ABC 2019 (III) 130 SC
ACQUITTAL & BAIL CASES

SUPREME COURT OF INDIA

(Uday Umesh Lalit & R. Subhash Reddy, JJ.)

Petition For Special Leave To Appeal (Crl)No.7016 of 2019 With Writ Petition (Crl.)No. 210 of 2019 & Petition For Special Leave To Appeal (Crl)No.7021 of 2019 & Writ Petition (Crl.)No. 220 of 2019

(From Bombay High Court)

Decided on 21 August 2019

UNION OF INDIA & ORS. ***- Petitioner(s).***

Versus

NISAR PALLATHUKADAVIL ALIYAR & ORS. ***- Respondent(s).***

Law Covered:- ***(A) Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974 — Sections 3(1), 8, 8(a), 8(b), 8(c) & 8(f) — Opinion of Advisory Board —Advisory Board found that there was no sufficient cause for the continued detention of the detenu — challenge by Union of India — Appeal dismissed. (Para 15 & 19)***

(B) Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974 — Sections 3(1), 8, 8(a), 8(b), 8(c) & 8(f) — Report & opinion of Advisory Board — Nature of — The nature of opinion given by the Advisory Board is neither judicial nor quasi judicial— it would be erroneous & unsafe to treat the opinion expressed by the Advisory Board as amounting to a judgment of a criminal court— the Advisory Board does not try the question about the propriety or validity of the citizen's detention as a court of law would, but, its function is limited— the opinion is merely intended to assist the government & it is binding on the appropriate government only if it favours the detenu & not when it goes against him— opinion of the Advisory Board cannot be subject matter of review or scrutiny by the judicial courts/tribunals— the Advisory Board opinion is never intended to be open to challenge on the merits before any tribunal. (Para 15)

(C) Constitution of India — Articles 136 & 227 — A body is exercising judicial/quasi judicial power & is a tribunal within the meaning of the expressions in Article 136 & 227 — its decisions rendered are amenable to challenge. (Para 18)

(D) Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974 — Section 8(b) — Report

& opinion of Advisory Board — Nature of — The report of the Advisory Board, excepting its opinion, is strictly confidential. (Para 19)

(E) Preventive Detention Act, 1950 — Section 10 — Powers of Advisory Board — Board has no power to make any order to continue or discontinue the detention, but is only under a duty to submit its report to the State Government — Dharam Singh Rathi vs. *State of Punjab* ***— referred. (Para 11)***

(F) Maintenance of Internal Security Act, 1971 — Section 11 — Advisory Board — Power of — Advisory Board is required only to submit its report to the appropriate Government — There is no obligation imposed by the Act on the Board to communicate its decision to the detenu — Akshoy Konai vs. State of W.B. — referred. (Para 12)

Facts:- *In the present case, an order of detention under Section 3(1) of the COFEPOSA Act was passed by the competent authority pursuant to which the respondent herein was detained. Writ Petition was thereafter filed by the respondent in the High Court of Judicature at Bombay challenging the order of detention on certain grounds. The High Court allowed said Writ Petition and quashed the order of detention. Honourable Supreme Court, however, set aside the judgment of the High Court dated. In the meantime, the case of the respondent-detenu, was referred to the Advisory Board. The decision of the hon'ble Apex Court was brought to the notice of the Advisory Board, however, the Advisory Board found that there was no sufficient cause for the continued detention of the respondent-detenu. The Union being aggrieved has filed the present Petition for Special Leave to Appeal against the aforesaid opinion of the Advisory Board, which was dismissed.*

Law of relief:- The opinion of Advisory Board is binding on the appropriate government only if it favours the detenu & not when it goes against him.

