IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM : NAGALAND : MIZORAM & ARUNACHAL PRADESH)

W.P.(Crl) 14 of 2017

Akhil Gogoi

.....*Petitioner*

- *VERSUS* **-**

The State of Assam & 2 Ors.,

.....**Respondents**

BEFORE

HON'BLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

Advocate for the petitioner :- Mr. N. Dutta, Sr. Advocate

Advocate for the state respondent:- Mr. R.C. Borpatragohain, A.G.
S.N. Sarma, Sr. Advocate

Dates of Hearing: 30.11.2017, 07.12.2017, 08.12.2017, 11.12.2017, 12.12.2017,13.12.2017, 14.12.2017, 15.12.2017, 16.12.2017, 18.12.2017, 19.12.2017 and 20.12.2017

Date of Judgment : 21.12.2017

JUDGMENT & ORDER (ORAL)

By the order of detention dated 24.09.2017 of the District Magistrate Nagaon, the petitioner Sri Akhil Gogoi has been detained in custody under Sections 3(3) of the National Security Act, 1980. On 24.09.2017 itself, the order of detention dated 24.09.2017 as well as the grounds of detention contained in the communication also dated 24.09.2017 were served on the petitioner.

2. The order of detention provides that the detaining authority being the District Magistrate, Nagaon was satisfied that the petitioner had been actively

abetting/instigating/provoking/motivating and conspiring to wage war against the State on certain counts as indicated therein. Accordingly, in exercise of the powers under Section 3(3) of the National Security Act, 1980, the detaining authority directs that the petitioner who was in judicial custody in the District Jail at Dibrugarh be detained with immediate effect in the District Jail Dibrugarh under the National Security Act, 1980.

In the communication bearing No.NMM.69/2017/294 dated 24.09.2017 containing the grounds of detention, the petitioner was informed that if he desires to submit representation against the order of detention, the petitioner may send his representation to the Principal Secretary to the Govt. of Assam in the Home and Political Department and that he may also make a representation to the Chairperson of the Advisory Board, Assam for the National Security Act.

3. The petitioner accordingly submitted a representation against the order of detention on 27.09.2017 which was addressed to the Principal Secretary to the Govt. of Assam in the Home and Political Department, as well as to the Chairman of the Advisory Board for Assam under the National Security Act. The representation was received by the Asst. Jailor of Central Jail Dibrugarh on 27.09.2017.

4. Prior to it, by the order of the Governor under the signature of the Principal Secretary to the Govt. of Assam, Home and Political Department, as contained in Memo No.PLA.298/2017/239 dated 26.09.2017, it was provided that the Govt. of Assam has approved the detention order dated 24.09.2017 on 26.09.2017 under Section 3(4) of the National Security Act, 1980.

5. On 04.10.2017 the petitioner makes a representation to the Chairman of the Advisory Board, Assam under the National Security Act, 1980 requesting the Advisory Board to consider his request for assistance by a legal counsel. In the representation, the petitioner also refers to a decision of the Constitution Bench of Hon'ble Supreme

Court rendered in ***A.K. Roy –Vs- Union of India*** reported in (***1982) 1 SCC 271*** to justify his claim for the assistance of a legal counsel. Alternative request was also made that in the event, the Advisory Board refuses the request for a legal counsel, the petitioner be permitted to be assisted by a friend, as provided in the Constitution Bench Judgment and accordingly, expressed his desire to be assisted by Sri Chandan Sarma. The said request for a legal counsel was rejected by the Advisory Board by the order dated 22.10.2017. By another order of 25.10.2017 as contained in Memo No.298/2017/360 dated 25.10.2017, the representation of the petitioner dated 27.09.2017 was rejected by the Govt. of Assam.

6. The petitioner was produced before the Advisory Board on 03.11.2017 at 1.00 P.M within the premises of the District Jail, Dibrugarh, wherein Sri Chandan Sarma was present to assist him. In the hearing the petitioner reiterated his prayer to be allowed to be represented by a legal counsel inasmuch as, senior Civil Officers as well as the Police Officers well conversed with law were present to represent the State Government. The petitioner also raised an allegation that he was not given access to any such record, which were presented by the State Government through the officers. It is the stand of the petitioner in the writ petition that in the proceedings before the Advisory Board, the petitioner had submitted a written argument. One of the main grounds urged by the petitioner before the Advisory Board was that there was a violation of his rights under Article 22(5) of the Constitution of India and accordingly, he relied upon a Judgment and Order of the Constitution Bench of the Hon'ble Supreme Court in paragraph-6 and 14 as reported in (1995) 4 SCC 517 and also the Full Bench Judgment of this Court in (2006) 1 GLT 375 in paragraph-57 and also to some other decisions of the Division Bench of this Court. The petitioner also raised the contention that non supply of certain documents and materials as indicated also violated Article 22(5) of the Constitution of India.

7. It is noticed that the State Government authorities had filed an affidavit in opposition on 07.12.2017. The petitioner also submitted an additional affidavit dated 20.11.2017, wherein in paragraph-4, it had been stated that he was not informed by the detaining authority at any point of time about his right to submit a representation before the Central Government, which again is a violation of his rights under Article 22(5) of the Constitution of India, for which he is entitled to be released. A stand has also been taken that because of the ignorance of law and the failure of the detaining authority to inform him, the petitioner could not submit any representation before the Central Government. Further, although the WT message dated 14.11.2017 indicates that the Central Government had considered the representation submitted by the petitioner before the State Government and the said representation is also construed to be a representation submitted to the Central Government, the disposal thereof by the order dated 14.11.2017 would mean that there is an unexplained delay of 48 days in disposing of the representation. Further, in paragraph-5, it had been stated that the Government of Assam had confirmed the detention order dated 24.09.2017 on the basis of the report of the Advisory Board under the National Security Act, for a period of 12(twelve) months with effect from the date of the detention or until further orders, whichever is earlier. During the pendency of the writ petition, the respondent authorities had also submitted an affidavit, wherein it was stated that in order to ensure that the right to make a representation to the detaining authority is guaranteed, the State Government by order No.HMA.19032(11)/90/2017-Political (A) (ecF No.45189)/128 dated 05.12.2017 had modified the detention order by exercising its power u/s 14(1)(a) of the National Security Act, 1980. Further, it was stated that by the said order liberty was given to the petitioner to ask for any other document so as to enable him to submit his representation. A stand has also been taken that there was no delay in disposing of the representation submitted by the petitioner and the provisions of Section-8 of the National Security Act, 1980 was duly complied with. A stand was also taken that the

District Magistrate, Nagaon had acted as per the provisions of law and also the Government Notification No.PLA.326/97/130 dated 30.08.2017 empowering him to exercise the powers conferred by Section 3(2) of the National Security Act, 1980.

8. In the aforesaid factual background, it is the contention of Mr. N. Dutta, learned senior counsel for the petitioner that the order of detention of 24.09.2017 is being assailed on the ground that:-

> *(i) The petitioner had not been informed that he has a right to submit a representation against the order of detention before the detaining authority itself and also before the Central Government;*
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> *(ii) There has been delay in disposing of the representation dated 27.09.2017 submitted before the State Government and the Chairman of the Advisory Board and such delay as required under the law had not been duly explained, and such unexplained delay vitiates the order of detention. Further, there has also been delay in the disposal of the said representation sent to the Central Government, which also remains unexplained.*
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> *(iiii) Certain materials and documents which the sponsoring authority ought to have produced before the detaining authority had not been produced and this had a bearing on the satisfaction of the detaining authority in one way or the other;*
>
> *(iv) Certain documents which were relied upon by the detaining authority in arriving at the satisfaction to pass the order of detention of 24.09.2017 have not been provided to the petitioner and this on its own had also vitiated the order of detention;*

(v) The petitioner has a right to avail legal assistance in the proceeding before the Advisory Board.

9. As regards his contention that the petitioner had a right to be informed about his right to make a representation before the detaining authority itself, as well as to the Central Government, Mr. Dutta, learned senior counsel for the petitioner relies upon paragraphs 6, 14 and 38 of the decision of the Constitution Bench of the Hon'ble Supreme Court rendered in ***Kamaleskumar Ishwardas Patel –vs- Union of India***, reported in ***(1995) 4 SCC Page 51***. Further reliance has been placed to the directions contained in paragraph 57 of ***Konsam Brojen Singh –vs- State of Manipur and others***, reported in ***2006 (1) GLT 375***. Reliance has also been placed upon paragraphs 8 and 9 of the Division Bench Judgment rendered in ***Rongjam Momin –vs- Union of India and others***, reported in ***2005 (1) GLT 173*** and paragraph-3 of ***Robin Dhekial Phukan –vs- Union of India and others***, reported in ***2008 (2) GLT 876***. Based on the proposition of law laid therein, Mr. Dutta, learned senior counsel submits that as the order of detention of 24.09.2017 as well as the communication containing the grounds of detention also of 24.09.2017, does not make any mention informing the petitioner of his right to make a representation to the detaining authority as well as to the Central Government, the right of the petitioner enshrined under Article 22(5) of the Constitution of India had been violated and therefore, apart from any other ground, the order of detention of 24.09.2017 is liable to be set aside on this ground alone.

10. Mr. Dutta, learned senior counsel also states that it is not known to the petitioner as to how the Central Government had the occasion to dispose of the representation on 14.11.2017 in a situation where no representation was submitted by the petitioner to the Central Government.

11. Mr. Dutta, learned senior counsel also raises a contention that the representation submitted by the petitioner to the State Government on 27.09.2017 was disposed of by the State Government on 25.10.2017 and thereby, there was an unexplained delay of 28 days. It is the further contention of the learned senior counsel that even if the Central Government had considered and disposed of the representation made by the petitioner to the State Government, still the said representation having been made on 27.09.2017 and being disposed of on 14.11.2017, there is an unexplained delay of about 48 days. The learned senior counsel by referring to a decision of the Hon'ble Supreme Court in paragraph-2 and 8 of ***Kamla Kanyalal Khushalani –vs- State of Maharashtra***, reported in ***(1981) 1 SCC 748*** submits that even a delay of 25 days in disposing the representation of a detenue is fatal. By further referring to paragraph-10 of the Judgment of the Hon'ble Supreme Court in ***Icchu Devi Choraria –vs- Union of India and others***, reported in ***(1980) 4 SCC 531***, a contention has been raised that a delay of 14 days can also be fatal. Mr. Dutta, learned senior counsel by referring to the order dated 25.10.2017 of the State Government while disposing of the representation of the petitioner, had brought it to the notice of the Court that while disposing of the representation, the authorities had taken into consideration a para-wise comment of the District Magistrate dated 10.10.2017. Accordingly, it has been questioned as to why it took the District Magistrate 13 days to submit the para-wise comments. Further, after receipt of the para-wise comment dated 10.10.2017, no explanation is forthcoming as to why it took the authorities in the State Government another 15 days from 10.10.2017 to 25.10.2017 to dispose of the representation. Mr. Dutta, by referring to paragraphs 8, 13 and 20 of the writ petition has stated that a specific stand has been taken in the writ petition as regards the delay in disposing of the representation, but the respondent authorities have not adequately controverted the same and therefore, the averments as regards delay would have to be construed to have been admitted by the respondents.

12. In the meantime, after the hearing had commenced, the respondent authorities filed an additional affidavit on 13.12.2017, wherein in paragraph-2, the chronology of the events from the date of submission of the representation on 27.09.2017 up to its rejection by the State Government on 25.10.2017 had been indicated. The chronology of events as indicated in the said additional affidavit is as follows:-

27.09.2017- Shri Akhil Gogoi submitted his representation to the Superintendent of Central Jail, Dibrugarh.

28.09.2017- Superintendent of Central Jail, Dibrugarh sent the representation to the Principal Secretary (Home & Political) as well as to the Advisory Board and to the District Magistrate, Nagaon.

28.09.2017
To - Government Holidays
02.10.2017

03.10.2017- Representation of the detenue received by the Government from the Superintendent of Central Jail, Dibrugarh and District Magistrate, Nagaon

04.10.2017- File put up by the Deputy Secretary to the Joint Secretary and thereafter same was endorsed to the Addl. Chief Secretary, for his approval for submission of all documents to the Advisory Board.

