Chapter – V

Role of Supreme Court of India After Withdrawal of Internal Emergency – 1977 To Date
Chapter-V

ROLE OF SUPREME COURT OF INDIA AFTER WITHDRAWAL OF INTERNAL EMERGENCY - 1977 TO DATE

The Supreme Court realised the serious consequences of its pronouncements, particularly those of its denial of the writ of habeas corpus in Shivakant Shukla's case. The court began to rebuild its prestige and power. It created a wide "due process" jurisdiction which had been decisively rejected by the framers of the Indian Constitution. Besides, it endeavoured to show that it was still the protector of the Western System of law and justice and that the emergency had not really done a lasting damage to its powers. It prepared itself to demonstrate that any exercise of power by the government could be reviewed by the courts on jurisdictional and other grounds.1 It was in this context that the Supreme Court was motivated to give a liberal interpretation to Article 21 and, in several cases after the internal emergency, stood firmly on the side of civil liberties. "The withering Article 21 which had been mauled severally by Gopalan and almost totally by Shivakant Shukla, was thus rejuvenated"2 in Maneka's case.

The decision of the Court in Maneka Gandhi's case was one of immense constitutional significance, as it was the first major decision concerning personal liberty since the Habeas Corpus case. "Maneka vibrates with humanism and single-minded judicial dedication to the cause of human rights in India, still recovering from the trauma of the suspension of civil liberties in 1975-77".3 This case gave the court a good opportunity to show its partisanship for Civil liberties and to declare that the "reality of liberty is not to be drowned in the hysteria of the hour" and the "hubris of power". It confidently ruled: "Governments come and go, but the fundamental rights of

the people cannot be subject to the wishful value-sets of political regimes of the passing day.".

The seven-judge constitutional bench in *Maneka Gandhi v. Union of India* examined the concept of personal liberty in general and the right to travel abroad in particular. In the case, the petitioner's (Mrs. Maneka Gandhi's) passport was impounded under Section 10 (3) (c) of the Passport Act, 1967. Provision in the Act was violative of Article 21 of the Constitution since it did not prescribe "procedure" within the meaning of that article and if it was held that procedure had been prescribed, it was arbitrary and unreasonable; and the impounding provision in the Act was also violative of Article 19 (1) (a) and (g), since it permitted restrictions to be imposed on the rights guaranteed by those provisions even though the restrictions were such as could not be imposed under Article 19 (2) and (6).

The Court examined these arguments and analysed the provisions in Part III of the Constitution, and discussed in detail earlier decisions on similar pleas.

4. This was an evidence of the court's affirmation of civil liberties in unambiguous terms.
5. Ibid. The seven judges' constitutional bench consisted of Beg, C.J., Y.V. Chandrachud (as he then was), P.N. Bhagwati (as he then was), V.R. Krishna Iyer, N.L. Untawalia, S. Murtaza Fazal Ali and P.S. Kalisam, JJ.
6. Section 10 (3) reads:
   "The passport authority may impound or cause to be impounded or revoke a passport or travel document -
   a) ..... 
   b) ..... 
   c) If the passport authority deems it necessary so to do in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any other foreign country, or in the interests of general public."
7. Article 19 of the Constitution of India reads: "Protection of Certain rights regarding freedom of speech, etc.
   (1) All citizens shall have the right -
   a) To freedom of speech and expression.
   b) To practice any profession, or to carry on any occupation, trade or business.
8. Article 19 (2) of the Constitution of India reads: "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.
   (6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause...."
The following cases determine now, the change attitude of the Supreme Court of India in the matter of preventive detention.

Object of Preventive Detention:

Preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it and to prevent him from so doing.9

Object of Preventive Detention – Not punitive but precautionary:

A preventive detention “is not punitive but precautionary measure”. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge is formulated; and the justification of such detention is suspicion or reasonable probability and there is no criminal conviction which can only be warranted by legal evidence. In this sense it is an anticipatory action. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. In case of punitive detention to person concerned is detained by way of punishment after being found guilty of wrongdoing where he has the fullest opportunity to defend himself, while preventive detention is not by way of punishment at all, but it is intended to prevent a person from indulging in any conduct injurious to the society.10

Different from punitive detention:

Though the element of detention is a common factor in cases of preventive detention as well as punitive detention, there is a vast difference in their objective. Punitive detention follows a sentence awarded to an offender for proven charges in a trial by way of punishment and has in it the elements of retribution, deterrence, correctional factor and institutional treatment in varying degrees. On the contrary preventive detention is an extraordinary measure resorted to by the State on account of compulsive factors pertaining

to maintenance of public order, safety of public life and the welfare of the economy of the country.\textsuperscript{11}

Punitive and preventive detention- Distinction

There is a vital distinction between these two kinds of detention. In case of 'punitive detention', the person concerned is detained by way of punishment after he is found guilty of wrongdoing as a result of a trial where he has the fullest opportunity to defend himself, while 'preventive detention' is not by way of punishment at all, but it is intended to pre-empt a person from indulging in any conduct injurious to the society. In case of preventive detention, he is detained merely on suspicion with a view to preventing him from doing harm in future and the opportunity that he has for contesting the action of the executive is very limited. Having regard to this distinctive character of preventive detention, the restrictions placed on a person preventively detained must, consistently with the effectiveness of detention, be minimal.\textsuperscript{12}

It has been said that the history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is stressed.