Held:- Concluding that there was non-compliance of the procedure laid down in Section 10 of the Preventive Detention Act, 1950, the petition was allowed and the detenu was directed to be set at liberty forthwith. Mr. Rohatgi, learned Senior Advocate, however relied upon the sentence which stated that the Advisory Board had no power to make any order to continue or discontinue of the detention but its duty was only to submit a report to the State Government.(Para-11)

According to the aforesaid decisions the nature of opinion given by the Advisory Board is neither judicial nor quasi judicial; that it would be erroneous and unsafe to treat the opinion expressed by the Advisory Board as amounting to a judgment of a criminal court; that

the Advisory Board does not try the question about the propriety or validity of the citizen's detention as a court of law would, but, its function is limited. As stated in **Akshoy Konai**, the opinion is merely intended to assist the government and it is binding on the appropriate government only if it favours the detenu and not when it goes against him. It was laid down in said decision that the opinion of the Advisory Board cannot be subject matter of review or scrutiny by the judicial courts/tribunals. The element of confidentiality was also taken note of and it was observed that the Advisory Board opinion is never intended to be open to challenge on the merits before any tribunal. (Para-15)

It is well settled that wherever a body is exercising judicial/ quasi judicial power and is a tribunal within the meaning of the expressions in Article 136 and 227 of the Constitution, the decisions so rendered are amenable to challenge. (Para-18)

But the basic issue in the present matter is the nature of power exercised by the Advisory Board when an opinion is given by it pursuant to a reference made to it under Section 8(b) of the COFEPOSA Act. The report of the Advisory Board, excepting its opinion, is strictly confidential and the nature of the power so exercised by the Advisory Board in giving its report and the opinion, has already been pronounced upon by this Court in the cases referred to above viz***. Dharam Singh Rathi, Akshoy Konai, A.K. Roy and Calcutta Dock Labour Board***.

We follow these decisions and hold the present petition seeking to challenge the Opinion dated 22.07.2019 of the Advisory Board as not maintainable. (Para-19)

Counsel:- ***For Petitioner(s):*** *B. Krishna Prasad, Adv.*
For Respondent(s): *Anzu. K. Varkey, Adv.*

Cases Referred:-

1. *Dharam Singh Rathi vs. State of Punjab and others, AIR 1958 SC 152 = 1958 SCR 996, (Para-6)*
2. *Akshoy Konai vs. State of West Bengal , (1973) 1 SCC 297, (Para-6)*
3. *A.K. Roy vs. Union of India and others, (1982) 1 SCC 271, (Para-6)*
4. *Calcutta Dock Labour Board and others vs. Jaffar Imam and others, (1965) 3 SCR 453 = AIR 1966 SC 282, (Para-6)*
5. *Bharat Bank Ltd., Delhi vs. Employees of the Bharat Bank Ltd., Delhi 1950 SCR 459 = AIR 1950 SC 188, (Para-7)*
6. *Columbia Sportswear Company vs. Director of Income Tax, Bangalore , (2012) 11 SCC 224, (Para-7)*

JUDGMENT

a ***UDAY UMESH LALIT, J.: -*** 1. This Petition for Special Leave to Appeal challenges the Opinion dated 22.07.2019 of the Advisory Board constituted under Section 8(a) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ('the COFEPOSA
b Act', for short) in Reference No. 81 of 2019. The Opinion in Part-II of the Report of the Advisory Board was to the following effect:-

> "The Advisory Board is of the opinion that there is no sufficient cause for the continued detention of the above named detenu under Section 3 of the Conservation of Foreign Exchange
c and Prevention of Smuggling Activities Act, 1974 (55 of 1974)."

2. In the present case, an order of detention under Section 3(1) of the COFEPOSA Act was passed by the competent authority on 17.05.2019, pursuant to which the respondent herein was detained. The
d documents and the grounds were served within the statutory period. Writ Petition (Criminal) No.2843 of 2019 was thereafter filed by the respondent in the High Court of Judicature at Bombay challenging the order of detention on certain grounds. After the response was filed by the present petitioner, the High Court by its order dated 25.06.2019
e allowed said Writ Petition and quashed the order of detention. However, on the request of the learned counsel for the petitioner, the High Court stayed the operation of its own order to enable the petitioner to approach this Court and challenge the judgment rendered by the High Court. Accordingly, Special Leave Petition (Criminal)
f No.5459 of 2019 was filed in this Court by the petitioner.

3. By its Judgment and Order dated 18.07.2019 passed in Criminal Appeal No.1064 of 2019 arising out of aforesaid Special Leave Petition (Criminal) No.5459 of 2019 and in other connected
g Appeals, this Court allowed said Appeals and set aside the judgment of the High Court dated 25.06.2019.

