M. AHAMEDKUTTY

v.

UNION OF INDIA & ANR.

JANUARY 31, 1990

[S. RANGANATHAN AND K.N. SAIKIA, JJ.]

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974: Sections 3, 9 and 10—Detention order—Validity of—Necessity to supply documents relied on by detaining authority to detenu—Prolongation of period of detention—Necessity to place facts and materials that occurred between date of detention and date of declaration before detaining authority.

After the appellant landed at Trivandrum Airport from Abu Dhabi, he was intercepted by the Customs officials detecting that he smuggled 1280 gms. of gold. He was arrested on 31.1.1988. On 12.2.1988 he was granted bail on certain conditions.

With a view to preventing the appellant from smuggling gold, the impugned detention order was passed against him on 25.6.1988 by the Home Secretary, Government of Kerala, in exercise of the powers conferred by section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The appellant was taken into custody on 2.8.1988. The Appropriate Authority and the Advisory Board found sufficient cause for his detention.

The detenu challenged his detention moving a Habeas Corpus petition under Article 226 of the Constitution, read with section 482, Cr.P.C., which was dismissed in limine by the High Court.

Before this Court. the main grounds of challenge to the detention order were that (1) after the event there was inordinate delay in passing the detention order which showed that there was no genuine need for detention of the appellant; (2) there was inordinate and unexplained delay of 38 days in execution of the detention order; (3) all the documents and materials, particularly the appellants bail application, the bail order, the show cause notice and his reply thereto were not placed before the detaining authority; (4) these documents and the fact that the appellant's old and new passports were seized and without those it would not be possible for the appellant to carry on smuggling, were not brought to the notice of the declaring authority; and (5) there was

A non-application of mind.

On behalf of the State of Kerala it was submitted, *inter alia*, that (1) there was no such delay between the date of detection and the date of passing the order of detention so as to make the grounds stale or to snap the relation; (2) that the delay in execution of the detention order had B been explained; and (3) that the bail application as well as the bail order were placed before the detaining authority but the same having not been referred to or relied on by the detaining authority, copies thereof were not required to be furnished to the detenu along with the grounds of detention.

C On behalf of the Union of India it was submitted that all the documents and materials that were required to be placed before the declaring authority were duly placed and on consideration of the relevant materials the declaring authority validly made the declaration.

Allowing the appeal and setting aside the order of detention, this D Court,

HELD: (1) It has been laid down by this Court in a series of decisions that the rule as to unexplained delay in taking action is not inflexible. Under a law like the COFEPOSA Act enacted for the purpose of dealing effectively with persons engaged in smuggling and E foreign exchange racketeering who, owing to their large resources and influence, have been posing a serious threat to the economy and thereby to the security of the nation, the courts should not merely on account of the delay in making of an order of detention assume that such delay, if not satisfactorily explained, must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of F the detaining authority or that such subjective satisfaction was not genuinely reached. Taking of such a view would not be warranted unless the Court finds that the grounds are stale or illusory or that there was no real nexus between the grounds and the impugned order of detention. [217B-E]

G *Ashok Narain* v. *Union of India*, [1982] 2 SCC 437; *Smt. Rekhaben Virendra Kapadia* v. *State of Gujarat*, [1979] 2 SCC 566; *Sheikh Salim* v. *The State of West Bengal*, [1975] 1 SCC 653; *Rajendrakumar Natvarlal Shah* v. *State of Gujarat*, [1988] 3 S.C.C. 153; *Olia Mallick* v. *The State of West Bengal*, [1974] 1 SCC 594; *Golam Hussain* v. *The Commissioner of Police*, [1974] 3 SCR 613; *Odut Ali Miah* v. *The State* H *of West Bengal*, [1974] 4 SCC 129; *Vijay Narain Singh* v. *State of Bihar*,

[1984] 3 SCC 14; *Gora* v. *State of West Bengal,* [1975] 2 SCR 996; *Rai Kumar Singh* v. *State of Bihar,* [1986] 4 SCC 407; *Smt. Hemlata Kantilal Shah* v. *State of Maharasthra,* [1981] 4 SCC 647, referred to. A

(2) In appropriate cases it could be assumed that the link was snapped if there was a long and unexplained delay between the date of order of detention and the arrest of the detenu and in such a case the order of detention could be struck down unless the grounds indicated a fresh application of mind of the detaining authority to the new situation and the changed circumstances. But where the delay is not only adequately explained but also is found to be the result of the recalcitrant or refractory conduct of the detenu in evading arrest, there is warrant to consider the 'link' not snapped but strengthened. [219C-D] B C

Mohammed Saleem v. *Union of India,* [1989] 3 Delhi Lawyer 77; *Bhawarlal Ganeshmalji* v. *State of Tamil Nadu,* [1979] 1 SCC 465; *Shafiq Ahmad* v. *District Magistrate, Meerut,* [1989] 4 SCC 556, referred to. D

(3) Seizure of the detenu's passports was no doubt one of the factors that the detaining authority should have taken (and did in fact take) into account, but it was for him to assess the weight to be attached to such a circumstance in arriving at his final decision and it is not open to the Court to interfere with the merits of his decision. [221E-F] E

