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JULY 11, 2008

**[A.K. MATHUR AND ALTAMAS KABIR, JJ.]**

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*Preventive Detention – Detention under COFEPOSA Act – Rejection of representation of detenu seeking permission to be represented by legal practitioner by Advisory Board – Propriety of – Held: Detenu though has no legal right u/s 8 (e) of the Act, to legal assistance before Advisory Board, he is entitled to make such request and the Board is bound to consider the request – Detention under preventive detention enactments is serious and severe invasion on the fundamental rights – Safeguards provided in order to check indiscriminate exercise of powers should be considered not perfunctorily – Constitution of India, 1950 – Articles 19 and 21 – Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 – ss. 3 (1) and 8 (e).*

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**Brother of respondent No. 1 was detained u/s. 3 (1) of Conservation of Foreign exchange and Prevention of Smuggling Activities Act, 1974. Detenu filed a writ petition through respondent No. 1. In the meantime his representation to Advisory Board for permission to be represented by a legal practitioner was rejected on the ground that the prayer could not be considered “for some obvious reasons”. High Court allowed the writ petition holding that the Advisory Board rejected the representation of the detenu on erroneous grounds. Hence the present appeal.**

**Dismissing the appeals, the Court**

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**HELD: 1. The order of the High Court does not warrant interference. Although, a detenu has no right under Section 8(e) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, to legal assistance in proceedings before the Advisory Board, he is entitled to make such a request to the Board and the Board**

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is bound to consider such request when made. [Para 14] A  
[837-F & G]

2. In the instant case, the detenu's prayer for being allowed to be represented by a legal practitioner was rejected by the Advisory Board upon observing that such prayer could not be considered "for some obvious reasons". It is quite clear that while rejecting the detenu's representation the Advisory Board took refuge in vague verbiage without really applying its mind as it was required to do, to the merits thereof. [para 15] [837-G & H; 838-B] B C

3. Detention of a citizen under any of the preventive detention enactments is a serious and severe invasion on the Fundamental Rights guaranteed to citizens under Articles 19 and 21 of the Constitution. Recognising such detention to be an evil necessity, various safeguards have been placed at different stages of the detention proceedings to ensure that such powers were not used indiscriminately to settle scores or to short-circuit the process of investigation and trial of an alleged offence. The representation made by a detenu for legal assistance before the Advisory Board, has, therefore, to be considered not perfunctorily, as has been done in this case, but with due application of mind, since in each case of detention, the liberty of an individual is involved. [Para 16] [838-C,D,E & F] D E

*Smt. Kavita vs. State of Maharashtra and Ors. 1981 (3) SCC 558; Nand Lal Bajaj vs. State of Punjab 1981 (4) SCCF 327 – relied on.* F

*Kekalwa Samuele Kongwa vs. Union of India 1985 (1) Bom. 742 C.R. 742 – approved.*

*A.K. Roy vs. Union of India 1982 (1) SCC 271 – referred to.* G

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal  
No. 1064 of 2008 H

A From the Judgment and final Order dated 30.6.2006 of the High Court of Judicature at Bombay in CrI. Writ Petition No. 2312 of 2005

Ravindra Keshavrao Adsure and Gautam Godara for the Appellants.

B Naresh Kaushik, Manish Kaushik and K.L. Janjani for the Respondent.

The Judgment of the Court was delivered by

C **ALTAMAS KABIR, J.** 1. Leave granted.

2. One Abu Baker Haji Qasim, the brother of respondent No.1 herein, was placed under detention after his arrest on 10<sup>th</sup> September, 2005, pursuant to an order of detention dated 9<sup>th</sup> September, 2005, issued by the Principal Secretary (Appeals and Security) to the Government of Maharashtra, specially empowered under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act of 1974 (hereinafter referred to as "the COFEPOSA Act, 1974").