Personal liberty is by every reckoning, the greatest of human freedoms and the law of preventive detention are strictly construed and a meticulous compliance with the procedural safeguards, however technical, is strictly insisted upon by the courts. The law on the matter did not start on a clean slate. The power of courts against the harsh incongruities and unpredictabilities of preventive detention is not merely 'a page of history' but a whole volume. The compulsions of the primordial need to maintain order in society, without which the enjoyment of all rights, including the right to personal liberty, would lose all their meaning are the true justifications for the laws of preventive detention. The pressures of the day in regard to the imperatives of the security of State and of public order might, it is true, require the sacrifice of the personal liberty of individuals. Laws that provide for prevention detention posit that an individual's conduct prejudicial to the maintenance of public order or to the security of the State provides grounds for a satisfaction for a reasonable prognostication of a possible future manifestation of similar propensities on the part of the offender. This jurisdiction has been called a jurisdiction of suspicion; but the compulsions of the very preservation of the values of freedom, or democratic society and of social order might compel a curtailment of individual liberty. "To lose our country by a scrupulous adherence to the written law" said Thomas Jefferson "would be to lose the law itself, with life, liberty and all those who are


enjoying with us, thus absurdly sacrificing the end to the means.” This is, no

doubt, the theoretical justification for the law enabling prevention detention.

But the actual manner of administration of the law of prevention
detention is of utmost importance. The law has to be justified by the genius of
its administration so as to strike the right balance between individual liberties
on the one hand and the needs of an orderly society on the other. But the
realities of executive excesses in the actual enforcement of the law have put
the courts on the alert, ever-ready to intervene and confine the power within
strict limits of the law both substantive and procedural. The paradigms and
value judgments of the maintenance of a right balance are not static but vary
according as the “pressures of the day” and according as the intensity of the
imperatives that justify both the need for and the extent of the curtailment of
individual liberty. Adjustments and readjustments are constantly to be made
and reviewed. No law is an end in itself.

The “inn that shelters for the night is not journey’s end and the law,
like the traveler, must be ready for the morrow”.

As to the approach to such laws which deprive personal liberty
without trial, the libertarian judicial faith has made its choice between the
pragmatic view and the idealistic or doctrinaire view. The approach to the
curtailment of personal liberty which is an axiom of democratic faith and of
all civilized life is an idealistic one, for, loss of personal liberty deprives a man
of all that is worth living for and builds up deep resentments. Liberty belongs
to what correspond to man’s inmost self.

Under our Constitution also the mandate is clear and the envoy is left
under no dilemma. The constitutional philosophy of personal liberty is an
idealistic view, the curtailment of liberty for reasons of State’s security, public
order, disruption of national economic discipline etc. being envisaged as a
necessary evil to be administered under strict constitutional restrictions.13

*Detenus to e kept separate from convicts*

If any of the persons detained under NSA are at present housed in the
same ward or cell where the convicts are housed, immediate steps must be
taken to segregate them appropriately.14

*Interpretation of Prevention detention legislation*

*Per Venkataramiah, J.*

The law of prevention detention is a hard law and therefore it should
be strictly construed. Care should be taken that the liberty of a person is not
jeopardized unless his case falls squarely within the four corners of the
relevant law.15

---

1989 Cri LJ 991.

Cri LJ 340; 1982 MLJ (Cri) 524.

1334; 1984 Cri LJ 909.
Preventive detention law, how to be construed

Prevention detention for the social protection of the community is a hard law but, it is a necessary evil in the modern society and must be pragmatically construed, so that it words, does not endanger social defence or the defence of the community and at the same time does not infringe the liberties of the citizens. A balance should always be struck.\textsuperscript{16}

Court's approach should be pragmatic and not highly technical- \textit{Strict adherence to procedure sacrificing greater social interests not justified- Practice and Procedure}

Prevention detention unlike punitive detention which is to punish for the wrong done, is to protect the society by preventing wrong being done. Though such powers must be very cautiously exercised so as not to undermine the fundamental freedoms guaranteed to our people, the procedural safeguards are to ensure that yet these must be looked at from a pragmatic and commonsense point of view. An understanding between those who exercise powers and the people over whom or in respect of whom such power is exercised is necessary. The purpose of exercise of all such powers by the Government must be to promote common well-being and must be to subserve the common good. It is necessary to protect therefore the individual rights insofar as practicable which are not inconsistent with the security and well-being of the society. Observance of written law about the procedural safeguards for the protection of the individual is normally the high duty of public official but in all circumstances not the highest. The law of self-preservation and protection of the country and national security my claim in certain circumstances higher priority.\textsuperscript{17}