(4) From the records it appears that the bail application and the bail order were furnished to the detaining authority on his enquiry. It is difficult, therefore, to accept the submission of the State Government that those were not relied on by the detaining authority. [223A-B]

(5) The constitutional requirement of Article 22(5) is that all the basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to making the detention order must be communicated to the detenu so that the detenu may have an opportunity of making an effective representation against the order of detention. It is immaterial whether the detenu already knew about their contents or not. [223E-F] F G

Ramchandra A. Kamat v. *Union of India,* [1980] 2 SCR 1072; *Frances Coralia Mullin* v. *W.C. Khambra,* [1980] 2 SCR 1095; *Smt. Ichhu Devi Choraria* v. *Union of India,* [1981] 1 SCR 640; *Pritam Nath Hoon* v. *Union of India,* [1981] 1 SCR 682; *Shri Tushar Thakkar* v. *Union of India,* [1980] 4 SCC 499; *Lallubhai Jogibhai Patel* v. *Union of* H

A *India,* [1981] 2 SCC 427; *Kirit Kumar Chaman Lal Kundaliya* v. *Union of India,* [1981] 2 SCC 436; *Smt. Ana Carolina D'Souza* v. *Union of India,* [1981] Suppl. SCC 53; *Mehrunissa* v. *State of Maharashtra,* [1981] 2 SCC 709; *Mohd. Zakir* v. *Delhi Administration,* [1982] 3 SCC 216 and *Khudiram Das* v. *State of West Bengal,* [1975] 2 SCR 832, B referred to.

(6) If the documents which formed the basis of the order of detention were not served on the detenu along with the grounds of detention, in the eye of law there would be no service of the grounds of detention and that circumstance would vitiate his detention and make it void ab initio. [225D-E]

C

State of U.P. v. *Kamal Kishore Saini,* [1988] 1 SCC 287; *Union of India* v. *Manoharlal Narang,* [1987] 2 SCC 241; *S. Gurdip Singh* v. *Union of India,* [1981] 2 SCC 419; *Ichhu Devi Choraria* v. *Union of India,* [1981] 1 SCR 640; *Smt. Shalini Soni* v. *Union of India,* [1981] 1 D SCR 962, referred to.

Haridas Amarchand Shah v. *K.L. Verma,* [1989] 1 SCC 250 distinguished.

(7) The bail application and the bail order, in the instant case, E were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired, and if those had been considered, they would be documents relied on by the detaining authority though not specifically mentioned in the annexure to the order of detention and those ought to have formed part of the documents supplied to the detenu with the grounds of detention and F without them the grounds themselves could not be said to have been complete. [226A-B]

(8) There is no alternative but to hold that non-supply of essential documents to the detenu amounted to denial of the detenu's right to make an effective representation and that it resulted in violation of G Article 22(5) of the Constitution rendered the continue detention of the detenu illegal and entitling the detenu to be set at liberty. [226B-C]

(9) Sections 9 and 10 of the COFEPOSA Act imply an obligation on the part of the detaining authority to place the facts and materials that occurred between the date of detention and the date of declaration, H so as to justify prolongation of the period of detention. [228D-E]

Smt. Rekhaben Virendra Kapadia **v.** *State of Gujarat & Ors.*, **[1979] 2 SCC 566;** *Smt. Madhu Khanna* **v.** *Administrator, Union Territory of Delhi,* **[1986] 4 SCC 240, referrred to.**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 49 of 1990.

From the Judgment and Order dated 13.2.1989 of Delhi High Court in Crl. W. No. 25 of 1989.

S.R. Setia, C.S. Vaidyanathan and K.V. Viswanathan for the Appellant.

V.C. Mahajan, Ms. Sushma Suri, P. Parmeshwaran, A.K. Srivastava and T.T. Kunhikannan for the Respondents.

The Judgment of the Court was delivered by

K.N. SAIKIA, J. Special leave granted.

After the Appellant landed at Trivandrum Airport from Abu Dhabi, he was intercepted by the customs officials detecting that he smuggled 13 gold sheets weighing 1280 gms. valued at Rs.4,26,240 concealed inside the plywood panels of his blue suitcase which was seized along with his two passports, old and new. He was arrested on 31-1-1988 and was produced before the Chief Judicial Magistrate (Economic Offences) Ernakulam who remanded him to judicial custody till 12-2-1988. On 12-2-1988 he was granted bail on condition, *inter alia,* that he would report before the Superintendent (Intelligence) Air Customs, Trivandrum on every Wednesday until further orders, and that he would not change his residence without prior permission of Court to "25-2-1988." The impugned detention order dated 25-6-1988 was passed by the Home Secretary, Government of Kerala. It stated that the Government of Kerala was satisfied with respect to the appellant that with a view to preventing him from smuggling gold it was necessary to detain him and, therefore, in exercise of powers conferred by section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974), hereinafter referred to as 'the COFEPOSA Act', the Government of Kerala directed that he be detained and kept in custody in the Central Prison, Trivandrum. The grounds of detention, which were also served, *inter alia,* gave the details as to how the smuggled gold was detected in his possession having been smuggled