4. In the meantime, in terms of Section 8(b) of the COFEPOSA Act, the case of the respondent-detenu, pursuant to the order of
h detention mentioned above was referred to the Advisory Board. It is a matter of record that the decision of this Court dated 18.07.2019 was brought to the notice of the Advisory Board pursuant to the requisition made by the Joint Director, Ministry of Finance, Directorate of Revenue Intelligence, Government of India. On 22.07.2019 the Advisory Board found that there was no sufficient

cause for the continued detention of the respondent-detenu and rendered its Opinion as stated above.

5. The petitioner being aggrieved has filed the present Petition for Special Leave to Appeal against the aforesaid Opinion of the Advisory Board. On 08.08.2019 the following Order was passed by a Bench of this Court:-

> "In this special leave petition, Union of India has challenged the opinion of the Advisory Board dated 22.07.2019.
>
> Regarding detention order passed against the respondent in Criminal Appeal No.1064 of 2019 (arising out of SLP(Crl.)No. 5459 of 2019), we have passed the judgment on 18.07.2019 expressing our views. Since we have already expressed our views, we are of the view that the matter(s) has to be placed before any other Bench after obtaining necessary orders from Hon'ble the Chief Justice of India. Subject to orders passed by Hon'ble the Chief Justice of India, list the matter accordingly before any other Bench."

The Petition was accordingly posted before us on 16.08.2019. Since it involved issues of personal liberty, the matter was heard finally, at the end of which an order was dictated in open court. The petition preferred against the opinion of the Advisory Board was dismissed and the detenu was directed to be released forthwith. The following are the reasons in support of the operative part of the order.

6. At the outset, a preliminary objection was raised by Mr. Mukul Rohatgi, learned Senior Advocate, appearing on behalf of the respondent about the maintainability of the present Petition for Special Leave to Appeal. It was submitted that under sub-section (c) of Section 8 of the COFEPOSA Act the Advisory Board has to prepare its report specifying in a separate paragraph of said report its opinion as to whether or not there is sufficient cause for the detention of the person concerned; that excepting that part of the report in which the opinion of the Advisory Board is specified, rest of the report is confidential; and that in terms of sub-section (f) of Section 8, if the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of a person, the appropriate Government is obliged to revoke the order of detention and cause the person to be released forthwith. It was submitted that the reasoning which weighed with the Advisory Board in its report would be non-justiciable and mere opinion cannot be subject matter of any challenge

in a court of law and that a petition under Article 136(1) would not be maintainable. Mr. Rohatgi, learned Senior Advocate, relied upon decisions of this Court in ***Dharam Singh Rathi vs. State of Punjab and others, AIR 1958 SC 152 = 1958 SCR 996, Akshoy Konai vs. State of West Bengal, (1973) 1 SCC 297, A.K. Roy vs. Union of India and others, (1982) 1 SCC 271*** and ***Calcutta Dock Labour Board and others vs. Jaffar Imam and others, (1965) 3 SCR 453 = AIR 1966 SC 282.***

7. On the other hand, Mr. K.M. Natraj, learned Additional Solicitor General, submitted that if the opinion of the Advisory Board were to be against the person detained, there could be no challenge to the opinion and/or report of the Advisory Board and to that extent the opinion would be non-justiciable. However, in his submission, if the opinion of the Advisory Board were to the effect that there was no sufficient cause for the detention of the person concerned, the challenge was still available to the appropriate government and the capacity of the Advisory Board while rendering such opinion would be that of a Tribunal and therefore the opinion could be subject matter of a challenge. He relied upon decisions of this Court in ***Bharat Bank Ltd., Delhi vs. Employees of the Bharat Bank Ltd., Delhi 1950 SCR 459 = AIR 1950 SC 188*** and in ***Columbia Sportswear Company vs. Director of Income Tax, Bangalore , (2012) 11 SCC 224***.

8. Section 8 of the COFEPOSA Act is as under:-

> **"8. Advisory Board.** - For the purposes of sub-clause (a) of clause (4), and sub-clause (c) of clause (7), of article 22 of the Constitution,-
>
> (a) the Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards each of which shall consist of a Chairman and two other persons possessing the qualifications specified in subclause (a) of clause (4) of article 22 of the Constitution;
>
> (b) save as otherwise provided in section 9, the appropriate Government shall, within five weeks from the date of detention of a person under a detention order make a reference in respect thereof to the Advisory Board constituted under clause (a) to enable the Advisory Board to make the report under sub-clause (a) of clause (4) of article 22 of the Constitution;
>
> (c) the Advisory Board to which a reference is made under clause (b) shall after considering the reference and the

materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desires to be heard in person, after hearing him in person, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned;

(d) when there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board;

(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 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;

(f) in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith."

