken into custody much later, on 30th September 2003 and, therefore, he had the occasion as well as the opportunity to refer to the same and incorporate his defence taken up in reply to the show cause notice in the representation made by him to the Advisory Board subsequently on 6-11-2003 on which date the meeting of the Advisory Board took place and the detenu handed over his representation to the Advisory Board.

17. Mr. Khan also relied on the decisions of the Supreme Court in the case of M. Ahamedkutty Vs. Union of India (UOI) and Another, and in the case of Kamla Kanyalal Khushalani Vs. State of Maharashtra and another, . In Ahamedkutty''s case the importance of communicating to the detenu the grounds as well as the order of detention in order to afford him the earliest opportunity of making the representation against the order of detention was emphasized. In Kamla Khushalani''s case it was held that there should be no delay in supply of the documents and materials relied upon in the order of detention to the detenu pari passu with the order of detention.

18. Reliance was also placed by Mr. Khan on the judgment of the Supreme Court in the case of Powanammal Vs. State of Tamil Nadu and Another, in support of his contention. It is relevant to point out that in para 9 of the said judgment the Supreme Court has held that that Court has maintained a distinction between a document which has been relied upon by the detaining authority in the grounds of detention and a document which finds a mere reference in the grounds of detention and whereas non-supply of a copy of the document relied upon in the grounds of detention has been held to be fatal to continued detention, but where the document merely finds a reference in the order or in the grounds of detention the detenu''s complaint of non-supply of document has to be supported by showing prejudice caused to him in making an effective representation. Those observations were made with reference to the order of detention and the grounds of detention. In the present case the question of reference to the show cause notice and reply thereto in the grounds of detention did not arise as those documents came into existence,

subsequent to the passing of the order of detention. Moreover, no prejudice is shown to have been caused to the detenu for non-supply of the copies of those documents to him in this case.

19. It would be relevant to point out here that Article 22(5) of the Constitution mandates the detaining authority to communicate to the detenu the grounds on which the order has been made and afford him the earliest opportunity of making representation against the order. Article 22(4) of the Constitution which deals with the power of the Advisory Board and obligation of the detaining authority to obtain report from the Advisory Board before the expiration of the period of three months for continuation of the detention does not cast similar obligation in respect of documents placed before the Advisory Board.

20. Similarly Section 8(c) of the COFEPOSA Act which lays down the power of the Advisory Board states as follows :

"(c) the Advisory Board to which a reference is made under Clause (b) shall after considering the reference and 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 in person, after hearing him in person, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned."

The aforesaid provision makes it clear that so far as the Advisory Board is concerned it has to prepare its report and give its opinion after considering the reference made to it by the concerned Government and the material 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 need be after hearing the detenu in person. Thus neither the Constitution nor the provisions of the COFEPOSA Act lay down any obligation on the Advisory Board or the Government to furnish copies of the further material placed before the Advisory Board to the detenu. The obligation cast on the detaining authority and the Government is in respect of the communication of the grounds of detention, documents and the material relied on by the detaining authority and the Government and not by the Advisory Board. The show cause notice and the reply thereto were placed before the Advisory Board as per Clause (c) of Section 8 of the COFEPOSA Act. There is no obligation on the Government or the Detaining Authority to send copies of the material placed before the Advisory Board u/s 8(c) to the detenu, specially when no prejudice is shown to have been caused thereby to the detenu.

21. Anyway it is pertinent to note that in this case what was placed before the Advisory Board is not only the show cause notice which contained allegations against the detenu but even the reply given to the said show cause notice by the detenu was also placed before the Advisory Board, the copies of which were already in possession of the detenu on the basis of which he must have made representation to the Advisory Board and other authorities. The stand taken in the reply affidavits on behalf of the respondents is that the contents of the reply filed by the detenu to the show cause notice also finds place, in other documents, copies of which were served on the detenu along with the grounds of detention as part of the grounds of detention. For instance copies of the letters retracting confessional statement made by the detenu u/s 108 of the Customs Act. He had also filed bail application in the lower Court copy whereof is also part of the documents served on the detenu. Lastly and more importantly the eight page reply filed by the detenu in this Court in the petition filed on behalf of the State against the order of the Magistrate granting permission to the detenu for going abroad. The learned APP took us through the said documents and also the reply to the show cause notice filed by the detenu to show that the points raised by the detenu in his reply to the show cause notice were already on record.

22. The endeavour of Mr. Khan appearing for the detenu was to emphasise that merely because some documents containing the points taken by the detenu in his reply to show cause notice are already on record does not deprive the detenu of his right to get copies of the material relied against him. In that respect Mr. Khan placed reliance on the judgment of the Division Bench of Allahabad High Court in the case of Ramesh Chandra Gupta Vs. State of U.P. and Another, . That was a case where statement of a witness recorded u/s 161 of Criminal Procedure Code was not supplied to the detenu. As observed earlier by us, the statement of a witness whether recorded u/s 161 of Criminal Procedure Code or u/s 108 of the Customs Act would stand on a different footing because the detenu cannot have copies thereof unless they are furnished to him along with the charge-sheet or the complaint. In this case the documents with which we are concerned are show cause notice and the reply of the detenu, both of which were already in possession of the detenu and nothing prevented him from taking the points in his representation made to the Advisory Board which were taken by him in his reply to the show cause notice. It is further important to note that, as observed by the Supreme Court in Powanammal''s case (supra), the detenu has to show the prejudice which was caused to him in making effective representation in the absence of those documents. These documents having come into existence after issuing the detention order, naturally they could not have been referred to or relied on in the grounds of detention. Both these documents were available with the detenu and he has not pointed out whether any and what prejudice was caused to him for non-supply of copies thereof. Simply because those documents were sent to the Advisory Board by the Government copies whereof were already with the detenu it cannot be presumed

that any prejudice was caused to the detenu by non-supply of copies thereof to him.