into India in violation of the provisions of the Customs Act, 1962, Foreign Exchange Regulation Act, 1973 and Import and Export Control Act, 1947; what were his statements at the time of seizure of his blue suitcase, his new and old passports and the air ticket used for the journey from Dubai to Trivandrum and the return open air ticket from Bombay to Abu Dhabi; and the gist of his statements given on 30/31-1-1988 under section 108 of the Customs Act, 1962 before the Intelligence Superintendent, Air Customs, Trivandrum. It was also stated that after his arrest on 31-1-1988 he was produced before the Additional Chief Judicial Magistrate (Economic Offences) Ernakulam on the same date and he was remanded to judicial custody and was subsequently released on bail; and that even though the departmental adjudication and prosecution proceedings under Customs Act were pending against him, the detaining authority was satisfied that he should be detained under section 3(1)(i) of the COFEPOSA Act with a view to prevent him from smuggling gold to Trivandrum. On 23-8-1988 the appropriate authority declared that he was satisfied that the detenu was likely to smuggle goods into and through Trivandrum Airport which was an area highly vulnerable to smuggling as defined in Explanation 1 to section 9(1) of the COFEPOSA Act. On 24th September, 1988, the detenu appeared before the Advisory Board which reported that there was sufficient cause for his detention.

The detenu challenged his detention moving a Habeas Corpus petition under Article 226 of the Constitution of India read with section 483 Cr. C.P. in the High Court of Delhi and the same having been dismissed in limine the appellant appeals therefrom by special leave. In para 11 of the Special Leave Petition it has been stated that the various grounds urged in the writ petition before the High Court have also been added in this petition and the writ petition itself has been annexed as Vol. II to the Special Leave Petition.

The main grounds on which the detention order is being challenged by the learned counsel for the appellant Mr. C.S. Vaidyanathan, *inter alia*, are that after the event there was inordinate delay in passing the detention order which showed that there was no genuine need for detention of the appellant; that there was inordinate and unexplained delay of 38 days in execution of the detention order; that all the documents and materials, particularly the appellant's bail application, the bail order, the show cause notice and his reply thereto were not placed before the detaining authority; that these documents and the fact that the appellant's old and new passports were seized and without those it would not be possible for the appellant to carry on

smuggling were not brought to the notice of the declaring authority and that there was non-application of mind. A

Mr. T.T. Kunhikannan, the learned counsel for the State of Kerala submits, *inter alia,* that there was no such delay between the date of detention and the date of passing the impugned order of detention as to make the grounds stale or to snap the relation; that the delay B in execution of the detention order has been explained; that the bail application as well as the bail order were placed before the detaining authority but the same having not been referred to or relied on by the detaining authority the copy thereof was not required to be furnished to the detenu along with the grounds of detention; that all the papers which were placed before the detaining authority for passing the order C of detention were also placed before the declaring authority and it was not necessary to place the show cause notice and the detenu's reply thereto; and that the detention order suffered from no infirmity whatsoever and this appeal is liable to be dismissed. Mr. V.C. Mahajan, the learned counsel for the Union of India emphatically submits that all the documents and materials that were required to be placed before D the declaring authority were duly placed and on consideration of the relevant materials the declaring authority validly made the declaration which was, therefore, unassailable.

We now take the first submission, namely, delay in passing the detention order. Mr. Vaidyanathan, referring to paragraph 6 of the E Writ Petition, submits that while the interception and seizure took place on 30-1-1988 and the detenu was arrested formally on 31-1-1988, the detention order was passed only 25-6-1988 and this delay remained unexplained and as such there was no nexus between the incident and the detention. In the counter affidavit filed in this Court there is no specific denial on this point. Mr. Kunhikannan submits that it so hap- F pened because this ground was not taken in the Special Leave Petition. The appellant having stated that the grounds urged in the Writ Petition should also be added, it cannot be said that this ground was not taken. Of course when other ground surged in the Writ Petition have also been taken specifically in the Special Leave Petition this ground could also have been so taken. However, on the basis of the Records Mr. G Kunhikannan submits that the Collector of Customs sent the proposal for detention on 27-5-1988 along with the draft grounds, and the Screening Committee meeting proposed to be held on 10th June, 1988 was postponed and was held on 21-6-1988 on which date the detenu's case was considered to be fit for detention under the COFEPOSA Act. It is submitted for the State that thorough investigation of the case was H

A required on the part of the Customs authorities both for the proceedings under the Customs Act and for prosecution in the criminal Court, and as such the proposal could not have been hurried through. These facts have not been shown to be untrue. Under the above circumstances can it reasonably be held that the nexus between the Smuggling Act and the detention order was snapped or that the grounds became stale?

Where the seemingly long time taken for passing the detention order after the prejudicial act is the result of full and detailed investigation and consideration of the facts of the case, the ground cannot be held to be remote and the detention cannot be held to be bad on that ground. In *Ashok Narain* v. *Union of India,* [1982] 2 SCC 437, where the detenu was apprehended for breach of Foreign Exchange Regulation in February, 1981 and without launching any prosecution the detenu was detained in October, 1981 the passage of time being the result of full and detailed consideration of facts and circumstances of the case after thorough examination at various levels, this Court observed that it could not be said that the detention was in any way illegal inasmuch as the detaining authority had fully and satisfactorily applied his mind to the question of detention.