06.10.2017- Parawise comments sought from the District Magistrate, Nagaon. All materials/documents were sent to the Advisory Board.

08.10.2017- Holiday (Sunday)

10.10.2017- Parawise comments submitted by the District Magistrate, Nagaon.

12.10.2017- File put up by the Deputy Secretary, Home & Political Department regarding forwarding of the representation to the Joint Secretary, Home & Political Department.

13.10.2017- Approval of Principal Secretary, Home & Political Department regarding transmission of the representation along with the parawise comments to the Advisory Board.

14.10.2017
& - Holiday (2nd Saturday & Sunday)
15.10.2017

16.10.2017- Transmission of representation along with the parawise comments to the Advisory Board.

17.10.2017- File was re-put up along with the representation submitted by the detenue and the parawise comments of District Magistrate, Nagaon for consideration at Govt. level.

18.10.2017
& - Holiday
19.10.2017

20.10.2017- The file was endorsed for necessary order to the Principal Secretary by the Joint Secretary.

21.10.2017- Principal Secretary endorsed the file to the Additional Chief Secretary.

22.10.2017- Holiday (Sunday)

23.10.2017- Additional Chief Secretary endorsed the file to the Chief Minister for rejection of the representation and the Chief Minister approved the same.

25.10.2017- Order of rejection issued.

13. Mr. Dutta, learned senior counsel for the petitioner by referring to the date 13.10.2017 of the chronology of the events submits that if the representation of the petitioner was before the Principal Secretary to the Government of Assam in the Home & Political Department on the said date, the subsequent sending back of the representation to the Deputy Secretary on 17.10.2017 for being put up once again through the Joint Secretary is unexplained and unjustified. What the Principal Secretary had done on 21.10.2017 to endorse the file to the Additional Chief Secretary could have also been done on 13.10.2017 itself. Hence, there is an unexplained delay from 13.10.2017 to 21.10.2017. Further, if the representation of the petitioner was received by the Government on 03.10.2017, no explanation is forthcoming as to why the parawise comments were sought from the District Magistrate, Nagaon as late as 06.10.2017 and further as to why it took the District Magistrate another four days up to 10.10.2017 to submit the parawise comments. Mr. Dutta, learned senior counsel further submits that in the matter of preventive detention where under Article 22(5) of the Constitution, the earliest opportunity of making a representation against the order is a fundamental right, the various authorities through whom such representation passes, has a corresponding duty to ensure that the representation is not kept pending before any of them without any acceptable reason and the quickest method of transmitting the same between the authorities is to be adopted. Considering the said requirement, the manner in which the representation was treated by the concerned authorities between 03.10.2017 and 06.10.2017 and further between 13.10.2017 and 21.10.2017 is contrary to the said requirement of law, which is unexplained. A further submission has also been made that even the District Magistrate; Nagaon had taken a longer and unexplained time from 06.10.2017 to 10.10.2017 to submit the parawise comments.

14. Mr. Dutta, learned senior counsel for the petitioner by relying upon the following decisions of the Hon'ble Supreme Court, which are as follows:

(i) paragraph-1 of Pabitra N Rana –Vs- Union of India and others, reported in (1980) 2 SCC 338, wherein delay of 17 days was considered to be fatal;

(ii) paragraph-1 of Narinder Singh Suri –Vs- Union of India, reported in (1980) 2 SCC 357, wherein delay of 20 days was considered to be fatal;

(iii) paragraph-8 of Shri Saleh Mohammad –Vs- Union of India and others, reported in (1980) 4 SCC 428, wherein delay of 22 days was considered to be fatal;

(iv) paragraphs-1 and 2 of Sardar Kasmir Singh –Vs- Union of India and others, reported in 1981 (Supp) SCC 55, wherein delay of 22 days was considered to be fatal;

(v) paragraph-14 of Vijay Kumar –Vs- State of Jammu Kasmir and others, reported in (1980) 2 SCC 43, wherein delay of 19 days was considered to be fatal;

(vi) paragraph-1 of Raj Kishore Prasad –Vs State of Bihar and others, reported in (1982) 3 SCC 10, wherein delay of 17 days was considered to be fatal;

substantiates that the delay of 28 days in disposing the representation dated 27.09.2017 by the State Government would be fatal and the order of detention of 24.09.2010 would stand vitiated.

15. Further submission has also been made by Mr. Dutta that from the chronology of events narrated in paragraph-2 of the Additional Affidavit of 13.12.2017, it is apparent that although the representation was submitted by the petitioner on 27.09.2017, but the State Government had not transmitted the same to the Central Government at least up to 25.10.2017. Such delay of 28 days in transmitting the representation to the Central Government without any mention of any reason would also be fatal and would vitiate the order of detention. It is also submitted that even otherwise no explanation is also forthcoming as to why the Central Government had disposed of the representation only on 14.11.2017 and such delay would also be fatal and would vitiate the detention order.

16. Further contention by relying upon a Judgment of this Court rendered in ***Lala Paite –vs- State of Manipur and others***, reported in ***1999 (3) GLT 236***, in paragraphs-9 and 10 thereof is that the right to make a representation is not only a statutory right, but it is a constitutional right as well and expeditious disposition is the rule and delay in disposal defeats the mandate of Article 22(5) of the Constitution and therefore, the authority is obliged to explain the delay caused every day. Accordingly, it is the submission that in the instant case, it is incumbent on the authorities to explain as to why the para-wise comments against the representation was submitted by the District Magistrate on 10.10.2017 i.e almost after 13 days of the representation dated 27.09.2017. Further, as held by the Division Bench, it is also incumbent upon the State respondent authorities to explain every day between 27.09.2017 and 25.10.2017 as to why the delay had occurred in disposal of the representation.

17. Mr. Dutta, learned senior counsel also contends that the order of modification of 05.12.2017 cannot save the situation for the respondent authorities inasmuch as, upon the order of detention being approved by the State Government on 26.09.2017 under Section 3(4) of the National Security Act, 1980, it is the State Government who would be the detaining authority and therefore, the right of the detenue to make a representation to the detaining authority cannot as such be revived. Accordingly, it is submitted that a subsequent modification of the order of detention by the order of 05.12.2017 providing for the information to the detenue that he has a right to make a representation also to the detaining authority itself as well as to the Central Government, would not remove the initial lacuna of not providing for it in the order of detention of the communication of grounds of 24.09.2017. Mr. Dutta, contends that firstly in spite of there being such modification, the respondent detaining authority still continued to deprive the detenue of his opportunity to make a representation at the earliest.

18. The further contention of Mr. Dutta, learned senior counsel is that the Hon'ble Supreme Court while interpreting Section 14 of the NSA, had held that although the provision clothes the authority with the power of revoking or modifying the order of detention at any time, but such power is for the benefit of the detenue and secondly, it can be exercised only upon there being new factors or change in circumstance. By relying upon the said pronouncement of the Hon'ble Supreme Court Mr. Dutta submits that the order of modification dated 05.12.2017 informing the detenue about his right to make a representation to the detaining authority and the Central Government, in fact, seeks to take away the right accrued to the detenue by not according informing in the original order of detention dated 24.09.2017 and therefore, as the order of modification dated 05.12.2017 is to the detriment of the detenue, therefore, under the law laid down by the Hon'ble Supreme Court, the said modification is not sustainable. Further it has also been contended that the order of modification of 05.12.2017 does not contain any new facts or circumstances so as to warrant a modification under Section 14 of the National Security Act.

19. Mr. Dutta, learned senior counsel for the petitioner also by referring to the averments made in paragraph-9 of the writ petition submits that it is the stated case of the petitioner that all the documents referred or relied while passing the order of detention had not been furnished and as such the petitioner was highly prejudiced in making an effective representation and further the notification dated 31.08.2017, which has been referred in the order of detention had also not been furnished to the petitioner. Accordingly, by referring to the affidavit in opposition of the State respondents dated 07.12.2017, it is submitted that paragraph-9 of the writ petition had been answered in paragraph-8 of the affidavit in opposition, wherein apart from a general denial, it had been stated that the petitioner was furnished with all the relevant records as per the National Security Act.

20. The learned senior counsel for the petitioner by referring to the order of detention dated 24.09.2017, states that while forwarding the copy of the same to the Principal Secretary to the Government of Assam, Home and Political Department, certain CDs and other documents were enclosed. But, again by referring to the communication dated 24.09.2017 addressed to the petitioner, which contains the grounds of detention, the enclosures therein contained amongst others, the copy of the dossier from page-1 to page 288, but it did not contain the CDs and other documents that were forwarded to the Principal Secretary. The learned senior counsel by referring to page-9 of the dossier submits that it contains the reference to some video clipping/video footage, which would indicate that the detenue had made certain speeches by which he had instigated the people to take up 'Hengdang' and 'AK-47 Rifle' against the nation. It is the submission that perhaps the CDs and other documents, which were not provided to the petitioner, contained the video clipping/video footage of such speech. Accordingly, it is the submission that by not providing the CDs, the respondent authorities had prevented the petitioner from making an effective representation against the order of detention, thereby causing prejudice to him and for that reason also, the order of detention dated 24.09.2017 is vitiated.

21. With regard to non furnishing of documents, the learned senior counsel for the petitioner by referring to the ground stated in the communication dated 24.09.2017 which reads in the manner that the petitioner had made an obnoxious statement that he would complete the task that was supposed to have been done by ULFA(I), which is a banned outfit submits that perhaps such statement upon which the ground was formulated may have been contained in the CD that was not provided to the petitioner. By further referring to another ground that on 22.06.2011, the petitioner had organized a rally in Guwahati, where his supporters had set on fire a police vehicle and four persons, who were inside the vehicle have received injuries, also submits that as no

other material had been provided to the petitioner, which refers to an incident of setting on fire of a police vehicle, again perhaps a video footage of the incident may have been contained in the CD that was not provided.

22. In this respect, the learned senior counsel relies upon the decision of the Hon'ble Supreme Court rendered in Icchu Devi Choraria (supra) wherein, in paragraph-6 it is provided that if there are any documents, statements or materials relied upon in the ground of detention, they must also be communicated to the detenue because being incorporated in the grounds of detention they form a part of the grounds and the grounds cannot be said to be complete without them. Further, in Kamla Kanyalal Khushalani (supra) in paragraph-4, it has been held that documents and materials relied upon the order of detention forms an integral part of the grounds and must be supplied to the detenue pari passu the grounds of detention and even if the documents and materials are supplied later, then also the detenue is deprived of an opportunity of making an effective representation. Reliance have also been placed upon Mangal bhai Motiram Patel (supra) wherein, in paragraph-12, it is provided that the nature of the constitutional obligation is to furnish the statements and documents relied upon in the ground of detention to enable the detenue to make an effective representation against his detention and in paragraph-13, it is provided that the detenue is entitled under Article 22(5) of the Constitution to be served with copies of all the relevant documents relied upon in the grounds of detention. Reliance has also been placed upon the decision in Preetam Nath Hoon (supra), wherein, in paragraph-8, it was provided that certain documents mentioned therein were not supplied to the detenuee in time and in paragraph-11 it was held that it was incumbent upon the detaining authority to supply the copies of such statements to the detenue in order to enable him to make an effective representation**.**

By relying upon the decision in Dharam Das, it is submitted by Mr. Dutta, learned senior counsel that if one of the grounds in the detention order is vitiated for not providing with the required materials and documents, the order as a whole stands vitiated.

23. A further submission of the learned senior counsel for the petitioner is that in the dossier provided to the petitioner, documents pertaining to Dispur P.S. Case No.1258/2011 under Section 341/336/347/34 IPC were also included. The said Dispur P.S. Case No.1258/2011 was perhaps related to the ground of detention that on 22.06.2011 the detenue had organized a rally in Guwahati where his supporters had set a police vehicle on fire and four persons who were inside the vehicle had received injuries. But in the dossier, the documents that were provided in relation to the said police case contained the FIR and the various statements of the witnesses, including the statement of the accused under Section 313 Cr.P.C., but it did not contain the order of acquittal of the competent court, although by that time, the accused detenue had already been acquitted.