E 3. On 22<sup>nd</sup> September, 2005, the said Abu Baker Haji Qasim (hereinafter referred to as "the detenu") filed Criminal Writ Petition No.2312 of 2005, through the respondent No.1 herein, before the Bombay High Court for quashing and setting aside the detention order dated 9<sup>th</sup> September, 2005. At the same time, in the proceedings, before the Advisory Board, the detenu made a representation for permission to be represented in the proceedings through a legal practitioner. Such representation was, however, rejected by the Advisory Board on 28<sup>th</sup> October, 2005, on the ground that under the COFEPOSA Act 1974, a detenu was not entitled to be represented by a legal practitioner and consequently it was not necessary to consider such prayer. In fact, the Advisory Board rejected the prayer made on behalf of the detenu for permission to be represented by a legal practitioner upon holding that such prayer could not be considered "for some obvious reasons".

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4. When the writ petition came up for hearing, the High Court upon considering the submissions made on behalf of the respective parties and upon placing reliance on a Division Bench Judgment of the Bombay High Court in *Kekalwa Samuele Kongwa vs. Union of India* [1985 (1) Bom. 742 C.R. 742] allowed the writ petition and quashed the detention order holding that the prayer of the detenu for permission to be represented by a legal practitioner was not rejected after proper consideration but on erroneous grounds. It may not be out of place to mention that in *Kekalwa Samuele Kongwa's* case (*supra*) the Division Bench of the Bombay High Court held as follows :-

“A request made by a detenu for being represented by a legal practitioner must be considered on merits and cannot be turned down on the ground (i) that the law does not give such a right to the detenu, or (ii) that it was the practice of the Board not to allow representation of a detenu by a legal practitioner.”

5. The said judgment and order of the Bombay High Court allowing the writ petition and quashing the detention order is under challenge in this appeal.

6. Although, the life of the detention order came to an end on 9<sup>th</sup> September, 2006, Mr. Adsure, appearing for the appellant – State of Maharashtra, submitted that the ground on which the High Court had quashed the detention order was erroneous and was required to be corrected.

7. Referring to clause (3)(b) of Article 22 of the Constitution, Mr. Adsure submitted that a person placed under preventive detention was not entitled to be represented by a legal practitioner before the Advisory Board. In this regard, Mr. Adsure also referred to Section 8(e) of the COFEPOSA Act, 1974, which reads as follows:-

“8(e) – a person against whom an order of detention has been made under this Act shall not be entitled to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of

A the Advisory Board and its report, excepting that part of  
the report in which the opinion of the Advisory Board is  
specified, shall be confidential;”

B 8. Mr. Adsure submitted that both Article 22(3)(b) of the  
Constitution as well as Section 8(e) of the COFEPOSA Act,  
1974, makes it quite clear that a detenu under any of the pre-  
ventive detention enactments would not be entitled to be repre-  
sented by a legal practitioner before the Advisory Board.

C 9. In support of his submissions, Mr. Adsure placed reli-  
ance on certain passages from the decision of this Court in  
Smt. Kavita vs. State of Maharashtra and Ors. [1981 (3) SCC  
558), where along with certain other questions, the question  
relating to a detenu’s request for being represented by lawyer  
before the Advisory Board in view of the provisions of Section  
D 8(e) of the COFEPOSA Act, 1974, fell for consideration. In the  
said case, a similar question arose on account of the rejection  
by the Government of the detenu’s request to be permitted to  
be represented by a lawyer before the Advisory Board. The  
detenu was informed by the Government that under the provi-  
E sions of Section 8(e) of the COFEPOSA Act, 1974, he was not  
entitled to be represented by a lawyer before the Advisory Board,  
and, therefore, it was not possible to grant his request. The  
three-Judge Bench, while considering the reply of the State  
Government, observed as follows:-

F “It is true that while Section 8(e) disentitles a detenu from  
claiming as of right to be represented by a lawyer, it does  
not disentitle him from making a request for the services  
of a lawyer.”