As was held in *Smt. Rekhaben Virendra Kapadia* v. *State of Gujarat,* [1979] 2 SCC 566, whether the time lag between the commission of the offence and the detention was enough to snap the reasonable nexus between the prejudicial activity and the purpose of detention would depend upon the facts of each case. The test of proximity is not a rigid or mechanical calendar test to be blindly applied by merely counting the number of months and days between the offending act and the order of detention. The question is whether the past activities of the detenu were such that the detaining authority could reasonably come to the conclusion that the detenu was likely to continue in his unlawful activities.

In *Sheikh Salim* v. *The State of West Bengal,* [1975] 1 SCC 653, there was a gap of about 4 months in between. The explanation of the interval was that the petitioner was being prosecuted and the order of discharge had to be obtained on June 17, 1972. The order of detention was passed 4 days before the order of discharge was passed. This Court repelling the contention observed: "We do not suppose that the length of time which a decision takes necessarily reflects the care or openness brought to bear upon it."

In *Rajendrakumar Natvarlal Shah* v. *State of Gujarat*, [1988] 3 SCC 153, even unexplained delay (of 5 months in that case) in making the order against economic offenders under the COFEPOSA Act or other anti-social elements such as those involved in illicit traffic in liquor trade under Gujarat Prevention of Anti-Social Activities Act having large resources and influence, it was held, would not be sufficient to vitiate the order if the grounds were not stale and the nexus between the grounds and the order of detention still existed. It was observed that a distinction must be drawn between the delay in making of an order of detention under a law relating to preventive detention like the COFEPOSA Act and the delay in complying with the procedural safeguards of Article 22(5) of the Constitution. It has been laid down by this Court in a series of decisions that the rule as to unexplained delay in taking action is not inflexible. Mere delay in making of an order of detention under a law like the COFEPOSA Act enacted for the purpose of dealing effectively with persons engaged in smuggling and foreign exchange racketeering who, owing to their large resources and influence, have been posing a serious threat to the economy and thereby to the security of the nation, the courts should not merely on account of the delay in making of an order of detention assume that such delay, if not satisfactorily explained, must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. Taking of such a view would not be warranted unless the Court finds that the grounds are stale or illusory or that there was no real nexus between the grounds and the impugned order of detention. In that case, there was no explanation for the delay between February 2, and May 28, 1987, yet it could not give rise to legitimate inference that the subjective satisfaction arrived at by the District Magistrate was not genuine or that the grounds were stale or illusory or that there was no rational connection between the grounds and the order of detention. This Court reiterated what was stated in *Olia Mallick* v. *The State of West Bengal*, [1974] 1 SCC 594; *Golam Hussain* v. *The Commissioner of Police*, [1974] 3 SCR 613; *Odut Ali Miah* v. *The State of West Bengal*, [1974] 4 SCC 129 and *Vijay Narain Singh* v. *State of Bihar*, [1984] 3 SCC 14. The Court also referred to *Gora* v. *State of West Bengal*, [1975] 2 SCR 996; *Raj Kumar Singh* v. *State of Bihar*, [1986] 4 SCC 407 and *Smt. Hemlata Kantilal Shah* v. *State of Maharashtra*, [1981] 4 SCC 647.

Applying the law enunciated and settled by the foregoing decisions we are of the view that in this case, considering the given explanation of the period in between the interception on 30-1-1988 and the

A order of detention on 25-6-1988 the nexus was not snapped and the ground was not rendered stale and the order of detention was not rendered invalid thereby. The submission is accordingly rejected.

As regards the submission as to delay in execution it was urged
B that there was inordinate and unexplained delay in execution of the detention order passed on 25-6-1988 as the detenu was taken into custody only on 2-8-1988 despite the fact that the detenu was reporting in compliance of the bail order. Relying on a full bench decision of the Delhi High Court in *Mohamméd Saleem* v. *Union of India,* since reported in 1989(3) Delhi Lawyer 77, it is submitted that this delay of 38 days was indicative of the fact that there was no genuine need for
C the detention order. This ground though taken in the Writ Petition was not repeated specifically in the Special Leave Petition and Mr. Kunhikannan prayed for an opportunity, for filing an additional counter affidavit, which we declined. However, explaining the delay counsel points out from the Records that on 27-6-1988 the Home Sec-
D retary wrote to the Superintendent of Police, Malapuram, with detailed instructions requesting him to arrange for the immediate execution of the detention order. On 19-7-1988 a teleprinter message was sent by the Home Secretary to the Superintendent of Police, in the nature of a reminder, requesting that the person be immediately apprehended and compliance reported and that the delay in execution
E may also be reported. On 27-7-1988 the Superintendent of Police, Malapuram wrote back to the Home Secretary that the detention order could not be executed since the warrantee was absconding and his 'present' whereabouts were not known and that the C.I. had been instructed to make all possible efforts to apprehend the warrantee. On 2-8-1988 the Superintendent of Police, Malapuram sent a wireless mes-
F sage to the Home Secretary stating that the detention order had been served on the detenu on 2-8-1988 at his residence and his acknowledgement obtained and he had been sent to the Central Prison, Trivandrum. Mr. Vaidyanathan's submission that the detenu could not have been absconding in view of his reporting as required by the bail order is not acceptable. The second condition in the bail order said: "that
G he will not change residents without prior permission of Court to 25-2-1988". There was no mention regarding the period thereafter. There is also no statement in the affidavit to the effect that the detenu was all along available at his residence or that he had not changed it. But even assuming that he was residing there, there is no reason to disbelieve the statement of the police that they were unable to find him
H earlier than they actually did.