24. In this respect the learned senior counsel relies upon paragraph-9 of ***Dharamdas Shamlal Agarwal –Vs- Police Commissioner & Anr***., reported in ***(1989) 2 SCC 370,*** wherein in paragraph-9, a question for consideration arose as to whether the detaining authority was aware of the acquittal of the detenue in two of the cases, where in the grounds of detention it was mentioned that the two cases were pending for trial and in paragraph-11, on the question of non-placing of the material, it was held that the vital fact of acquittal if had been placed would have influenced the mind of the detaining authority on way or the other. Accordingly, it was concluded in paragraph-12 that if the vital facts which would have a bearing on the issue and weighed the satisfaction of the detaining authority one way or the other were either withheld or suppressed by the sponsoring authority, the same would render the detention order invalid.

25. By also relying upon the Dharamdas *Shamal Agarwal* (supra), the learned senior counsel for the petitioner by relying upon paragraph-9 therein, also submits that a contention was raised on behalf of the detaining authorities that each activity of the detenue is a separate ground of detention and therefore, the acquittal in any two of the criminal cases is of no consequence, was unacceptable to the Court by observing that such explanation by the detaining authority cannot be comprehended.

26. Mr. Dutta, learned senior counsel for the petitioner also submits that detenue had made a specific request that he be allowed to be represented by a legal counsel before the Advisory Board and for the purpose relied upon a decision of the Hon'ble Supreme Court in A.K. Roy (supra) by referring to paragraph-93 wherein, it has been held that the officer who assists the Advisory Board, although are not legal practitioners or legal advisers, but such officers who assist or advises on facts or law must be deemed to be in the position of a legal adviser and therefore, permitting the detaining authority or the Government to appear before the Advisory Board with the aid of such legal adviser would violate Article 14, if a similar facility is denied to the detenue. Accordingly, it is the submission of the learned senior counsel that the denial of the Advisory Board in the order 22.10.2017 to allow the detenue to take the aid of a legal counsel, while at the same time, allowing the detaining authority and the Government to be assisted by legal adviser, had violated Article 14 of the Constitution.

27. Per-contra, Mr. S.N. Sarma, learned senior counsel appearing for the detaining authority, while addressing the issue of non-mentioning in the order of detention of the right of the detenue to make a representation before the detaining authority itself and also the Central Government, has referred to the representation of the detenue dated 27.09.2017, which is annexed Annexure-C to the representation, to indicate that the detenue on his own volition had requested that the said representation be placed before the Advisory Board and/or any other competent authority under the National Security

Act for their consideration and appropriate orders and submits that by requiring the authorities to place the representation before any other competent authority under the National Security Act, the detenue has waived his right to be informed that he also has a right to make the representation before the aforesaid two authorities.

28. Mr. Sarma, learned senior counsel has referred to the various documents in the dossier, which contains the statement of the witnesses implicating the detenue as regards the incidents considered in arriving at the grounds of detention. By referring to such statements of various witnesses as contained in the documents and materials relied upon, Mr. Sarma submits that the grounds of detention are well founded and the same cannot stand vitiated merely because a particular CD mentioned in the order of detention was not provided to the detenue. Mr. Sarma accordingly submits that the detenue was well aware of the materials upon which the grounds have been formulated and therefore, he was not prejudiced in any manner for the purpose of making an effective representation against the order of detention.

29. With regard to the contention of the petitioner that if one of the grounds of the detention order is unfounded, the whole of the detention order stands vitiated, Mr. Sarma, learned senior counsel for the detaining authority submits that if the detention order is based upon several grounds, then even if one of the ground goes, the other grounds still remain. Accordingly, it is the submission of the learned senior counsel that even if all the documents and materials including the CD were not provided in respect of some of the grounds, such grounds would be held to be untenable, but at the same time the other grounds for which every document and materials were provided would remain.

30. In order to substantiate his submission, the learned senior counsel relies upon the decision of the Hon'ble Supreme Court rendered in *Attorney General for India –Vs- Aratlal Prajivandas* reported in *(1994) 5 SCC 54* wherein in paragraph-49, it has been held that where an order of detention is made on more than one ground, it must

be deemed that there are as many orders of detention as there are grounds. Further reliance has also been made to the Judgment of the Hon'ble Supreme Court rendered in *Gautam Jain –Vs- Union of India* reported in *(2017) 3 SCC 133*, wherein in paragraph 27, it has been held that if there are other grounds on which the order of detention can be sustained, it would not mean that the principle of severability would become inapplicable. Accordingly, it is the submission of the learned senior counsel that even if some of the grounds can be held to be unsustainable for not providing the relevant documents and materials relatable to such grounds, the other grounds would remain and the submission of the petitioner that the whole order stands vitiated would be unfounded, inasmuch as every ground is to be construed to be a separate order of detention of its own.

31. Mr. R.C. Borpatragohain, learned Advocate General, Assam appearing for the State Govt. while addressing the issue of non-mentioning in the communication containing the grounds and also in the order of detention of the right of the detenue to make a representation before the detaining authority and the Central Government also refers to the particular averment of the detenue in his representation dated 27.09.2017, wherein, he makes a request that the representation submitted before the State Government be also placed before any other competent authority under the National Security Act for their consideration and appropriate order, and submits that the detenue was well aware of his right to submit the representation and therefore, no fundamental right of the detenue had been violated. The learned Advocate General submits that the foundation of the principle that the detenue also has a right to be informed that he has a right to make a representation to the detaining authority also is based on Article 22(5) of the Constitution of India, which infact is also a fundamental right. Therefore, when the detenue himself being aware of his right to make the representation, it cannot be said that such fundamental right of the detenue had been violated.

32. The learned Advocate General while referring to the Full Bench Judgment of this Court in Konsam Brojen Singh (supra) has stated the law laid therein that even under the National Security Act, the detenue has a right to be informed that he has the right to make a representation was based on the facts and circumstances of that case. It is the submission of the learned Advocate General that similar factual situation as prevailing in the present case that the detene on his own had made a request that his representation submitted before the State Government be also placed before any other competent authority under the National Security Act for its consideration and appropriate order, was absent in the case under consideration before the Hon'ble Court in the Full Bench Judgment. Consequently, the learned Advocate General relies upon the decision of the Hon'ble Supreme Court rendered in ***State of Haryana and Anr., -Vs- Dharam Singh and Ors***., reported in ***(2009) 4 SCC 340*** , wherein, in paragraph-4, it has been held that the decision relied therein had no relevance and it is factually distinguishable. Further reliance has been made to the decision of the Hon'ble Supreme Court in ***Municipal Corporation of Greater Mumbai –Vs- Bharat Construction and Ors***., reported in ***(2009) 9 SCC 109*** wherein, in paragraph-5 a Judgment rendered in Atul Raj Builders (Pvt.) Ltd. was relied but it was held that the said Judgment had no application to the facts of the said case. Reliance has also been made on a decision of the ***State of Andhra Pradesh –Vs- M. Radha Krishna Murthy*** reported in ***(2009) 5 SCC 117*** wherein, in paragraph-17, by relying upon a passage in Abdul Kayoom –Vs- CIT, it was concluded that each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect in deciding such cases.

33. Mr. N. Dutta, learned senior counsel for the petitioner while responding to the contention of Mr. S.N. Sarma that the detenue had waived his right by to be informed about his right to make a representation as because in his representation to the State

Government he had requested that the representation be placed before all the competent authorities under the National Security Act for its consideration and appropriate order, submits that the right to be informed about the right to submit the representation is a fundamental right under Article 22(5) of the Constitution of India accordingly by placing reliance on the decision of the Hon'ble Supreme Court rendered in ***Bashesar Nath –Vs- Commissioner of Income Tax Delhi & Rajasthan and Anr***., reported in ***1959 Supp (1) SCR 28; AIR 1959 SC 149*** wherein, in paragraph-15 of the judgment delivered by Chief Justice Sudhi Ranjan Das, by posing a question that can a breach of obligation imposed on the State be waived by any person and is it open to the State to disobey the Constitutional mandate merely because a person tells the State that it may do so, it was held that no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the constitution and a person certainly cannot give up or waive a breach of his fundamental right. Reliance has also been placed on the decision of the Hon'ble Supreme Court rendered in ***Olga Tellis –Vs- Bombay Municipal Corporation*** reported in ***(1985) 3 SCC 545*** *wh*erein, in paragraphs 27, 28 & 29 it has been held that there can be no estoppel against the Constitution and a concession made by a person whether under mistake of law or otherwise, that he will not enforce any particular fundamental right cannot create an estoppel against him and such concession, if enforced, would defeat the purpose of the Constitution.

34. Heard the contentions raised by the rival parties.

Issue as to whether the detenue having not being informed about his right to make a representation to the detaining authority and the Central Government had vitiated the detention order dated 24.09.2017.

35. From the detention order dated 24.09.2017, it is noticed that in the communication dated 24.09.2017 made to the detenue containing the grounds of detention, it had been stated that "If you want to represent against this order, you may

send your representation to the Principal Secretary to the Govt. of Assam, Home and Political Department, Assam Sachivalaya, Dispur-6 within the stipulated time." Apart from the said provision, nothing further had been stated that the detenue also has a right to make a representation to the detaining authority itself and also to the Central Government and therefore, it is to be construed to be an admitted position of the respondent authorities that while serving the order of detention dated 24.09.2017, the detenue had not been informed of his right to make a representation to the detaining authority and the Central Government. No further material has been produced by the respondent authorities to indicate that the detenue was so informed in any other manner.

36. At the commencement of the hearing, an affidavit dated 07.12.2017 had been filed, wherein, an order dated 05.12.2017 under the signature of the Secretary to the Govt. of Assam in the Home and Political Department had been enclosed. The said order of 05.12.2017 provides that by the said order, the detenue had been intimated that he may represent against the order of detention dated 24.09.2017 before the detaining authority and he may represent afresh before the Central Government, in addition to the authorities mentioned in the communication dated 24.09.2017. In paragraph-6 of the said affidavit, it had been stated that the order of 05.12.2017 had been issued under Section 14(1)(a) of the National Security Act, 1980. Accordingly, the State Government authority seeks to justify the sustainability of the order of modification by tracing its power to do so under Section 14(1)(a) of the National Security Act, 1980.

37. When the maintainability of the said order of modification dated 05.12.2017 is further examined, as submitted by Mr. Dutta, learned senior counsel for the petitioner, it is noticed that the provision in the order of 05.12.2017 that the detenue may make representation to the detaining authority has become ineffective in the meantime, inasmuch as upon the order of detention being approved by the State Government on

27.09.2017, the detaining authority being the District Magistrate, Nagaon, no longer continues to be the detaining authority, inasmuch as after order of approval, it is the State Government who is the detaining authority. Therefore, even if the order of modification has been made, the same is ineffective. Further, the law relating to submission of representation is that the detenue must be given the earliest possible opportunity to make a representation, but the order of detention having been made on 24.09.2017, the opportunity given on 05.12.2017 to make the representation to the detaining authority and the Central Government does not constitute an earliest possible opportunity given to the detenue and hence, there is an aberration of Article 22(5) of the Constitution to render the order of modification of 05.12.2017 to be ineffective.

38. Although in a subsequent affidavit of 13.12.2017, it has been stated that the order of modification of 05.12.2017 had been served on the detenue, but the detenue also swears an affidavit dated 11.12.2017 stating that the order of modification had not been served on him. Further a comparison had also been drawn that whereas, when the copy of a WT message of 14.11.2017 and the order dated 18.11.2017 of the Principal Secretary Govt. of Assam, Home and Political Department was served on the detenue, there was an endorsement of the Superintendent of the Central Jail, Dibrugarh. But in the order of modification dated 05.12.2017 there is no such endorsement of the Superintendent of the Central Jail, Dibrugarh, which itself is a prima facie indication that the same may not have been served on the detenue, although it is the stand of the State Government authorities that the detenue had refused to accept the same.