This Section refers to provisions of sub-clause (a) of clause (4) and sub-clause (c) of clause (7) of Article 22 of the Constitution and states so in sub-section (b) that a reference is made to the Advisory Board to enable the Board to make a report under sub-clause (a) of clause (4) of Article 22 of the Constitution. The text of Article 22 may, therefore, be considered at this stage:-

"22. Protection against arrest and detention in certain cases.-(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the

grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

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

(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

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

9. In terms of clause (4) of Article 22 of the Constitution, no law providing for preventive detention shall authorise the detention of any person for a period longer than three months unless an Advisory Board had reported before the expiration of said period of three months that in its opinion there was sufficient cause for such detention. The question whether there is sufficient cause for detention or not is in the exclusive domain of the Advisory Board. In terms of clause (7) (c) of Article 22 of the Constitution the procedure to be followed by the Advisory Board can be prescribed by the Parliament by law.

10. Accordingly, in the COFEPOSA Act enacted by the Parliament, appropriate provisions are made in Section 8. Sub-section (b) of said Section 8 facilitates reference to the Advisory Board to enable it to make the report under sub-clause (a) of clause (4) of Article 22 of the Constitution while sub-sections (c), (d) and (e) of said Section 8 deal with the procedure to be adopted by the Advisory Board. In terms of subsection (e) of Section 8, the report of the Advisory Board has to be in two parts. The first part is to contain the assessment made by the Advisory Board in the form of a report which is completely confidential. The second part contains the result of such assessment in the form of an opinion. It is this second part of opinion alone which is not confidential. Sub-section (f) of Section 8 obliges the appropriate government to revoke the detention order and cause the person to be released forthwith in case the Advisory Board has reported that there was, in its opinion, no sufficient cause for the detention of the person concerned. However, if the opinion is otherwise and the Advisory Board has found that there was sufficient cause for the detention of the person, the appropriate government

'*may confirm*' the detention order and continue the detention. The choice is available to the appropriate government only in the latter of these two eventualities. Therefore, in case the opinion is to the effect that there was no sufficient cause for the detention of the person concerned, the appropriate government has to *revoke* the detention order and cause the person concerned to be released forthwith.

11. **Dharam Singh Rathi** was a decision of the Constitution Bench of this Court, in which it was alleged that the Advisory Board had not made any report within the prescribed period. The submission in that behalf was noted as under:-

> "3. .....Under Section 10 of the Act the Board has no power to make any order to continue or discontinue the detention, but is only under a duty to submit its report to the State Government. In this context, therefore, a plain reading of para 10(xii) indicates that the grievance of the petitioner, in substance, is that the Board has not submitted its report within the prescribed period and that, therefore, his detention has become illegal. ....."

Concluding that there was non-compliance of the procedure laid down in Section 10 of the Preventive Detention Act, 1950, the petition was allowed and the detenu was directed to be set at liberty forthwith. Mr. Rohatgi, learned Senior Advocate, however relied upon the sentence which stated that the Advisory Board had no power to make any order to continue or discontinue of the detention but its duty was only to submit a report to the State Government.

12. In **Akshoy Konai** the submission raised on behalf of the detenu was that the decision of the Advisory Board was never communicated to him. The further submission was that the opinion of the Advisory Board should have been communicated to the detenu so as to enable him to question the legality of said opinion. These submissions were rejected by a Bench of three Judges of this Court as under:-

> **"4.** The first objection against the petitioner's detention raised by Shri B. Dutta, the learned counsel appearing as amicus curiae in support of the writ petition, is that though the petitioner had been heard in person by the Advisory Board the decision of the Board was never communicated to him. This omission, according to the counsel, invalidates the petitioner's detention as he was not able to take any step to have this opinion scrutinised by any judicial tribunal. This submission is, in our opinion, difficult to accept. Under Section 11 of the Act

the Advisory Board is required only to submit its report to the appropriate Government. There is no obligation imposed by the Act on the Board to communicate its decision to the detenu. The mere fact that under Section 11 the Board hears the person affected by the detention order in case he desires to be so heard, would not for that reason alone impose on the Board a legal obligation to communicate its decision to the detenu. Our attention has not been drawn to any provision of law or to any principle which would imply any such obligation. In any event omission on the part of the Advisory Board to do so cannot invalidate the petitioner's detention. .....