Where the passage of time is caused by the detenu himself by absconding, the satisfaction of the detaining authority cannot be doubted and the detention cannot be held to be bad on that ground. In *Bhawarlal Ganeshmalji* v. *State of Tamil Nadu and Anr.*, [1979] 1 SCC 465, where the appellant had been evading arrest and surrendering after three years of the making of order of detention under the COFEPOSA Act the order was held to be still effective as the detenu himself was to be blamed for the delay. This Court observed that there must be a 'live and proximate link' between the grounds of detention alleged by the detaining authority and the avowed purpose of detention, namely, the prevention of smuggling activities. In appropriate cases it could be assumed that the link was snapped if there was a long and unexplained delay between the date of order of detention and the arrest of the detenu and in such a case the order of detention could be struck down unless the grounds indicated a fresh application of mind of the detaining authority to the new situation and the changed circumstances. But where the delay is not only adequately explained but also is found to be the result of the recalcitrant or refractory conduct of the detenu in evading arrest, there is warrant to consider the 'link' not snapped but strengthened. In that case the order of detention was made on December 19, 1974. The detenu was found to be absconding. Action was taken pursuant to section 7 of the COFEPOSA Act and he was proclaimed as a person absconding under section 82 of the Criminal Procedure Code. The proclamation was published in several leading English and local daily newspapers. Several other steps were taken despite which he could not be arrested until he surrendered himself on February 1, 1978.

In *Shafiq Ahmad* v. *District Magistrate, Meerut*, [989] 4 SCC 556, relied on by appellant, it has been clearly held that what amounts to unreasonable delay depends on facts and circumstances of each case. Where reason for the delay was stated to be abscondence of the detenu, mere failure on the part of the authorities to take action under section 7 of the National Security Act by itself was not sufficient to vitiate the order in view of the fact that the Police force remained extremely busy in tackling the serious law and order problem. However it was not accepted as a proper explanation for the delay in arresting the detenu. In that case the alleged incidents were on April 2/3/9, 1988. The detention order was passed on April 15, 1988 and the detenu was arrested on October 2, 1988. The submission was that there was inordinate delay in arresting the petitioner pursuant to the order and that it indicated that the order was not based on a *bona fide* and genuine belief that the action or conduct of the petitioner were

such that the same were prejudicial to the maintenance of public order. Sabyasachi Mukharji, J., as my Lord the Chief Justice then was, observed that whether there was unreasonable delay or not would depend upon the facts and circumstances of a particular situation and if in a situation the person concerned was not available and could not be served, then the mere fact that the action under section 7 of the Act had not been taken, would not be a ground for holding that the detention order was bad. Failure to take action even if there was no scope for action under section 7 of the COFEPOSA Act, would not by itself be a decisive or determinative of the question whether there was undue delay in serving the order of detention.

In *Shafiq's* case the affidavit affirmed by the detaining authority showed that several raids of the petitioner's premises for the service of the order dated 15-4-1988 were conducted and the authorities had made all efforts to serve the order on the detenu, but he was all along absconding and the house of the petitioner for this purpose was raided on several occasions. However, in view of the fact that in that case from April 15, 1988 to May 12, 1988 no attempt had been made to contact or arrest the petitioner and there was no explanation as to why from September 27, 1988 to October 2, 1988 no attempt had been made, there was unexplained delay and it was, therefore, not possible for the Court to be satisfied that the Distict Magistrate had applied his mind and arrived at the subjective satisfaction that there was genuine need for detention of the detenu. The detention order was accodingly quashed.

We have already noted how in the instant case the Home Secretary sent detailed instructions to the Superintendent of Police, Malapuram on 27-6-1988 and sent the teleprinter message on 19-7-1988 and the Superintendent of Police wrote back on 27-7-1988 stating that the detenu was absconding and his whereabouts were not known and all possible efforts were being made to execute the order and on 2-8-1988 the Superintendent of Police reported that the order was served on 2-8-1988 at his residence and that he was sent to the Central Prison, Trivandrum. Though it could not be denied that the detenu was reporting before the Superintendent (Intelligence) Air Customs, Trivandrum on every Wednesday, the Superintendent of Police, Malapuram apparently was not aware of it. Under the above facts and circumstances we are of the view that there was no inordinate and unexplained delay in the period of 38 days between the detention order and its execution so as to snap the nexus between the two or to render the grounds stale or to indicate that the detaining authority was

not satisfied as to the genuine need for detention of the detenu. This submission is accordingly rejected. A