39. Be that as it may, if the purport of the order of modification was to cover up the lacuna that the detenue was not informed of his right to make a representation to the detaining authority and the Central Government at the time when the order of detention was served on him, the same under the law cannot be accepted inasmuch as by doing so, the State Government authorities have not given the detenue the earliest possible

opportunity to make the representation. In this regard, reference is made to a Judgment of the Hon'ble Supreme Court rendered in Kamleshkumar Ishwardas Patel (supra), wherein the Constitution Bench of the Hon'ble Supreme Court in paragraph-6 had held that Article 22(5) imposes a dual obligation on the authority making the order of preventive detention to also afford the person detained the earliest opportunity of making a representation against the order of detention. In the Full Bench of this Court Konsam Brojen Singh (supra) in paragraph-57 had also provided that under Article 22(5) of the Constitution, the detenue has a right to be afforded the earliest opportunity of making a representation against the order of detention. Paragraph-6 of the Kamleshkumar Ishwardas Patel and paragraph-57 of Konsam Brojen Singh are quoted in one of the succeeding paragraphs.

40. In view of the above, the modification of the order of 05.12.2017 for the purpose of indicating that the detenue was informed of his right to make a representation to the detaining authority and the Central Government is accordingly found to be unacceptable.

41. Further, it is also noticed that the modification order of 05.12.2017 had been made in exercise of the powers under Section 14(1)(a) of the National Security Act 1980. While examining the powers conferred under Section 14 of the National Security Act, the Hon'ble Supreme Court in ***Haradhan Saha –Vs- The State of West Bengal and Ors,*** reported in ***(1975) 3 SCC 198***, in paragraph-27 had held that Section 14 clothes the authority with the power of revoking or modifying the order of detention at any time and that such power which is for the benefit of the detenue carries with it the duty to exercise that power whenever and as soon as changed or new factors called for the exercise for that power. It had further been held that the authorities can consider new factors of changed circumstances.

Paragraph 27 is as follows:-

"**27.** Section 14 of the Act clothes the authority with the power of revoking or modifying the detention order at any time. Such a power which is for the benefit of the detenue carries with it the duty to exercise that power whenever and as soon as changed or new factors call for the exercise of that power. This shows that the authorities can consider new factors or changed circumstances."

42. From the said provisions of paragraph 27 of the Judgment of the Hon'ble Supreme Court, it is discernible that the power to modify the order of detention under Section 14 of the National Security Act, 1980 can be undertaken if, firstly, the order of modification is made for the benefit of the detenue and secondly, if any new factors or changed circumstances have in the meantime come into existence. In other words, it has to be understood that the order of modification cannot be made under Section 14 of the National Security Act, 1980, if such modification is for the detriment of the detenue.

43. Under the law laid down by the Hon'ble Supreme Court, in Kamaleshkumar Ishwardas Patel (supra) as well as the Full Bench of this Court in Konsam Brojen Singh (Supra) and also the Division Bench in Rongjam Momin (Supra) and Robin Dhekial Phukan (supra), the detenue has a right to be informed at the earliest that he has a right to make a representation, amongst others, to the detaining authority itself. In the instant case, as noticed, in the order of detention as well as the communication containing the grounds of detention dated 24.09.2017, the detenue had not been informed that he has a right to make such representation. As per the law laid down by the Constitution Bench of the Hon'ble Supreme Court as well as the Full Bench and Division Bench of this Court, as indicated above, a situation has arisen in favour of the detenue to make a claim that the detention order stood vitiated for not being so informed. Now if the order of modification of 15.12.2017 is accepted, the same would reverse the advantageous position that the detenue had arrived at of making a claim that the detention orders stood vitiated and therefore, any such acceptance of the said order would be to the detriment of the detenue. Accordingly, by applying the principles of law laid down in Haradhan Saha (supra), such modification order of 05.12.2017 which

is not for the benefit of the detenue, cannot be accepted. By further applying the principles of law laid in Haradhan Saha (supra), no new factors or changed circumstance had been indicated in the order of modification of 05.12.2017 and for such reason also the said order of modification cannot be accepted.

44. As regards the right of the detenue to be informed about his right to make a representation to the detaining authority, apart from the other authorities, has been laid down by the Hon'ble Supreme Court and also the Full Bench and Division Bench of this Court in the following cases:-

a) In Kamleshkumar Ishwardas Patel (supra) in paragraph-6 it had been held as follows:-

"6. This provision has the same force and sanctity as any other provision relating to fundamental rights. (See: State of Bombay v. Atma Ram Shridhar Vaidya[3].) Article 22(5) imposes a dual obligation on the authority making the order of preventive detention: (i) to communicate 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 which is empowered by law to revoke the order of detention."

b) In Konsam Brojen Singh (supra) in paragraph-57, it had been held as follows:-

"57. For all the aforesaid reasons, we hold:

(1) That a detenu has two rights under article 22(5) of the Constitution (1) to be informed, as soon as may be, the grounds on which the order of

detention is passed, i.e., the grounds which led to the subjective satisfaction of the detaining authority, and (ii) to be afforded the earliest opportunity of making a representation against the order of detention. The twin rights are available to a detenu whether they are provided for or not in the preventive detention laws."

c) In Rongjam Momin (supra) in paragraph-9, it had been held that

"the effect of the approval by the State Government is that from the date of such approval the detention is authorized by the order of the State Government approving the order of detention and the State Government is the detaining authority from the date of the order of approval."

d) In Robin Dhekial Phukan (supra) in paragraph 9 and 10 it has been that

9*." ….the detention order is not capable of being interpreted to mean that the detenue has been informed of his right to make a representation also before the detaining authority……"*

10. *"Therefore, the detention order cannot be sustained in view of the law laid down by the Supreme Court in Kamleshkumar (supra) and accordingly, the impugned detention order dated 11.09.07 is hereby quashed."*

45. The purport of the law laid down in Kamaleskumar Ishwardas Patel *is that* Article 22(5) of the Constitution imposed the obligation on the detaining authority, firstly to communicate to the detenue the grounds on which the order of detention had been made and also to afford the detenue the earliest opportunity of making a representation against the order of detention. Further, the detaining authority who had made the order of detention also has an inherent right to revoke the order of detention and therefore, Article 22(5) postulates that the detenue has a right, amongst others, to make a representation also to the detaining authority. In Konsam Brojen Singh the law laid down is that the detaining authority is under the constitutional obligation to inform the detenue of his right to make a representation to the detaining authority and any failure to inform the detenue of such right to make a representation to the detaining authority vitiates the order of detention made under the National Security Act, 1980. In Rongjam Momin, the law laid down is that, firstly the effect of an approval by the State Government under Section 3(4) of the National Security Act, 1980 is that from the date of such approval the detention is authorized by the order of the State Government and

from the date of approval it is the State Government who is the detaining authority and secondly, the failure of the detaining authority to inform the detenue to file a representation to the detaining authority as well as to the Central Government is an infringement of the fundamental right of the detenue under Article 22(5) of the Constitution resulting in the order of detention as well as the order of approval being vitiated. In Robin Dhekial Phukan (supra), an attempt has been made by the learned state counsel to give an interpretation that although it was not specifically stated in the detention order that the detenue has a right to submit representation against the order of detention to the detaining authority as well as the Central Government, but the same can also be interpreted to mean that the detenue had been informed of his right to make a representation before the detaining authority. Such interpretation sought to be made has been rejected by stating that the words incorporated in the detention order are clear and suffers no ambiguity and that the detention order is not capable of being interpreted to mean that the detenue had also been informed of his right to make a representation also before the detaining authority. Accordingly, as the Hon'ble Court has arrived at a conclusion that the detention order did not specifically indicate that the detenue had a right to make a representation even before the detaining authority, the Constitutional guarantee envisaged under Article 22(5) of the Constitution had been violated and the order of detention was quashed by following the law laid down in Kamaleskumar Ishwardas Patel (supra).

46. In the instant case, it is noticed from the communication dated 24.09.2017 of the detaining authority, by which the ground of detention were conveyed to the petitioner, that the petitioner had been informed that if he wants to represent against the order of detention, he may send his representation to the Principal Secretary to the Govt. of Assam in the Home and Political Department and also to the Chairperson of the Advisory

Board under the National Security Act. The relevant provision in the said communication of 24.09.2017 is as follows:-

"If you want to represent against this order, you may send your representation to the Principal Secretary to the Government of Assam, Home and Political Department, Assam Sachivalaya, Dispur-6 within the stipulated time.

You may also represent to the Chairperson, Advisory Board for the National Security Act in Assam, c/o The principal Secretary to the Government of Assam, Home and Political Department, Assam Sachivalaya, Dispur-6."

47. Although, the communication of 24.09.2017 does not specifically provide that the detenue had been informed that he has a right to make a representation to the detaining authority itself, and also to the Central Government, but it is the contention of Mr. S.N. Sarma, learned senior counsel for the detaining authority by referring that in his representation dated 27.09.2017 addressed to the Principal Secretary to the Govt. of Assam in the Home and Political Department and to the Chairman of the Advisory Board, against the order of detention, the petitioner had stated that the representation of the petitioner be also placed before any other competent authority under the National Security Act for their consideration and appropriate order, contends that the petitioner had waived his right to be informed that he has a right to make a representation before the detaining authority also. The said provision in the representation of the petitioner is as follows:-

"It is requested that the present representation be placed before the Advisory Board and/or any other competent authority under the National Security Act for their consideration and appropriate orders."

48. As held by the Constitution Bench of the Hon'ble Supreme Court as well as the Full Bench and Division Bench of this Court, the right to be informed that the detenue has a right to make a representation before the detaining authority also is a fundamental right under Article 22(5) of the Constitution. Therefore, in order to appreciate the contention of Mr. Sarma, the relevant consideration would be as to whether a fundamental right can be waived. In this respect, the decisions of the Hon'ble Supreme Court in respect of

waiver of a fundamental right, as submitted by Mr. N. Dutta, learned senior counsel for the petitioner would be relevant.

In ***Behram Khurshid Pesikaka –Vs- State of Bombay*** reported in ***AIR 1955 SC 123*** in paragraph-12 it has been held as follows:-

*"**12**. In our opinion, the doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our Constitution without a fuller discussion of the matter. No inference in deciding the case should have been raised on the basis of such a theory. The learned Attorney-General when questioned about the doctrine did not seem to be very enthusiastic about it. Without finally expression an opinion in this question wer are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part-III of our Constitution. We think that the rights described as fundamental are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public polity and the doctrine of waiver can have no application to provisions of law which hae been enacted as a matter of constitutional policy. Reference to some of the articles, inter alia, Articles 15(1), 20, 21 makes the proposition quite plain. A citizen cannot get discrimination by telling the State "You can discriminate", or get convicted by waiving the protection given under Article 20 and 21."*

In ***Basheshar Nath –Vs- Commissioner of Income Tax Delhi & Rajhasthan and Anr.,*** reported in ***AIR 1959 SC 149*** in paragraph-15 of the judgment by Chief Justice Sudhi Ranjan Das it had been provided as follows:-

> "***15.*** *Such being the true intent and effect of Article 14 the question arises, can a breach of the obligation imposed on the State be waived by any person? In the face of such an unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the constitutional mandate merely because a person tells the State that it may do so? If the Constitution asks the State as to why the State did not carry out its behest, will it be any answer for the State to make that "true, you directed me not to deny any person equality before the law, but this person said that I could do so, for he had no objection to my doing it". I do not think the State will be in any better position than the position in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State's above answer will be as futile as was that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit. It seems to us absolutely clear, on the language of Article 14 that it is a command issued by the Constitution to the State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity*

which every welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution. Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State."