23. Neither the report of the Advisory Board, which we have perused ourselves, nor the confirmation of the detention order issued by the State Government pursuant to the report of the Advisory Board, can be said to be made on the basis of either of these two documents. In our view since the reply of the detenu had also been placed before the Advisory Board and the Government it could not have caused any prejudice to the detenu and on the contrary, if at all, it might have benefited him.

24. In this connection it would be relevant to refer to the judgment of the Supreme Court in the case of Raverdy Marc Germain Jules Vs. State of Maharashtra and Others, . In that case the argument was advanced that since the retraction of confessional statement of the detenu was not considered by the Detaining Authority and was also not forwarded to the Advisory Board the detention order was vitiated. The letter of retraction was dated 16/19 December 1981 which must have reached the Customs Authorities on or after 19th December 1981. The order of detention was dated 16th December 1981 and, therefore, there was no question of the said retraction letter being considered by the Detaining Authority. The argument that the retraction letter was not placed before the Advisory Board was rejected by the Supreme Court since the detenu himself was before the Advisory Board and it was immaterial that the Advisory Board did not take the same into consideration. The said judgment of the Supreme Court was followed by the Division Bench of this Court in the case of Nikhil Shah Vs. The Union of India (UOI) and Others, .

25. In the present case the earlier as well as subsequent retractions, which were placed before the detaining authority were also before the Advisory Board and in addition reply to the show cause notice was also sent to the Advisory Board. The detenu, who had filed his reply and, therefore, was aware of the contents of his own reply could have very well made representation to the Advisory Board on the lines of the said reply. We may repeat that the representation was given by the detenu himself to the Advisory Board on the date of the meeting of the Advisory Board on 6-11-2003 when the detenu was present before the Advisory Board. Since he was detained on 30th September 2003 the representation must have been prepared much after the date of his reply dated 25-2-2003 and, therefore, his representation could have and was expected to have contained or incorporated all the relevant points which were taken by him in his reply to the show cause notice. In view of the aforesaid factual position and the law which we have discussed hereinabove, we find no substance in the second contention raised on behalf of the detenu either.

26. The last submission made on behalf of the detenu is that the manner in which the order of detention was passed is not in accordance with law. This point has not been specifically taken in the original petition nor even in the amended petition. But the said point has been argued on the basis of the contents of para 4 of the reply affidavit dated 25th February 2004 filed by the detaining authority. That paragraph deals with the point raised in the petition about the delay in issuing the order of

detention and, therefore, mentions the various steps taken at various levels from the time sponsoring authority had sent papers for consideration of the detaining authority for issuing the order of detention till the order was passed. Mr. Khan has particularly referred to the portion in which it is stated that after the draft grounds of detention were formulated and placed before the detaining authority along with the documents, further newly generated documents were also placed before the detaining authority and, therefore, the papers were again sent to the lower authorities for reformulation of the grounds of detention. When the proposal along with the documents with draft grounds of detention were forwarded to the Detaining Authority newly generated documents were not considered by the sponsoring authority and, therefore, when new documents were sent to the detaining authority subsequently it had to send the papers back for reformulation of the draft grounds of detention in the light of the newly generated documents and ultimately when the reformulated grounds of detention along with new documents were placed before the detaining authority the detention order came to be passed. That procedure is objected to by Mr. Khan appearing for the detenu.

27. He placed reliance on the judgment of the Division Bench of this Court in the case of Ashwinkumar B. Halari Vs. State of Maharashtra and others, wherein it was observed that the documents cannot be considered piecemeal and when the grounds are formulated and the order is prepared already and kept ready earlier on the basis of the material then available and such grounds and orders, are merely endorsed from time to time after considering the documents received subsequently it makes a mockery of law and can hardly satisfy the test of conclusion drawn by Detaining Authority by considering all the material together. From the observations made in para 2 of the said judgment it appears that in that case the order was already passed i.e. signed and kept ready earlier on the basis of material then available and thereafter it was changed on the basis of the documents received subsequently. That is not the case here. In this case the order was not signed nor it was kept ready but only draft grounds were formulated. It may be mentioned here that as per the detention law as it stands if the detaining authority does not consider any material documents which come into existence prior to or upto the date of detention, the order of detention can be rendered invalid for non-consideration of the relevant and material documents by the detaining authority. In our opinion the ratio of the aforesaid judgment of the Division Bench of this Court is not at all applicable to the facts of the present case and, therefore, we find the last contention raised on behalf of the detenu also devoid of any merit. Since none of the points argued on behalf of the detenu are found to be of any substance the petition is liable to be dismissed.

28. In the result, the petition is dismissed and the rule is discharged.