We may pause here to point out that the circumstances in the present case seem to indicate a certain degree of lack of coordination between the detaining authorities and those entrusted with the execution of the detention order. This is clearly seen from two circumstances B in the present case. Though the detention order was sent for service on 27-6-1988, a reminder was issued only on 19-7-1988. Apparently, the Superintendent of Police was finding it difficult to trace the detenu but he did not report this immediately and mentioned it to the detaining authority only on 27-7-1988. He was obviously not aware that, under the terms of the bail order the detenu had to report every week at the Customs Office. If he had reported his difficulty earlier or if the C detaining authorities had apprised him of the terms of the bail order, it would have been possible to have had the detention order served earlier. These communication gaps should, we think, be avoided since it is of the very essence of a detention order to have it served at the earliest. While we have accepted the explanation tendered in the pre- D sent case for this delay, we would like the State to ensure that such delays do not occur as, apart from giving the detenu a ground for attacking the detention order. such delay really tends to frustrate and defeat the very purpose of preventive detention.

The next submission of counsel was that the detaining authority E should have realised that the seizure of the detenu's passports was by itself sufficient to restrain the detenu's smuggling activities, if any, and refrained from passing the order of detention. We see no force in this contention. This was no doubt one of the factors that the detaining authority should have taken (and did in fact take) into account but it was for him to assess the weight to be attached to such a circumstance F in arriving at his final decision and it is not open to us to interfere with the merits of his decision. We, therefore, reject this contention of Mr. Vaidyanathan.

The next submission is that of non-supply of the bail application and the bail order. This Court, as was observed in *Mangalbhai Motiram Patel* v. *State of Maharashtra*, [1981] 1 SCR 852, has 'forged' G certain procedural safeguards for citizens under preventive detention. The Constitutional imperatives in Article 22(5) are two-fold: (a) The detaining authority must, as soon as may be i.e. as soon as practicable, after the detention communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority H

must afford the detenu the earliest opportunity of making the representation against the order of detention. The right is to make an effective representation and when some documents are referred to or relied on in the grounds of detention, without copies of such documents, the grounds of detention would not be complete. The detenu has, therefore, the right to be furnished with the grounds of detention along with the documents so referred to or relied on. If there is failure or even delay in furnishing those documents it would amount to denial of the right to make an effective representation. This has been settled by a long line of decisions: *Ramachandra A. Kamat* v. *Union of India,* [1980] (2) SCR 1072; *Frances Coralie Mullin* v. *W.C. Khambra & Ors.*, [1980] 2 SCR 1095; *Smt. Ichhu Devi Chararia* v. *Union of India*, [1981] 1 SCR 640; *Pritam Nath Hoon* v. *Union of India,* [1981] 1 SCR 682; *Shri Tushar Thakkar* v. *Union of India*, [1980] 4 SCC 499; *Lallubhai Jogibhai Patel* v. *Union of India,* [1981] 2 SCC 427; *Kirit Kumar Chaman Lal Kundaliya* v. *Union of India,* [1981] 2 SCC 436 and *Smt. Ana Carelina D'Souza* v. *Union of India,* [1981] Suppl. SCC 53.

It is immaterial whether the detenu already knew about their contents or not. In *Mehrunissa* v. *State of Maharashtra*, [1981] 2 SCC 709, it was held that the fact that the detenu was aware of the contents of the documents not furnished was immaterial and non-furnishing of the copy of the seizure list was held to be fatal. To appreciate this point one has to bear in mind that the detenu is in jail and has no access to his own documents. In *Mohd. Zakir* v. *Delhi Administration*, [1982] 3 SCC 216 it was reiterated that it being a Constitutional imperative for the detaining authority to give the documents relied on and referred to in the order of detention *pari passue* the grounds of detention, those should be furnished at the earliest so that the detenu could make an effective representation immediately instead of waiting for the documents to be supplied with. The question of demanding the documents was wholly irrelevant and the infirmity in that regard was violative of Constitutional safeguards enshrined in Article 22(5).

It is also imperative that if the detenu was already in jail the grounds of detention are to show the awareness of that fact on the part of the detaining authority, otherwise there would be non-application of mind and detention order vitiated thereby. In the instant case though the order of detention *ex-facie* did not mention of the detenu having been in jail, in paragraph 3 of the grounds of detention it was said that he was arrested by the Superintendent (Intelligence) Air Customs, Trivandrum on 31-1-1988 and he was produced before the Additional Chief Judicial Magistrate (Economic Offences), Erna-

kulam the same day. It was clearly said: "You were remanded to judicial custody and you were subsequently released on bail." From the Records it appears that the bail application and the bail order were furnished to the detaining authority on his enquiry. It cannot, therefore, be said that the detaining authority did not consider or rely on them. It is difficult, therefore, to accept the submission of Mr. Kunhikannan that those were not relied on by the detaining authority. The bail application contained the grounds for bail including that he had been falsely implicated as an accused in the case at the instance of persons who were inimically disposed towards him, and the bail order contained the conditions subject to which the bail was granted including that the accused, if released on bail, would report to the Superintendent (Intelligence) Air Customs, Trivandrum on every Wednesday until further order, and that "he will not change his residence without prior permission of court to 25-2-1988". This being the position in law, and non-supply of the bail application and the bail order having been apparent, the legal consequence is bound to follow.