In paragraph-9 & 15 of the Judgment by Justice Bhagawati, it has been provided as follows:-

"9. The question then arises whether a breach of the obligation thus imposed on the State can be waived by a citizen. To borrow the words of my Lord the Chief Justice "In the face of such unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the constitutional mandate merely because a citizen told the State that it may do so? If the Constitution asks the State as to why the State did not carry out its behest, will it be any answer for the State to make that "True, you directed me not to take away or abridge the rights conferred by this Part, but his citizen said that I could do so, for he had no objection to my doing so". I do not think the State will be in any better position than the position in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State's above answer will be as futile as that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit. It is absolutely clear on a perusal of Article 13(2) of the Constitution that it is a constitutional mandate to the State and no citizen can by any act or conduct relieve the State of the solemn obligation imposed on it by Article 13(2) and no distinction can be made at all between the fundamental rights enacted for the benefit of the individual and those enacted in the public interest on grounds of public policy.

15. This, in my opinion, is the true position and it cannot therefore be urged tht it is open to a citizen to waive his fundamental rights conferred by Part-III of the Constitution. The Supreme Court is the bulwark of the fundamental rights which have been for the first time enacted in the Constitution and it would be a sacrilege to whittle down those rights in the manner attempted to be done."

In paragraph-78 of the judgment by Justice Subba Rao, it has provided as follows:-

*"**78.** The scope of the doctrine of waiver was considered by this Court in Behram Khurseed case[10]. There a person was prosecuted for an offence under Section 66(b) of the Bombay Prohibition Act and he was sentenced to one month's rigorous imprisonment. One of the questions raised there was whether Section 13(b) of the Bombay Prohibition Act, having been declared to be void under Article 13(1) of the Constitution insofar as it affected the consumption or use of liquid medicinal or toilet preparation containing alcohol, the prosecution was maintainable for infringement of that section. The Court held that in India once the law has been struck down as unconstitutional by the Supreme Court, no notice can be taken of it by any court, because, after it is declared as*

unconstitutional, it is no longer law and is null and void. Even so, it was contended that the accused had waived his fundamental right and therefore he could not sustain his defence. Mahajan, C.J., delivering the judgment of the majority, repelled this contention with the following observations at p. 653:

The learned Attorney-General when questioned about the doctrine did not seem to be very enthusiastic about it. Without finally expressing an opinion on this question we are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of our Constitution. We think that the rights described as fundamental rights are a necessary consequence of the declaration in the Preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for the individual benefit though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Reference to some of the articles, inter alia, Articles 15(1), 20, 21, makes the proposition quite plain. A citizen cannot get discrimination by telling the State 'You can discriminate', or get convicted by waiving the protection given under Articles 20 and 21."

On the question of waiver, Venkatarama Aiyar, J., in his judgment before review, considered the American decisions and was inclined to take the view that under our Constitution when a law contravenes the provisions intended for the benefit of the individual, it can be waived. But the learned Judge made it clear in his judgment that the question of waiver had no bearing to any issue of fact arising for determination in that case but only for showing the nature of the right declared under Article 19(1)(f) and the effect in law of a statute contravening it. Das, J., as he then was, in his dissenting judgment, did not state his view on this question but expressly reserved it in the following words:

In coming to the conclusion that I have, I have in a large measure found myself in agreement with the views of Venkatarama Aiyar, J., on that part of the case. I, however, desire to guard myself against being understood to agree with the rest of the observations to be found in his judgment, particularly those relating to waiver of unconstitutionality, the fundamental rights being a mere check on the legislative power or the effect of the declaration under Article 13(1) being 'relatively void'. On those topics I prefer to express no opinion on this occasion."

I respectfully agree with the observations of Mahajan, C.J. For the aforesaid reasons, I hold that the doctrine of waiver has no application in the case of fundamental rights under our Constitution."

In Olga Tellis (supra) in paragraph 27, 28 & 29 it has provided as follows"-

"**27.** We will first deal with the preliminary objection raised by Mr K.K. Singhvi, who appears on behalf of the Bombay Municipal Corporation, that the petitioners are estopped from contending that their huts cannot

be demolished by reason of the fundamental rights claimed by them. It appears that a Writ Petition No. 986 of 1981, was filed on the original side of the Bombay High Court by and on behalf of the pavement dwellers claiming reliefs similar to those claimed in the instant batch of writ petitions. A learned Single Judge granted an ad-interim injunction restraining the respondents from demolishing the huts and from evicting the pavement dwellers. When the petition came up for hearing on July 27, 1981, counsel for the petitioners made a statement in answer to a query from the court, that no fundamental right could be claimed to put up dwellings on footpaths or public roads. Upon this statement, respondents agreed not to demolish until October 15, 1981, huts which were constructed on the pavements or public roads prior to July 23, 1981. On August 4, 1981, a written undertaking was given by the petitioners agreeing, inter alia, to vacate the huts on or before October 15, 1981 and not to obstruct the public authorities from demolishing them. Counsel appearing for the State of Maharashtra responded to the petitioners' undertaking by giving an undertaking on behalf of the State Government that, until October 15, 1981, no pavement dweller will be removed out of the city against his wish. On the basis of these undertakings, the learned Judge disposed of the writ petition without passing any further orders. The contention of the Bombay Municipal Corporation is that since the pavement dwellers had conceded in the High Court that they did not claim any fundamental right to put up huts on pavements or public roads and since they had given an undertaking to the High Court that they will not obstruct the demolition of the huts after October 15, 1981, they are estopped from contending in this Court that the huts constructed by them on the pavements cannot be demolished because of their right to livelihood, which is comprehended within the fundamental right to life guaranteed by Article 21 of the Constitution.

28. It is not possible to accept the contention that the petitioners are estopped from setting up their fundamental rights as a defence to the demolition of the huts put up by them on pavements or parts of public roads. There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. If a person makes a representation to another, on the faith of which the latter acts to his prejudice, the former cannot resile from the representation made by him. He must make it good. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. For example, the concession made by a person that he does not possess and would not exercise his right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those constitutional rights, any more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of Article 22 of the Constitution. Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. But, the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit

individuals but to secure the larger interests of the community. The Preamble of the Constitution says that India is a democratic Republic. It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15, 16, 19, 21 and 29 and, some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21, 22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all-powerful State could easily tempt an individual to forego his precious personal freedoms on promise of transitory, immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the existence and scope of the right claimed by the petitioners is well-founded is another matter. But, the argument has to be examined despite the concession.

29. The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-to-day transactions. In *Basheshar Nath* v. *CIT*[2] a Constitution Bench of this Court considered the question whether the fundamental rights conferred by the Constitution can be waived. Two members of the Bench (Das, C.J. and Kapoor, J.) held that there can be no waiver of the fundamental right founded on Article 14 of the Constitution. Two others (N.H. Bhagwati and Subba Rao, JJ.) held that not only could there be no waiver of the right conferred by Article 14, but there could be no waiver of any other fundamental right guaranteed by Part III of the Constitution. The Constitution makes no distinction, according to the learned Judges, between fundamental rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy."

In ***Nar Singh Pal –Vs- Union of India and Ors.,*** reported in ***(2000) 3 SCC 588*** , it has been provided as under:-

*"**13.** The Tribunal as also the High Court, both appear to have been moved by the fact that the appellant had encashed the cheque through which retrenchment compensation was paid to him. They intended to say that once retrenchment compensation was accepted by the appellant, the chapter stands closed and it is no longer open to the appellant to challenge his retrenchment. This, we are constrained to observe, was wholly erroneous and was not the correct approach. The appellant was a casual labour who had attained the "temporary" status after having put in ten years of service. Like any other employee, he had to sustain himself, or, maybe, his family members on the wages he got. On the termination*

of his services, there was no hope left for payment of salary in future. The retrenchment compensation paid to him, which was only a meagre amount of Rs 6350, was utilised by him to sustain himself. This does not mean that he had surrendered all his constitutional rights in favour of the respondents. Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor can there be any estoppel against the exercise of Fundamental Rights available under the Constitution. As pointed out earlier, the termination of the appellant from service was punitive in nature and was in violation of the principles of natural justice and his constitutional rights. Such an order cannot be sustained."

49. From the said propositions of law laid down by the Hon'ble Supreme Court, it is discernible that the doctrine of waiver enunciated in the American Courts in construing the American Constitution cannot be introduced in our Constitution and that the fundamental rights enshrined in the Constitution are not merely for the individual benefits, but they have been put there as a matter of public policy and the doctrine of waiver can have no application to the provision of law which have been enacted as a matter of constitutional policy. Further the Constitution adopted by our founding fathers is sacrosanct and it is not permissible to tinker with the fundamental rights by ratiocination or analogy of the decisions of the Supreme Court of the United States of America. Accordingly, the true position is that it cannot be urged that it is open to a citizen to waive his fundamental rights conferred by the Part-III of the Constitution of India. Further also the doctrine of waiver has no application in the case of fundamental rights under the Constitution and even an undertaking given by a person in a court of law, cannot be an estoppel for the citizens to claim a fundamental right and that there can be no estoppels against the Constitution and that a concession made by a citizen in a proceeding whether under a mistake of law or otherwise that he will not enforce any particular fundamental right cannot create an estoppel against him in that or any other proceeding. The plea of estoppels is closely connected with the plea of waiver and the Constitution makes no distinction between fundamental rights enacted for the benefit of an individual and those enacted in public interest or on the grounds of public policy. It

also does not mean that a citizen can surrender all his constitutional rights in favour of the authorities and the fundamental rights under the Constitution cannot be bartered away and neither it can be compromised and nor can there be any estoppel against the exercise of fundamental rights available under the Constitution.

50. In the premises of the aforesaid proposition of law laid down by the Hon'ble Supreme Court that neither there can be any waiver nor an estoppel can come against the exercise of a fundamental right and also nor that the fundamental rights can be compromised, the contention of Mr. S.N. Sarma, learned senior counsel for the detaining authority that the petitioner had waived his fundamental right under Article 22(5) of the Constitution to be informed about his right to make representation to the detaining authority, in view of the stand in his representation to the State Government authorities that the representation also be placed before any other competent authority for its consideration, cannot be accepted. Irrespective of whatever may be stated by the detenue in the representation dated 27.09.2017 before the State Government authorities that the representation be also placed before any other competent authority, the same cannot be a basis to arrive at a conclusion that the petitioner had waived his fundamental right under Article 22(5) of the Constitution to be informed of his right to make a representation before the detaining authority.

51. The contention of the learned Advocate General, by referring to the said expression of the petitioner in his representation dated 27.09.2017 that the representation submitted before the State Government authorities be also placed before all the other competent authorities for its consideration, that the same by itself constitutes a factual background which is different from the facts under consideration in the Full Bench of this Court in Konsam Brojen Singh and the Division Bench in Rongjam Momin & Robin Dhekial Phukan, and therefore the ratio decidendi therein is not applicable in the present case also has to be examined from the context under which the

law relating to the right of the detenue to be informed about his right to make a representation also to the detaining authority has been laid down.

52. The learned Advocate General relies upon the Judgment of the Hon'ble Supreme Court rendered in ***Arasmeta Captive Power Co. (P) Ltd. –Vs- Lafarge India(P) Ltd.*** reported in ***(2013) 15 SCC 414,*** wherein in paragraph 31 to 36 and 38 and 39 it has been provided as follows:-

"**31.** At this juncture, we think it condign to refer to certain authorities which lay down the principle for understanding the ratio decidendi of a judgment. Such a deliberation, we are disposed to think, is necessary as we notice that contentions are raised that certain observations in some paragraphs in *SBP*[3] have been relied upon to build the edifice that latter judgments have not referred to them.

32. In *Ambica Quarry Works* v. *State of Gujarat*[8] it has been stated (SCC p. 221, para 18) that the ratio of any decision must be understood in the background of the facts of that case. Relying on *Quinn* v. *Leathem*[9] it has been held that the case is only an authority for what it actually decides, and not what logically follows from it.