5. The submission that the Advisory Board should have communicated its opinion to the petitioner so as to enable him to question its legality is also misconceived. In the first instance the Advisory Board constituted under Section 9 of the Act, as its name connotes, is only required to function in an advisory capacity. Its opinion which is merely an advice is binding on the appropriate Government only if according to it there is no sufficient cause for the detention in question: in that eventuality the detenu cannot possibly have any grievance. When the Board reports that there is sufficient cause for the detention in question the appropriate Government is not bound under the law to confirm the order of detention. It may or may not do so. The advisory opinion of the Board is merely intended to assist the appropriate Government in determining the question of confirming the detention order and continuing the detention. It is binding on the appropriate Government only when it favours the detenu and not when it goes against him. Such advisory opinion can scarcely be an appropriate subject-matter of review or scrutiny by the judicial courts or tribunals. Secondly the proceedings of the Board and its report are expressly declared by Section 11 (4) of the Act to be confidential except that part of the report in which its opinion is specified. This provision clearly indicates that the advisory opinion is never intended to be open to challenge on the merits before any tribunal. So far as the final opinion of the Board is concerned the communication of the confirmation of the detention order by the State Government clearly informed the petitioner that the opinion of the Board was against him."

13. **A.K. Roy** was also a decision of the Constitution Bench of this Court. It was observed in para 98 as under:-

> 98. .....In proceedings before the Advisory Board, the question for consideration of the Board is not whether the detenu is *guilty* of any charge but whether there is sufficient cause for the detention of the person concerned. The detention, it must be remembered, is based not on facts proved either by applying the test of preponderance of probabilities or of reasonable doubt. The detention is based on the subjective satisfaction of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to certain stated objects. The proceeding of the Advisory Board has therefore to be structured differently from the proceeding of judicial or quasi-judicial tribunals, before which there is a lis to adjudicate upon."

14. In **Calcutta Dock Labour Board** the question was whether after having suffered an order of detention under Section 3(1)(a)(ii) of the Prevention Detention Act, 1950, the services of the concerned person could be terminated by the employer merely on the ground that there was an order of detention. In that context a Bench of three Judges of this Court observed:-

> **"12.** But the question which we have to consider in the present appeals is of a different character. A citizen may suffer loss of liberty if he is detained validly under the Act; even so, does it follow that the detention order which deprived the citizen of his liberty should also serve indirectly but effectively the purpose of depriving the said citizen of his livelihood? If the view taken by the appellant's officers who tried the disciplinary proceedings is accepted, it would follow that if a citizen is detained and his detention is confirmed by the State Government, his services would be terminated merely and solely by reason of such detention. In our opinion, such a position is obviously and demonstrably inconsistent with the elementary concept of the rule of law on which our Constitution is founded. When a citizen is detained, he may not succeed in challenging the order of detention passed against him, unless he is able to adduce grounds permissible under the Act. But we are unable to agree with Mr Sen's argument that after such a citizen is released from detention, an employer, like the appellant, can immediately start disciplinary proceedings