In *Khudiram Das* v. *State of West Bengal,* [1975] 2 SCR 832, this Court held that where the liberty of the subject is involved it is the bounden duty of the Court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and that the subject is not deprived of his personal liberty otherwise than in accordance with law. The Constitutional requirement of Article 22(5) is that all the basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to making the detention order must be communicated to the detenu so that the detenu may have an opportunity of making an effective representation against the order of detention. "It is, therefore, not only the right of the Court, but also its duty as well, to examine what are the basic facts and materials which actually and in fact weighed with the detaining authority in reaching the requisite satisfaction. The judicial scrutiny cannot be foreclosed by a mere statement of the detaining authority that it has taken into account only certain basic facts and materials and though other basic facts and mateials were before it, it has not allowed them to influence its satisfaction. The Court is entitled to examine the correctness of this statement and determine for itself whether there were any other basic facts or materials, apart from those admitted by it, which could have reasonably influenced the decision of the detaining authority and for that purpose, the Court can certainly require the detaining authority to produce and make available to the Court the entire record of the case which was before it. That is the least the Court can do to ensure observance of the requirements of law by the detaining authority."

A From the decision in *Ramesh Yadav* v. *District Magistrate, Etah & Ors.*, [1985] 4 SCC 232, it can be said that the facts of the detenu having been in jail and his being granted bail are by themselves not enough to justify the passing of the detention order. In that case it was mentioned in the grounds of detention:

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> "At this time you were detained in the District Jail, Mainpuri and you have filed an application for bail in the court of law which is fixed for hearing on September 17, 1984, and there is positive apprehension that after having bail you will come out of the jail and I am convinced that after being released on bail you will indulge in activities
C prejudicial to the maintenance of public order."

It was observed that the detention order was passed as the detaining authority was apprehensive that in case the detenu was released on bail, he would again carry on his criminal activities in the area. If the
D apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under-trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed. The detention order was accordingly quashed.

E In *State of U.P.* v. *Kamal Kishore Saini*, [1988] 1 SCC 287, the application of a co-accused as well as statements made in the bail application filed on behalf of the detenu alleging that the detenu was falsely implicated and the Police report thereon were not produced before the detaining authority before passing the detention order. Holding that the detention order was invalid on that ground, it was
F observed:

> "Similarly with regard to ground No. 3, the application of the co-accused as well as the statement made in the bail application filed on behalf of the detenus alleging that they had been falsely implicated in the same case and the police
G report thereon, were not produced before the detaining authority before passing of the detention order ..... It is incumbent to place all the vital materials before the detaining authority to enable him to come to a subjective satisfaction as to the passing of the order of detention as mandatorily required under the Act."

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Non-consideration of the bail order would have, therefore, in this case amounted to non-application of mind. In *Union of India* v. *Manoharlal Narang*, [1987] 2 SCC 241, the Supreme Court's interim order in pending appeal against High Court's quashing of a previous order of detention against the same detenu was not considered by the detaining authority while making the impugned subsequent order against him. By the interim order Supreme Court had permitted the detenu to be at large on condition of his reporting to the police station daily. It was held that non-consideration of the interim order which constituted a relevant and important material was fatal to the subsequent detention order on ground of non-application of mind. If the detaining authority considered that order one could not state with definiteness which way his subjective satisfaction would have reacted and it could have persuaded the detaining authority to desist from passing the order of detention. If in the instant case the bail order on condition of the detenu's reporting to the Customs authorities was not considered the detention order itself would have been affected. Therefore, it cannot be held that while passing the detention order the bail order was not relied on by the detaining authority. In *S. Gurdip Singh* v. *Union of India,* [1981] 1 SCC 419, following *Ichhu Devi Choraria* v. *Union of India,* (supra) and *Smt. Shalini Soni* v. *Union of India,* [1981] 1 SCR 962, it was reiterated that if the documents which formed the basis of the order of detention were not served on the detenu along with the grounds of detention, in the eye of law there would be no service of the grounds of detention and that circumstances would vitiate his detention and make it void *ab initio*.

Mr. Kunhikannan relies on *Haridas Amarchand Shah* v. *K.L. Verma*, [1989] 1 SCC 250, wherein the application for bail and the order dated September 15, 1987 passed by the Metropolitan Magistrate granting conditional bail were placed before the detaining authority, but the application dated September 21, 1987 for variation of the conditions and the order made by the Metropolitan Magistrate thereon were not placed before the detaining authority, this Court held that the application for variation of conditions on bail and the order passed by the Metropolitan Magistrate varying the conditions of bail were, in its opinion, not vital and material documents inasmuch as the granting of bail by the Magistrate enabled the detenu to come out and carry on his business as before and variation of the conditions were not considered vital for the satisfaction as to need for detention. That case is, therefore, distinguishable on facts.

Considering the facts in the instant case, the bail application and

A the bail order were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired, and if those had been considered, they would be documents relied on by the detaining authority though the specifically mentioned in the annexure to the order of detention and those ought to have formed part of the documents supplied to the detenu with the B grounds of detention and without them the grounds themselves could not be said to have been complete. We have, therefore, no alternative but to hold that it amounted to denial of the detenu's right to make an effective representation and that it resulted in violation of Article --(5) of the Constitution of India rendering the continued detention of the detenu illegal and entitling the detenu to be set at liberty in this C case.