33. Lord Halsbury in *Quinn*[9] has ruled thus: (AC p. 506)

> "... there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. *The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all*."
>
> (emphasis supplied)

34. In *Krishena Kumar* v. *Union of India*[10] the Constitution Bench, while dealing with the concept of ratio decidendi, has referred to *Caledonian Railway Co.* v. *Walker's Trustees*[11] and *Quinn*[9] and the observations made by Sir Frederick Pollock and thereafter proceeded to state as follows: (*Krishena Kumar case*[10], SCC pp. 226-27, para 20)

> "*20*. ... The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. *The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or Judge-made, and a minor premise consisting of the material facts of the case under immediate consideration*. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th Edn., Vol. 26, para 573):
>
> > 'The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in

relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear … it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to be bound by it, *and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi*.

35. In *State of Orissa* v. *Mohd. Illiyas*[12] it has been stated thus: (SCC p. 282, para 12)

"*12*. … According to the well-settled theory of precedents, every decision contains three basic postulates: (*i*) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (*ii*) statements of the principles of law applicable to the legal problems disclosed by the facts; and (*iii*) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment."

36. In *Islamic Academy of Education* v. *State of Karnataka*[13] the Court has made the following observations: (SCC p. 719, para 2)

"*2*. … The ratio decidendi of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. *In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment*."

(emphasis supplied)

37. The said authorities have been relied upon in *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*[14], SCC p. 68, para 73.

38. At this stage, we may also profitably refer to another principle which is of assistance to understand and appreciate the ratio decidendi of a judgment. The judgments rendered by a court are not to be read as statutes. In *Union of India* v. *Amrit Lal Manchanda*[15] it has been stated that: (SCC p. 83, para 15)

15. … Observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. [The] observations must be read in the context in which they appear to have been stated. … To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes."

53. The learned Advocate General accordingly submits that due to variance in the factual background of a similar provision in the representation of the detenue, the law laid down in the Full Bench Judgment in *Konsam Brojen Singh and Division Bench in Rongjam Momin and Robin Dhekial Phukan that the* detenue has a fundamental right under Article 22(5) of the Constitution of India to be informed of his right that he has a

right to make a representation before the detaining authority is inapplicable in the present case.

54. In this respect, the provision of the Hon'ble Supreme Court in ***Official Liquidator –Vs- Dayanand and Ors.,*** reported in ***(2008) 10 SCC*** in paragraph 90 has its relevance. In paragaraph-90, the Hon'ble Supreme Court has provided that the learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by the coordinate and even larger Benches by citing minor difference in facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation.

It is noticed that the alleged variance in the factual background of the present case and that in the Full Bench Judgement of Konsam and Division Bench judgment of Rongjam Momin and Robin Dhekial Phukan to the extent that in the other cases there is no such provision in the representation of the detenue that the copy thereof be also placed before other competent authorities under the National Security Act, can be termed to be minor difference in facts, even it is construed to be a difference.

55. Further, it is also required to be noticed that in the Full Bench Judgment in Konsam Brojen Singh, the circumstance in which the reference had been made to the Full Bench can be found in paragraph-18 thereof. The background of the reference in Konsam Brojen Singh is that there was a divergence of views between Division Benches as regards the concept that the detenue has a right to be informed that he has a right to make representation before the detaining authority also was referred to an earlier Full Bench, which had held that such a right is a fundamental right under Article 22(5). But in a subsequent situation, the learned Advocate General of Manipur had raised an issue that the Full Bench Judgment is per incuriam to the extent that two decisions of the Hon'ble Supreme Court in ***Veeramani –Vs- State of Tamil Nadu*** and ***Mohammed***

Quershi –Vs- Commissioner of Police, Greater Bombay were not taken into consideration. In the aforesaid circumstance, the matter was again referred to the Full Bench in Konsam Brojen Singh case.

56. In the aforesaid circumstance, it cannot be said that the decision of the Full Bench in Konsam Brojen Singh was rendered in a factual background where there is a variance to the extent that the detenues therein had not made a provision in their respective representation that the representation be also placed before any other competent authority under the National Security Act.

In such view of the matter, the contention of the learned Advocate General that the provision of law laid in Konsam Brojen Singh is not applicable in the present case is found to be unacceptable.

57. The further contention of the learned Advocate General that the mandate of Paragaraph-57 of Konsam Brojen Singh has been complied in the present case inasmuch as the detenue had responded by submitting a representation on 27.09.2017 by indicating that his representation be also placed before any other competent authority under the National Security Act have to be examined in relation to the provision of Section 57 of Konsam Brojen Singh.

In Konsam Brojen Singh two postulations of law have been formulated that the detaining authority is under the constitutional obligation to inform the detenue of his right to make a representation to the detaining authority and that the failure to inform the detenue of such right to make the representation to the detaining authority vitiates the detention order.

58. Therefore, in order to comply with the mandate of paragraph-57 of Konsam Brojen Singh, the detaining authority would firstly be required to inform the detenue that he has a right to make a representation to the detaining authority also. If the

communication of the detaining authority does not so inform the detenue, it cannot be said that paragraph-57 of Konsan Brojen Singh had been complied with. Even if by a subsequent act, the detenue makes a representation where he indicates that the concerned representation be also placed before the detaining authority for its consideration, the same on its own cannot rectify the earlier lacuna of not so informing. It is more so, in view of the provisions laid down in the Full Bench Judgment in Konsam Brojen Singh that on the detenue not being informed of his right to make a representation to the detaining authority also, the same violates Article 22(5) of the Constitution and the order of detention stands vitiated.

Further reference can also be made to the decision of the Hon'ble Supreme Court in the case of ***State of Maharashtra and Ors., -Vs- Santosh Shankar Acharya*** reported in ***(2000) 7 SCC 463***, wherein, in paragraph, 6, it has been held as under:-

> *".....This being the position, it goes without saying that even under the Maharashtra Act a detenu will have a right to make a representation to the detaining authority so long as the order of detention has not been approved by the State Government and consequently non-communication of the fact to the detenu that he has a right to make a representation to the detaining authority would constitute an infraction of the valuable constitutional right guaranteed to the detenu under Article 22(5) of the Constitution and such failure would make the order of detention invalid....."*

From the aforesaid proposition of law, it is inferred that the order of preventive detention stands vitiated at the time when the detenu was not informed that he has a right to make a representation before the concerned authority.

59. Accordingly, in view of the above, it is the considered view of the Court that the order of detention of 24.09.2017 stands vitiated as the detaining authority in the communication dated 24.09.2017 had not informed the petitioner that he has a right to make a representation against the order of detention before the detaining authority itself also.

Issue as to whether there has been an unexplained delay in disposing of the representation dated 27.09.2017 before the State Government and the Chairman of the Advisory Board.

60. The petitioner states that a representation was made on 27.09.2017 to the Principal Secretary to the Govt. of Assam in the Home and Political Department as well as to the Chairman of the Advisory Board in Assam under the National Security Act. The representation submitted to the Principal Secretary to the Govt. of Assam was rejected by an order dated 25.10.2017. In the affidavit dated 13.12.2017, the State Government mentions the various dates as to how the representation of the petitioner was dealt by the various authorities in the State Government. As submitted by Mr. N. Dutta, learned senior counsel for the petitioner, it is noticed that on 13.10.2017, the representation was placed before the Principal Secretary to the Govt. of Assam along with the parawise comments of the District Magistrate, Nagaon. Thereafter, on 16.10.2017, the representation along with the parawise comments was transmitted to the Advisory Board. On 17.10.2017, the file was put up along with the representation of the petitioner and the parawise comments of the District Magistrate, Nagaon before the Deputy Secretary of the department, who had endorsed the file to the Joint Secretary. On 20.10.2017, the file was endorsed to the Principal Secretary, who again on 21.10.2017 had endorsed the same to the Addl. Chief Secretary.

61. What has remain unexplained is if the representation of the petitioner was available before the Principal Secretary along with the parawise comments of the District Magistrate, Nagaon on 13.10.2017, no reason has been stated as to what necessitated the representation to be again sent back to the Deputy Secretary for being endorsed to the Joint Secretary, who again endorses it back to the Principal Secretary and thereafter, the Principal Secretary endorses the file to the Principal Secretary on 21.10.2017. The learned Advocate General tries to explain the movement of the representation from the Principal Secretary down to the Deputy Secretary and thereafter again going up to the

Principal Secretary through the Joint Secretary to be a matter of procedure. Apart from taking the stand that no further materials has been produced as to what was the required procedure which necessitated such an action of moving the representation down to the Deputy Secretary and again sending it up the Principal Secretary. In this respect, the note-sheet pertaining to the said period had been examined. The note-sheet reveals that on 13.10.2017 the view of the Principal Secretary was sought for sending the representation of the petitioner to the Advisory Board. All the other contents of the note-sheet from 13.10.2017 upto 21.10.2017 pertains to the holding of the meeting of the Advisory Board under the National Security Act, except for one of the notings of 17.10.2017 which reflects that the file be perhaps endorsed to the Chief Minister. The noting of 13.10.2017 also gives an indication that there was a direction by the Principal Secretary that the District Magistrate, Nagaon be asked to hand over a copy of the notification dated 31.08.2017 pertaining to PLA.326/797/130. The said notification of 31.08.2017 is the notification under Section 3(3) of the National Security Act, 1980 by which the District Magistrates have been empowered to make the orders of detention. If the said notification is a notification of the State Government empowering the District Magistrate under Section 3(3) no plausible reason is discernible as to why it should be asked from the District Magistrate, Nagaon, where the reasonable expectation is that such notification would be available in the appropriate file maintained by the State Government.

In view of the absence of any reason as to why the representation of the petitioner was not taken up for doing the needful on 13.10.2017 itself, this Court is of the considered view that there was an unexplained delay by the State Government between 13.10.2017 and 21.10.2017 in disposing of the representation of the detenue made on 27.09.2017.

62. It is also borne from the records that there is an order of the appropriate authority in the State Government dated 13.10.2017 that the representation of the petitioner made on 27.09.2017 be also transmitted to the Central Government for its consideration. The record further reveals that the representation was purportedly sent to the Central Government on 16.10.2017. But the postal receipt indicates that the representation was sent through speed post on 25.10.2017. There is no explanation forthcoming as to what had happened between 16.10.2017 when the representation was purportedly sent to the Central Government and 25.10.2017, when it was actually posted through the speed post. Such delay on the part of the authorites of the State Government is also unexplained in the view of the Court.

63. The law as relating to an unexplained delay in disposing of the representation have been dealt with by Hon'ble Supreme Court in paragraph-6 & 9 of ***Aslam Ahmed Zahire Ahmed Shaik –Vs- Union of India and Ors,*** reported in ***(1989) 3 SCC 277***, it has been held as follows:-

> *"6. This view was reiterated in Rashid Sk. V. State of West Bengal while dealing with the constitutional requirement of expeditious consideration of the petitioners representation by the government as spelt out from Article 22(5) of the Constitution observing thus:*
>
> *The ultimate objective of this provision can only be the most speedy consideration of his representation by the authorities concerned, for, without its expeditious consideration with a sense of urgency the basis purpose of affording earliest opportunity of making the representation is likely to be defeated. This right to represent and to have the representation considered at the earliest flows from the constitutional guarantee of the right to personal liberty-the right which is highly cherished in our Republic and its protection against arbitrary and unlawful invasion.*
>
> 9. Thus when it is emphasized and re-emphasized by a series of decisions of this Court that a representation should be considered with reasonable expedition, it is imperative on the part of every authority, whether in merely transmitting or dealing with it, to discharge that obligation with all reasonable promptness and diligence without giving room for any complaint of remissness, indifference or avoidable delay because the delay, caused by slackness on the part of any authority, will ultimately result in the delay of the disposal of the representation which in turn may invalidate the order of detention as having infringed the mandate of Article 22(5) of the Constitution."