against him and tell him in substance that he was detained for prejudicial activities which amount to misconduct and that the detention order was confirmed by the State Government after consultation with the Advisory Board, and so, he is liable to be dismissed from his employment. It is obvious that the Advisory Board does not try the question about the propriety or validity of the citizen's detention as a court of law would; indeed, its function is limited to consider the relevant material placed before it and the representation received from the detenu, and then submit its report, to the State Government within the time specified by Section 10(1) of the Act. It is not disputed that the Advisory Board considers evidence against the detenu which has not been tested in the normal way by cross-examination; its decision is essentially different in character from a judicial or quasijudicial decision. In some cases, a detenu may be given a hearing; but such a hearing is often, if not always, likely to be ineffective, because the detenu is deprived of an opportunity to cross-examine the evidence on which the detaining authorities rely and may not be able to adduce evidence before the Advisory Board to rebut the allegations made against him. Having regard to the nature of the enquiry which the Advisory Board is authorised or permitted to hold before expressing its approval to the detention of a detenu, it would, we think, be entirely erroneous and wholly unsafe to treat the opinion expressed by the Advisory Board as amounting to a judgment of a criminal court. The main infirmity which has vitiated the impugned orders arises from the fact that the said orders equate detention of a detenu with his conviction by a criminal court. We are, therefore, satisfied that the court of appeal was right in taking the view that in a departmental enquiry which the appellant held against the respondents it was not open to the appellant to act on suspicion, and inasmuch as the appellant's decision is clearly based upon the detention orders and nothing else, there can be little doubt that, in substance, the said conclusion is based on suspicion and nothing more."

15. According to the aforesaid decisions the nature of opinion given by the Advisory Board is neither judicial nor quasi judicial; that it would be erroneous and unsafe to treat the opinion expressed by the Advisory Board as amounting to a judgment of a criminal court; that the Advisory Board does not try the question about the propriety or

validity of the citizen's detention as a court of law would, but, its function is limited. As stated in **Akshoy Konai**, the opinion is merely intended to assist the government and it is binding on the appropriate government only if it favours the detenu and not when it goes against him. It was laid down in said decision that the opinion of the Advisory Board cannot be subject matter of review or scrutiny by the judicial courts/tribunals. The element of confidentiality was also taken note of and it was observed that the Advisory Board opinion is never intended to be open to challenge on the merits before any tribunal.

16. The decisions relied upon by the learned Additional Solicitor General pertain to fields other than preventive detention. In **Bharat Bank Ltd.** the issue was whether a decision of an Industrial Tribunal could be amenable to the appellate jurisdiction under Article 136(1) of the Constitution. The reliance was placed by the learned Additional Solicitor General on the opinion of S. Fazal Ali, J. as under:-

> "The important question to be decided in this case is whether the present appeal lies at all to this Court. The question is not free from difficulty, but on the whole I am inclined to think that the appeal does lie. It is fully recognized that the scope of Article 136 of the Constitution is very wide, but the significance of the language used in the section can be appreciated only by comparing it with the articles which precede it. Article 132 deals with the appellate jurisdiction of the Supreme Court in cases involving a substantial question of law as to the interpretation of the Constitution, and the words used in that article are: "appeal ... from any judgment, decree or final order". Article 133 deals with appeals in civil matters and the same words are used here also. Article 134 deals with appeals in criminal matters, and the words used in it are: "appeal ... from any judgment, final order or sentence". In Article 136, the words "judgment" and "decree," which are used in Articles 132 and 133 are retained. Similarly, the words "judgment" and "sentence" occurring in Article 134 are also retained. But the expression "final order" becomes "order," and, instead of the High Court, reference is made to "any court." Certain other words are also used in the article which seem to me to have a special significance, these being "determination," "cause or matter" and "tribunal". It is obvious that these words greatly widen the scope of Article 136. They

show that an appeal will lie also from a determination or order of "any tribunal" in any cause or matter.

6. Can we then say that an Industrial Tribunal does not fall within the scope of Article 136? If we go by a mere label, the answer must be in the affirmative. But we have to look further and see what are the main functions of the Tribunal and how it proceeds to discharge those functions. This is necessary because I take it to be implied that before an appeal can lie to this Court from a tribunal it must perform some kind of judicial function and partake to some extent of the character of a Court.

7. Now there can be no doubt that the Industrial Tribunal has, to use a well-known expression, "all the trappings of a court" and performs functions which cannot but be regarded as judicial. This is evident from the rules by which the proceedings before the Tribunal are regulated. It appears that the proceeding before it commences on an application which in many respects is in the nature of a plaint. It has the same powers as are vested in a civil court under the Code of Civil Procedure when trying a suit, in respect of discovery, inspection, granting adjournment, reception of evidence taken on affidavit, enforcing the attendance of witnesses, compelling the production of documents, issuing commissions etc. It is to be deemed to be a civil court within the meaning of Sections 480 and 482 of the Criminal Procedure Code, 1898. It may admit and call for evidence at any stage of the proceeding and has the power to administer oaths. The parties appearing before it have the right of examination, cross -examination and reexamination and of addressing it after all evidence has been called. A party may also be represented by a legal practitioner with its permission.