Mr. Vaidyanathan's last submission is that the order of declaration dated 23-8-1988 is bad on the ground that the show cause notice dated 7-7-1988 and his reply thereto dated 26-7-1988, the bail application and the bail order dated 12-2-1988 as also the fact that the two D passports of the detenu were seized were not placed before the declaring authority before he issued the declaration order under section 9(1) of the COFEPOSA Act. Mr. Mahajan clearly stated that all the materials that were placed before the detaining authority were also placed before the declaring authority, which meant that the show cause notice, the reply thereto, and the seizure list of the passports were not E placed before him.

The declaration made under section 9 of the COFEPOSA Act by the Additional Secretary to the Government of India on 23-8-1988 reads as under:

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> "Whereas Shri M. Ahamedkutty S/o Shri Cheriya Saidukutty has been detained on 2-8-1988 in pursuance of order No. 35158/SSAI/88/Home dated 25-6-1988 of the Government of Kerala made under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 with a view to preventing G him from smuggling gold;
>
> And whereas I, the undersigned, specially empowered in this behalf by the Central Government, have carefully considered the grounds of detention and the material served on the detenu:

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Now, therefore, I, the undersigned, hereby declare that I am satisfied that the aforesaid Shri Ahamedkutty S/o Shri Cheriya Saidukutty is likely to smuggle goods into and through Trivandrum Airport which is an area highly vulnerable to smuggling as defined in Explanation 1 to Section 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974." A B

This order *ex facie* says that the declaring authority had carefully considered the grounds of detention and the materials served on the detenu and on those materials the authority was satisfied that the detenu was likely to smuggle goods into and through Trivandrum Airport which was an area highly vulnerable to smuggling as defined in Explanation 1 to section 9(1) of the COFEPOSA Act. The question is whether there were adequate materials for the authority being satisfied that the detenu was likely to smuggle goods. The detenu having already been under detention and his detention confirmed by the Government under section 8, the Advisory Board having reported that there was sufficient cause for continued detention of the detenu, were there still enough materials to be satisfied that the detenu was likely to smuggle goods into Trivandrum vulnerable area? To decide this question, Mr. Vaidyanathan urged, it is necessary to remember that the passports of the detenu had been seized by the authorities. According to counsel, if the detaining authority had applied his mind to this important fact, he could not have been satisfied that his detention was necessary to restrain the detenu's activities of smuggling. This point we have touched upon earlier. In any event, Mr. Vaidyanathan submits, the declaring authority could not have been satisfied that the detenu "was likely to smuggle goods into and through the Trivandrum airport" (which is the vulnerable area) for, without a passport, he could not come in or go out through the airport. C D E F

In *Smt. Rekhaben Virendra Kapadia* v. *State of Gujarat & Ors.*, [1979] 2 SCC 566, the declaring authority who passed an order under section 9(1) had also stated that the detenu "engages" and "is likely to engage" in transporting smuggled goods. To that extent it was observed by this Court that there was no material for coming to the conclusion that the detenu was "engaging" himself in the unlawful activities as the detenu had been under detention. However, in an appropriate case if the declaring authority came to the conclusion taking into account the past activities of the detenu that he was likely to continue to indulge in such acivities in future there might be no justification for this Court to interfere. It was quite likely that persons G H

A who were systematically involved in smuggling activities could cause reasonable apprehension in the minds of the declaring authority that they were likely to continue their prejudicial activities.

The emphasis in section 9 appears to be on the satisfaction that the detenu (a) smuggles or is likely to smuggle goods into, out of or B through any area highly vulnerable to smuggling; or (b) abets or is likely to abet the smuggling of goods into, out of or through any area highly vulnerable to smuggling; or (c) engages or is likely to engage in transporting or concealing or keeping smuggled goods in any area highly vulnerable to smuggling; and in making a declaration to that effect within 5 weeks of the detention of the person. Explanation 1 C defines "area highly vulnerable to smuggling" and Explanation 2 defines "customs airport" and the "customs station". It is true that under section 10 of the COFEPOSA Act, where the provisions of section 9 apply, the maximum period of detention shall be a period of two years from the date of detention or the specified period whichever period expires later. However, nothing contained in section 9 shall D affect the power of the appropriate Government in either case to revoke or modify the detention order at any earlier time. This may imply an obligation on the part of the detaining authority to place the facts and materials that occurred between the date of detention and the date of declaration, so as to justify prolongation of the period of detention. In *Smt. Madhu Khanna* v. *Administrator, Union Territory* E *of Delhi*, [1986] 4 SCC 240, where detenu's representation was rejected and declaration under section 9(1) was made on the same day but in different files, mere non-reference of the representation in the declaration was held not to have shown failure of the declaring authority to consider the representation before making the declaration. However, as we have taken the view that non-furnishing of the copies F of the bail application and the bail order has resulted in violation of Article 22(5) of the Constitution, we do not express any opinion on this submission.

In the result, the detention order and the impugned judgment are set aside, the appeal is allowed and the detenu is to be set at liberty G in this case.

R.S.S. Appeal allowed.