In Rashid Sk –Vs- State of West Bengal reported in (1973) 3 SCC 476 in paragarpah-6 it has been held as under:-

> *"..... Now whether or not the State Government has in a given case considered the representation made by the detenu as soon as possible, in other words, with reasonable dispatch, must necessarily depend on the facts and circumstances of that case, it being neither possible nor advisable to lay down any rigid period of time uniformly applicable to all cases. The Court has in each case to consider judicially on the available material if the gap between the receipt of the representation and its consideration by the State Government is so unreasonably long and the explanation for the delay offered by the State Government so unsatisfactory as to render the detention order thereafter illegal."*

In the case of Pabitra N. Rana –Vs- Union of India and Ors., reported in (1980) 2 SCC 338 in paragraph-1 it has been held as follows:-

> *".....in their reply the respondents have not at all explained or detailed any reason why there was inordinate delay in disposing of the representation submitted by the detenu to the detaining authority..... It is now well settled that any unexplained delay in deciding the representation filed by the detnu amounts to a clear violation of Article 22(5) of the Constitution of India and is sufficient to vitiate the detention."*

In Lala Paite –Vs- State of Manipur and Ors., reported in 1999 (3) GLT 236 in paragraph-10 it has been held as under:-

> *"10. A right to make representation is not only a Statutory right under the National Security Act, it is a Constitutional rights as well. The words "as soon as may be" as enjoined in Article 22(5) of the Constitution reflects the concern of the makers of the constitution for individual liberty which made in incumbent on the authority to Act with promptitude, diligence and responsibility without the least possible delay. Expeditious disposition is the rule and delay in disposal defeats the mandate of Article 22(5) of the Constitution. Therefore, the authority is obliged to explain every day's delay."*

64. The provisions of law as indicated above requires that the representation submitted by the detenue must be disposed of as expeditiously as possible and without there being any unexplained delay in doing so. The right of the detenue to have his representation expeditiously disposed of without any unexplained delay is also a

fundamental right under Article 22(5) of the Constitution of India where any violation thereof vitiates the order of detention. The delay of every day in disposing of the representation is required to be explained and any non-explanation thereof renders the order of detention vitiated.

65. In the instant case as already concluded, there is unexplained delay between 13.10.2017 and 21.10.2017 in disposing of the representation of the petitioner to the State Government made on 27.09.2017 as well as a further unexplained delay between 16.10.2017 and 25.10.2017 in transmitting the representation to the Central Government through the speed post. In view of such unexplained delay and by applying the principles laid down as indicated herein above, the order of detention of 24.09.2017 by which the petitioner had been placed under preventive detention, stands vitiated.

Issue as to whether the order of detention of 24.09.2017 is vitiated for not providing the documents and materials relied upon by the detaining authority in arriving at its satisfaction as regards the grounds of detention

66. The petitioner contends that certain materials, more particularly a CD that finds mention in the order of detention of 29.04.2017 and which was forwarded to the Principal Secretary to the Govt. of Assam in the Home and Political Department had not been provided to the petitioner along with the order of detention and the grounds thereof. Mr. Dutta, learned senior counsel for the petitioner refers to the dossier that was provided to the petitioner which refers to certain video clippings and video footage which establishes that the petitioner had instigated the people for taking 'Hendang' and 'AK-47 Rifle' against the nation. It is contemplated that perhaps the CD mentioned in the order of detention pertains to such video clippings and video footage which establishes that the petitioner made certain inflammatory statement for instigating the people. Accordingly, it is also contemplated that the said CD perhaps relates to the grounds that the petitioner had made an obnoxious statement that he would complete the task that was supposed to have been done by ULFA (I), which is a banned outfit and that on

12.09.2017, in his speech at Bamunbari Tea Garden, Playground in Dibrugarh, he had instigated the common people to wage war against the State by taking up arms like 'AK-47 Riffle', 'Hangdang' (Sword).

67. Although Mr. Sarma learned senior counsel for the detaining authority takes the Court through several documents containing the statement of various witnesses in different police cases which would indicate that the petitioner had made such inflammatory statements, but the existence of such statement, although provided to the petitioner, cannot mitigate the situation where particular materials that had been relied upon by the detaining authority to arrive at its satisfaction as regards the existence of the grounds had not been provided to the detenue. It cannot be a matter that even in the absence of the concerned CD being provided to the petitioner, he had the knowledge as regards the basis of the satisfaction for arriving at a particular ground, and therefore, by not providing the CD no prejudice has been caused. It is rather a matter of procedural requirement of the law as laid down in various pronouncements of the Hon'ble Spreme Court that the detenue is entitled to be provided with all such documents and materials that are relied upon by the detaining authority for arriving at its satisfaction regarding the existence of a particular ground and such entitlement flows from Article 22(5) of the Constitution.

68. In this respect reference is made to the Judgment of the Hon'ble Supreme Court in ***Kamla Kanyalal Khushalani –Vs- State of Maharashtra and Ors.,*** reported in ***(1981) 1 SCC 748*** wherein, in paragraph-4 it was held as under:-

> ***" 4.*** *The court, therefore, clearly held that the documents and materials relied upon in the order of detention formed an integral part of the grounds and mkust be supplied to the detenu pari passu the grounds of detention. If the documents and materials are supplied later, then the detenu is deprived of an opportunity of making an effective representation against the order of detention. In this case, the court relied upon the ratio in Icchu Devi Choraria case extracted above. We find ourselves in complete agreement with the view expressed by the two decisions of this Court and we are unable to accede to the prayer of Mr. Rana for sending the case for reconsideration to a larger Bench. This Court has*

invariably laid down that before an order of detention can be supported, the constitutional safeguards must be strictly observed."

In ***Icchu Devi Choraria –Vs- Union of India and Ors.,*** reported in ***(1980) 4 SCC 531*** it had been held as under:-

7. "……these grounds which were served upon the detenu did not include the documents, statement and other materials relied upon in the grounds and forming part of them….. It is clear from the discussion in the preceding paragraph that under clause (5) of Article 22 read with Section 3 sub-section(3) of the COFEPOSA Act, the detaining authority was bound to supply copies of the documents, statements and other materials relied upon in the grounds of detention to the detenu within five days from the date of detention, that is, on or before June, 9, 1980 and in any event, even if we assume that there were exceptional circumstances and reasons for not supplying such copies within five days were recorded in writing, such copies shoud have been supplied to the detenu not later then fifteen days from the date of detention"

9." The facts as we find them here are that the detenu asked for copies of the documents, statements and other materials relied upon in the grounds of detention by his letters dated June 6, 1980 and June 9, 1980 and he also complained about non-supply of such copies in his representation date June 26, 1980….. There was thus a delay of more than one month in supply of copies of the documents, statements and other materials to the detenu…. We must in the circumstances hold that there was unreasonable delay on the part of the detaining authority in supplying to the detenu copies of the documents, statements and other materials relied upon in the grounds of detention and the continued detention of the detenu was accordingly illegal and void and the detenu was entitled to be released forthwith from detention."

In the case of ***Pritam Nath Hoon –Vs- Union of India and Ors.,*** reported in ***(1980) 4 SCC 525*** in paragraph-11 it was held as follows:-

11*" ….. It was, therefore, incumbent on the detaining authority to supply copies of those statements to the petitioner to enable him to make an effective representation….."*

69. From the aforesaid provisions of law, it is discernible that the right to be provided with all the relevant documents and materials which the detaining authority had relied upon to arrive at its satisfaction as regards the existence of grounds of detention, is a constitutional right of the detenue under Article 22(5) of the Constitution. As such, any such violation of the said right would render the ground, which was based upon such material and document, to be vitiated. Accordingly, this Court is of the considered view that the grounds for which the concerned CD also constitutes a material for arriving at

the satisfaction regarding the existence of the ground, stands vitiated, for not being provided with the CD under reference.

70. Mr. Dutta, learned senior counsel by referring to the Judgment of Hon'ble Supreme Court in Dharamdas Shamlal Agarwal (supra), in paragaraph-12 raises the contention that the result of non-placing of material facts had vitiated the subjective satisfaction of the detaining authority thereby rendering the impugned detention order to be invalid. By relying upon the said Judgment, Mr. Dutta contends that as some of the grounds had got vitiated as the concerned CD was not provided, therefore, the detention order of 24.09.2017 is invalid.

In this respect, Mr. S.N. Sarma, learned senior counsel for the detaining authority by refers to the decision of Attorney General for India (supra), wherein it is provided that where the order of detention is based on more than one ground, section 5(A) of the National Security Act, 1980 creates a legal fiction that it must be deemed that there are as many orders of detention as there are grounds, which means that each of such orders is an independent order. Paragraph-49 of the said Judgment is as follows:-

> *49." .....Where the order of detention is based on more than one ground, the section creates a legal fiction, viz,. it must be deemed that there are as many orders of detention as there are grounds which means that each of such orders is an independent order.....Parliament is competent to create a legal fiction and it did so in this case. Article 22(5) does not in terms or otherwise prohibit making of more than one order simultaneously against the same person, on different grounds..... Be that as it may, we do not see why Parliament is not competent to say, by creating a legal fiction, that were an order of detention is made on more than one ground, it must be deemed that there are as many orders of detention as there are grounds....."*

71. In view of the said decision of the nine Judges' Bench of the Hon'ble Supreme Court in the Attorney General's case the contention of the petitioner that the order of detention dated 24.09.2017 is invalid, cannot be accepted. In view of the law laid down by the Hon'ble Supreme Court that every ground of the detention order is an independent order of detention, the whole of the order of detention of 24.09.2017

would not be invalid merely because some of the grounds therein stood vitiated as the concerned CD which was also a relevant material in arriving at the satisfaction as regards the existence of the said grounds, was not provided to the petitioner. The other grounds, which were not based on the concerned CD would remain and accordingly, the independent detention order corresponding to such grounds would also remain.

Issue regarding not including the order of acquittal along with the materials and documents provided by the sponsoring authority to the detaining authority:

72. As regards the ground of detention that on 22.06.2011, the petitioner had organized a rally in Guwahati where his supporters had set a police vehicle on fire and four persons who were inside the vehicle had received injuries and that in the concerned police case the petitioner was charge-sheeted, a contention has been raised, that there is one police case being Dispur PS Case No.1258/2011, which had been registered against the petitioner in respect of the said incident. It is stated that in the dossier provided to the petitioner, various documents, including the statement of the witnesses as well the statement under Section 313 Cr.PC, had been included. It is to be understood that the said document provided by the sponsoring authority were the basis upon which the detaining authority arrived at its satisfaction as regards the said ground. Although in the said Dispur PS Case No.1258/2011, the petitioner had been acquitted by an order dated of the competent criminal court, but the order of acquittal had not been made a part of the documents and materials relied upon by the detaining authority to arrive at its satisfaction as regards the existence of the said ground.

73. Accordingly, a contention has been raised that had the detaining authority been provided with the order of acquittal, the same may have influenced the mind as regards the satisfaction pertaining to the said ground. In this respect, the Judgment of the

Hon'ble Supreme Court rendered in Dharamdas Shamlal Agarwal (supra) in paragraph 9 had been relied upon, wherein it has been provided as follows:

".....On the question of non-placing of the materials and vital fact of acquittal which if had been placed, would have influenced the minds of the detaining authority one way or the other..."

74. In the instant case, it is noticed that for the incident of 22.06.2011, the documents provided refers to only one police case i.e. Dispur PS Case No. 1258/2011 and materials have been produced that in the said police case there is an order of acquittal in favour of the petitioner. Therefore, following the proposition of law laid down by the Hon'ble Supreme Court in Dharamdas Shamlal Agarwal, it can be concluded that had the order of acquittal been provided to the detaining authority, its mind could have been influenced in one way or the other. Accordingly, as the order of detention was not placed before the detaining authority the ground that on 22.06.2011, the petitioner had organized a rally in Guwahati where his supporters had set a police vehicle on fire stands vitiated.

Issue as to whether the detenue has a right to be represented by a legal counsel before the Advisory Board.

75. The petitioner had made an application dated 04.04.2017 before the Chairman, Advisory Board, Assam under the National Security Act. By the said representation the petitioner by following the mandate of the Hon'ble Supreme Court in *AK Roy* (supra) and also by referring to Article 14 of the Constitution, had requested that he also be allowed to take the assistance of a legal counsel, with an alternative request that otherwise he be permitted to take legal assistance of a friend, namely, Sri Chandan Sarma. The said request of the petitioner was rejected by the Advisory Board by its order dated 22.10.2017, while allowing the petitioner to be assisted by Sri Chandan Sarma.