8. The matter does not rest there. The main function of this Tribunal is to adjudicate on industrial disputes which implies that there must be two or more parties before it with conflicting cases, and that it has also to arrive at a conclusion as to how the dispute is to be ended. Prima facie, therefore, a Tribunal like this cannot be excluded from the scope of Article 136, but before any final conclusion can be expressed on the subject certain contentions which have been put forward on behalf of the respondents have to be disposed of."

17. Similarly, reliance was also placed on the decision in **Columbia Sportswear Company** In that case the issue was whether an Advance Ruling pronounced by the Authority for Advance Rulings (Income Tax) constituted under Chapter XIX-B of the Income Tax Act, 1961 could be challenged under Articles 226 and 227 of the Constitution before the High Court or under Article 136 of the Constitution before this Court. Reliance was placed by the learned Additional Solicitor General on para 15 of the decision, which was to the following effect:-

> "As Section 245-S expressly makes the advance ruling binding on the applicant, in respect of the transaction and on the Commissioner and the income tax authorities subordinate to him, the Authority is a body acting in judicial capacity. H.M. Seervai in his book *Constitutional Law of India* (4th Edn.) while discussing the tests for identifying judicial functions in Para 16.99 quotes the following passage from Prof. de Smith's *Judicial Review* on p. 1502:
>
> "An authority acts in a judicial capacity when, after investigation and deliberation, it performs an act or makes a decision that is binding and conclusive and imposes obligation upon or affects the rights of individuals."
>
> We have, therefore, no doubt in our mind that the Authority is a body exercising judicial power conferred on it by Chapter XIX-B of the Act and is a tribunal within the meaning of the expression in Articles 136 and 227 of the Constitution."

18. Both these decisions on which reliance was placed by the learned Additional Solicitor General were completely in different context. It is well settled that wherever a body is exercising judicial/ quasi judicial power and is a tribunal within the meaning of the expressions in Article 136 and 227 of the Constitution, the decisions so rendered are amenable to challenge.

19. But the basic issue in the present matter is the nature of power exercised by the Advisory Board when an opinion is given by it pursuant to a reference made to it under Section 8(b) of the COFEPOSA Act. The report of the Advisory Board, excepting its opinion, is strictly confidential and the nature of the power so exercised by the Advisory Board in giving its report and the opinion, has already been pronounced upon by this Court in the cases referred

to above viz. ***Dharam Singh Rathi, Akshoy Konai, A.K. Roy and Calcutta Dock Labour Board***.

We follow these decisions and hold the present petition seeking to challenge the Opinion dated 22.07.2019 of the Advisory Board as not maintainable.

20. The Petition for Special Leave to Appeal is, therefore, dismissed.

21. In view of the Opinion of the Advisory Board as stated above and the dismissal of the Petition for Special Leave to Appeal (Criminal) No. 7016 of 2019, no orders are called for in Writ Petition (Criminal) No. 220 of 2019 as said Writ Petition prays for writ, order or direction quashing and setting aside the order of detention dated 17.05.2019 passed against the aforementioned respondent-detenu. The writ petition stands disposed of.

22. For the reasons as stated above, Petition for Special Leave to Appeal (Criminal) No. 7021 of 2019 preferred by the petitioner against the Opinion dated 22.07.2019 passed by the Advisory Board in Reference No. 87 of 2019 in connection with the detenu named 'Happy Arvind Kumar Dhakad' is also found to be not maintainable. The Petition for Special Leave to Appeal is, therefore, dismissed.

23. Writ Petition (Criminal) No. 210 of 2019 *inter alia* prayed for writ order or direction seeking quashing of the order of detention dated 17.05.2019 passed against aforesaid detenu 'Happy Arvind Kumar Dhakad'. Again, in view of the Opinion of the Advisory Board in Reference No.87 of 2019 and the dismissal of Special Leave Petition (Criminal) No. 7021 of 2019 no separate orders are called for. This Writ Petition is, therefore, disposed of.

Result:- Petition dismissed.