G 10. It was observed further that without adequate legal  
assistance the personal liberty of the detenu guaranteed by Ar-  
ticle 21 of the Constitution could be jeopardized and rendered  
meaningless. The request by a detenu for legal assistance  
would have to be considered on its own merits in each indi-  
vidual case. However, since in the said case, the detenu had  
H not applied to the Advisory Board, it was held that it could not

be said that the detenu had been wrongly denied the assistance of counsel. What Mr. Adsure tried to emphasise was that no legal right vested in the detenu for being allowed to be represented by a legal practitioner before the Advisory Board.

11. Mr. Adsure also referred to the Constitution Bench decision of this Court in A.K. Roy vs. Union of India [1982 (1) SCC 271], wherein the questions raised in this appeal had also been considered in detail in the light of the provisions of the Maintenance of Internal Security Act, 1971 and the National Security Act and it was held, with regret, that the detenu had no right to appear through a legal practitioner in the proceedings before the Advisory Board.

12. Various other decisions on the same issue were also referred to by Mr. Adsure in support of his contention that the order of the High Court quashing the detention order issued against the brother of respondent No.1, was erroneous and was liable to be set aside.

13. On behalf of the respondent No.1, the views expressed before the High Court were reiterated and it was urged that no interference was warranted with the order of the High Court impugned in the instant appeal.

14. Having considered the submissions made on behalf of the respective parties, we are of the view that the order of the High Court impugned in this appeal does not warrant interference. In Smt. Kavita's case (supra) on which reliance was placed by Mr. Adsure, it was also laid down that, although, a detenu has no right under Section 8(e) of the COFEPOSA Act, 1974, to legal assistance in proceedings before the Advisory Board, he is entitled to make such a request to the Board and the Board is bound to consider such request when made.

15. In the instant case, the detenu's prayer for being allowed to be represented by a legal practitioner was rejected by the Advisory Board upon observing that such prayer could not be considered "for some obvious reasons". The said reasoning runs counter to the decision of this Court in Smt. Kavita's case (supra) and cannot, therefore, be sustained. The decision

A of the Division Bench of the Bombay High Court, relied upon by  
the High Court in quashing the detention order, says much the  
same thing as has been stated by this Court in Smt. Kavita's  
case (supra) and also in the case of Nand Lal Bajaj vs. State of  
Punjab [1981 (4) SCCF 327]. It is quite clear that while reject-  
B ing the detenu's representation the Advisory Board took refuge  
in vague verbiage without really applying its mind as it was re-  
quired to do, to the merits thereof.

16. Detention of a citizen under any of the preventive de-  
tention enactments is a serious and severe invasion on the Fun-  
C damental Rights guaranteed to citizens under Articles 19 and 21  
of the Constitution. Recognising such detention to be an evil  
necessity, various safeguards have been placed at different  
stages of the detention proceedings to ensure that such powers  
were not used indiscriminately to settle scores or to short-circuit  
D the process of investigation and trial of an alleged offence. In  
Smt. Kavita's case (supra) and also in Nand Lal Bajaj's case  
(supra) this Court held that even if the detenu had no right to  
appear through a legal practitioner in the proceedings before the  
Advisory Board he was entitled to make a representation for the  
E services of a lawyer to appear before the said Board which was  
under an obligation to consider the same dispassionately in the  
facts of the particular case. The representation made by a detenu  
for legal assistance before the Advisory Board, has, therefore, to  
be considered not perfunctorily, as has been done in this case,  
F but with due application of mind, since in each case of detention  
the liberty of an individual is involved.

17. We, therefore, see no reason to interfere with the judg-  
ment and order of the High Court impugned in this appeal and  
the appeal is accordingly dismissed.

G 18. This judgment would also govern Criminal Appeal NO.  
1065 (@ Special Leave Petition (Criminal) No.1975 of 2007)  
titled State of Maharashtra vs. Sheetal Manoj Gore.

K.K.T.

Appeals dismissed.