76. The law in this respect was considered by the Hon'ble Supreme Court in AK Roy (supra) wherein in paragraph 93 it has been held as follows:

"93.....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."

77. The law in this respect has been clearly provided by the Constitution Bench of the Hon'ble Supreme Court in AK Roy's case, which is that in the event, the detaining authority or the government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenue must also be allowed to be represented by a legal practitioner. Again, if the detaining authority or the State government are being represented by the officers, who assists or advises on facts and law must also be deemed to be in a position of a legal adviser.

78. In the instant case, from the records, it cannot be ascertained as to whether any officer of the government who assists or advises on facts or law had appeared before the Advisory Board with a view to justify the order of detention. In view of such absence of any material to conclude as to whether any officer of the government had appeared before the Advisory Board to justify the order of detention or as to whether such officers had merely carried the records, this Court refrains itself from giving a conclusive view as to whether the petitioner was prejudiced by the refusal to be assisted by a legal counsel.

79. In view of the above, the detention order is held to be vitiated for the reason that the petitioner was not informed about his constitutional right under Article 22(5) of the Constitution that he has a right to make a representation also to the detaining authority and the Central Government and also the order of detention is not sustainable for there being a delay in disposal of the representation of the petitioner by the State government as indicated above and also in causing the delay in transmitting the representation of the petitioner to the Central Government, *inasmuch as*, the representation was not sent by speed post for about 9(nine) days between 16.10.2017 and 25.10.2017.

80. Accordingly, the detenue is ordered to be released, if he is not warranted in any other case.

81. However, having said so, it is also a matter of concern that the detenues under the preventive detention are required to be released as because the detaining authority while making the order of detention either does not provide all that are required to be provided in a detention order under the law or that in the subsequent follow up procedure of the requirements of law are not being scrupulously followed. The object and reason of the National Security Act is that in a prevailing situation of communal disharmony, social tensions, extremist activities, industrial unrest etc., it was considered necessary that the law and order situation in the country be tackled in the most determined and effective way. The anti-social and anti-national elements, including the secessionist, communal and pro-caste elements poise a grave challenge to the lawful authority and sometimes even hold the society to ransom. Any laxity or casualness on the part of the authorities who are involved in the process of making and sustaining an order of preventive detention, which would result in the release of the detenue, would, therefore, have to be termed to be a factor, which contributes to such anti-social and anti-national activity.

82. As eluded, hereinabove, taking of a person in custody under the laws of preventive detention is an exception to the general mode of taking a person into custody under the relevant law and the sustainability of all such action of taking a person into custody under the laws of preventive detention would have to be strictly scrutinized within the cornerstones of right to life under Article 21 and 22(5) of the Constitution. Such views find place in several pronouncements of the Hon'ble Supreme Court.

In Kamla Kanyalal Khushalani(supra) in paragraph 8 it has been held as follows:

" 8.*It is a matter of great concern and deep dismay that despite repeated warnings by this Court, the detaining authorities do not care to comply with the spirit and tenor of the constitutional safeguards contained in Art. 22 (5) of the Constitution. It is manifest that when the detaining authority applies its mind to the documents and materials which form the basis of the detention, the same are indeed placed before it and there could be no difficulty in getting photostat copies of the documents and materials, referred to in the order of detention, prepared and attaching the same along with the grounds of detention, if the detaining authority is really serious in passing a valid order of detention. Unfortunately, the constitutional safeguards are not complied with, resulting in the orders of detention being set aside by the Court, even though on merits they might have been justified in suitable cases. We feel that it is high time that the Government should impress on the detaining authority the desirability of complying with the constitutional safeguards as adumbrated by the principles laid down in this regard. We would like to suggest that whenever a detention is struck down by the High Court or the Supreme Court, the detaining authority or the officers concerned who are associated with the preparation of the grounds of detention, must be held personally responsible and action should be taken against them for not complying with the constitutional requirements and safeguards (viz. delay in disposing of the representation, not supplying the documents and materials relied upon in the order of detention pari passu the order of detention, etc. etc.) or, at any rate, an explanation from the authorities concerned must be called for by the Central Government so that in future persons against whom serious acts of smuggling are alleged, do not go scot free".*

In Pritam Nath Hoon (supra) at paragraph 3, it has been held as follows:

"3. What surprises me, however, is the Executive's strange indifference to compliance with law's requirements despite this court's pronouncements. This has resulted in the release of one who, the State alleges, is a master strategist of smuggling exploits at the expense of the national economy. If there be truth in that imputation,-it is not for me to express any view, especially since a prosecution may be launched-who but the concerned authorities are to blame? Had the functionaries entrusted with the drastic detention power been careful enough to update their procedures in keeping with the strict directives laid down by this court the prospect of criminal adventurists continuing their precious metal traffic could have been pre-empted constitutionally by

successful preventive detention. Had the rulings of this court, from time to time, in the precious area of personal liberty versus preventive detention, been converted into pragmatic 'instructions' by a special cell the law would have fulfilled itself and served the nation with social justice. It is an imperative of social justice through State action that white collar robbers, dubiously respectable and professionally ingenious, reap the wages of their sins, viz., preventive detention and prompt prosecution, both according to law. Here, by not supplying promptly copies of the incriminating materials by an indifferent authority a detention is being judicially demolished. And prosecution for a serious offence is enjoying an occult spell of gestation because of official slow motion. Whether this court's insistence on the need to explain every day of delay in serving copies of every document on the detenu, is too tall an order in an atmosphere of habitual institutional paper-logging and hibernating is too late to ask. The judicial process-if one may self-critically lament-is itself no model of perfection in promptitude of disposal and may well sympathise with laggards elsewhere. But personal liberty, constitutionally sanctified, is too dear a value to admit of relaxation. And preventive detention being no substitute for prosecution, the criminal law stands stultified by the State itself if a charge is not laid before court with utmost speed and the crime is not punished with deserving severity. The rule of law has many unsuspected enemies, and remember, limping legal process as well as slumbering executive echelons are contributories to social injustice."

83. From the above pronouncements of the Hon'ble Supreme Court also it is noticed that concerns and dismay have been expressed on the attitude of the detaining authorities who do not care to comply with the spirit and tenor of the Constitutional safeguard of Article 22(5) of the Constitution of India and that it is a high time that the government impresses upon the detaining authorities the desirability of complying with the constitutional safeguards. The Hon'ble Supreme Court went to the extent to suggest that whenever a detention order is struck down by the High Court or the Supreme Court the detaining authority and the other officers associated with the preparation of the ground of detention must be personally held to be responsible and action should be taken against them for not complying with the constitutional requirements. The Hon'ble Supreme Court even went to the extent of saying that the rule of law has many unsuspected enemies and the slumbering executive echelons are contributory to social injustice.

84. If notice is taken of the various orders of prevention detention made by the authorities during the past two decades, more often than not, it can be seen that the

orders of detention could not survive the judicial scrutiny of Courts. Examples are available even in the reported Judgments, which indicates that the orders of preventive detention are invariably interfered.

85. If a further examination is made, it is discernible that the orders of preventive detention are interfered for not complying with the constitutional guarantees under Article 22(5) of the Constitution of India.

86. The kinds of constitutional guarantees that are available can also be noticed from the pronouncements of the Hon'ble Supreme Court and this Court which had been referred and indicated hereinabove. Apart from others, four kinds of constitutional guarantees can be noticed, the violation of which, leads to an interference of the order of preventive detention. The first kind is that the detenue has a right under Article 22(5) of the Constitution of India to be informed of his right to make a representation to four of the authorities, namely, the State Government, the Central Government, the Advisory Board and to the detaining authority itself. If the said constitutional requirement is duly informed to the detenue along with the grounds of detention, one of the reasons for which the preventive detention orders are interfered, can be taken care of.

87. The other constitutional guarantee is that the representation submitted by the detenue is required to be considered and disposed of at the earliest without there being any delay which cannot be explained. Delays occur either at the stage of transmission or the stage of consideration, both of which, can be adequately addressed if due diligence is made. The state with its vast machinery is not dependent only upon the postal system for transmitting a representation and where the services of the postal department is being utilized, it is noticeable that even an unexplained duration of time is taken to carry the document to the post office in order to effect the posting. Unexplained delays also take place in moving the representation from one table to the other, where in the case at hand, the representation was even moved down from the level of the Principal

Secretary to that of the Deputy Secretary and again back to the Principal Secretary without any explainable cause.

88. In this respect, the manner in which the Central Governemnt had dealt with the representation of the petitioner is worth taking note of. After receiving the representation on 08.11.2017, the file was put before the Under Secretary (NSA) on 09.11.2017, who had sent the file with his comments to the Deputy Legal Adviser (DLA) on 09.11.2017 and the Deputy Legal Adviser in turn sent the same to the Joint Secretary (Internal Security) on 09.11.2017. The Joint Secretary (Internal Security) forwarded the same with his comments to the Union Home Secretary on 10.11.2017 and who upon duly considering the order of detention as well as the ground and also the representation of the petitioner and the comments of the detaining authority had passed his orders on the representation on 11.11.2017. It is not understood as to why a similar attitude cannot be taken by the concerned authorities in the State Government. If due diligence is exercised in dealing with a representation of a detenue by all the authorities concerned, there is no reason as to why they cannot act in the same manner in which the authorities in the Central Government had acted.

89. The other reason of interfering with an order of detention is that all the documents and materials relied upon by the detaining authority are not provided to the detenue. The detaining authority in order to be satisfied as regards the existence of the grounds have all the documents and materials before it to arrive at such satisfaction. It is unexplainable as to why in providing the dossier to the detenue, all such documents and materials cannot be included and why one document or the other or some material are not provided to the detenue to enable him to make his representation. Again exercise of due diligence is called for and if done so, such an omission ought not to take place.

A further reason as revealed from the various orders passed by the Court is that in the event the detenue is already in custody and there is no likelihood of being released, what satisfaction the detaining authority arrives for making an order of preventive detention which otherwise is not justified as the detenue is already being in custody cannot act in any manner prejudicial to the security of the state or to the maintenance of public order or maintenance of supplies and services essential to the community.

90. If the aforesaid reasons for interfering with an order of preventive detention are duly taken care of by the authorities, the likelihood of an order of preventive detention being interfered with would so drastically be reduced that the same would serve the purpose of invoking a detention under the preventive detention laws. On the contrary, if it is not done, the very purpose of invoking the preventive detention laws is frustrated. As already alluded, the National Security Act amongst others enables the Central or the State Government to make an order directing a person to be detained with a view to prevent him from acting in any manner prejudicial to the security of the state, or for maintenance of public order. But if the concerned authorities act in a manner which renders the order of detention to be interfered because of non-compliance of the requirements as indicated above, such an act on the part of the authorities can also be termed to be a threat to the security to the state. In the premises, it is a requirement under the Constitution for the State Government authorities to ensure that by such casual and irresponsible act on the part of some of the authorities, the security of the state is not exposed to a threat.

91. Accordingly, it is directed that the Chief Secretary to the Govt. of Assam shall conduct a detailed enquiry involving all the persons, who had a role either constructive or advisory in the process leading to the order of preventive detention dated 24.09.2017 made against the petitioner and also as regards those involved in the procedure

subsequent to the order of preventive detention. Upon such enquiry being conducted, a proper analysis be made as to where and why such serious lapses have occurred and upon doing so, effective corrective measure be taken that such lapses and lacunas do not occur in future. As required by the Hon'ble Supreme Court in paragraph-8 of Kamla Kanyalal Khushalani and paragraph-3 of Pritam Nath Hoon, the State Government authorities through the Chief Secretary in its discretion may take such action.

92. Again, it is a requirement of the constitutional process that the State Government authorities educate all the authorities connected with the process of making and sustaining an order of preventive detention as regards the constitutional requirements, more particularly under Article 22(5) and put in place an effective monitoring system to ensure that the requirements of the Constitution is duly followed and implemented.

In terms of the above, this writ petition stands disposed of.

JUDGE

Alam/Anamika