Precedent- High Court not justified in quashing order of detention merely on ground that detention order in similar cases had earlier been revoked- Each case to be decided on its own facts\textsuperscript{18}

Place of detention- Administrative decision should normally prevail- \textit{Court's interference when called for- Detenu belonging to Punjab, detained in District jail, Bharatpur, Rajasthan- Detenu's prayer for detaining him at a place in or near his home State disallowed.}

The place of detention is a matter for the administrative choice of the detaining authority, and a court would be justified in interfering with that decision only if it was in violation of any specific provision of the law or was vitiated by arbitrary considerations and mala fides. While it is ordinarily desirable that a \textit{detenu} should be detained in an environment natural to him in point of climate, language, food and other incidents of living, in the actual decision concerning the place of detention these considerations must yield to factors related to, and necessitated by, the need for placing him in preventive


detention. Although the detention must be punitive, they must nevertheless be such as to secure the effectiveness of his incarceration.

In the present case the affidavits filed by the respondents on the record indicate that the mind has been applied to the facts and circumstances of the case and that it was felt necessary to effect the detention at Bharatpur. The city of Bharatpur, although situated in the State of Rajasthan, is not very distant from the States of Punjab and Haryana. In the circumstances, the relief sought on behalf of the detenu in respect of the place of detention cannot be granted.19

Solitary Confinement- On facts held, Court's interference not called for- National Security (Rajasthan Conditions of Detention) Order, 1984, Condition No. 4 (ii)

The detenu had been provided two adjacent cells and enjoyed a certain degree of freedom of movement from early morning to the evening. A convict officer served as his cook and he was entitled to contact two wardens, one of whom was available in the ward itself and the other was posted at the gate of the ward. Medical officers and male nurses also attended on the detenu. The respondents claimed that Condition No. 4(ii) of the National Security (Rajasthan Conditions of Detention) Order, 1984 empowered them to keep the detenu separate from ordinary prisoners. On behalf of the petitioner-detenu it could not be satisfactorily shown that the nature of the detenu's detention calls for interference by the Court.20

Torture of detenu while in detention- Proof regarding- Visitor's register maintained at jail produced to show that police officers had visited the detenu and interrogated him- Held, visitor's register would not substantiate the charge of torture in absence of showing what actually went on during the visits- Register will only indicate identity of the visitors and may record duration of the visit.21

Unreasonable restraints put on a detenu during detention can be subjected to judicial review

Persons who are put under preventive detention must be segregated from the convicts and kept in a separate part of the place of detention. It is hardly fair that those who are suspected of being engaged in prejudicial conduct should be lodged in the same ward or cell where the convicts whose crimes are established are lodged. The evils of ‘custodial perversity’ are well known. Care has to be taken to ensure that the detenu is not subjected to any indignity.22

Constitutional Rights

Constitutional safeguards, available to detenus, approach of detaining authorities and scope of court's interference with detention orders- Constitution of India, Arts. 21 and 22

---

Detention of individuals without trial for any length of time, however short, is wholly inconsistent with the basic ideas of our government and the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of the citizen except in accordance with the procedure established by law. The Supreme Court has therefore in a series of decisions forged certain procedural safeguards in the case of preventive detention of citizens. When the life and liberty of a citizen is involved, it is expected that the government will ensure that the constitutional safeguards embodied in Art. 22(5) are strictly observed. When any person is detained in pursuance of an order made under any law of 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. These procedural safeguards are ingrained in our system of judicial interpretation. The power of preventive detention by the government under any law for preventive detention is necessarily subject to the limitations enjoined on the exercise of such power by Art. 22(5) as construed by this Court. Thus, this court speaking through Bhagwati, J. observed:

"The constitutional imperatives enacted in this article are twofold: (1) the detaining authority must, as soon as may be, that is, 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 must afford the detenu the earliest opportunity of making a representation against the order of detention. These are the barest minimum safeguards which must be observed before an executive authority can be permitted to preventively detain a person and thereby drown his right of personal liberty in the name of public good and social security."  

As observed by this Court, when the liberty of the subject is involved, whether it is under the Preventive Detention Act or the Maintenance of Internal Security Act or the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act or any other law providing for preventive detention: [SCC p. 642; SCC (Cri) p. 562, para 17]

"...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."

Nevertheless, the community has a vital interest in the proper enforcement of its laws particularly in an area such as conservation of foreign exchange and prevention of smuggling activities in dealing effectively with persons engaged in such smuggling and foreign exchange racketeering or with persons engaged in anti-national activities which threaten the very existence of the unity and integrity of the Union or with persons engaged in anti-social activities seeking to create public disorder in the worsening law and order situation, as unfortunately is the case in some of the States today,

24. [SCC p. 87, para 5]
by ordering their preventive detention and at the same time, in assuring that
the law is not used arbitrarily to suppress the citizen of his right to life and
liberty. The court must therefore be circumspect in striking down the
impugned order of detention where it meets with the requirements of Art.
22(5) of the Constitution.26

Compliance with Art. 22(5) mandatory

It is incumbent on the State to satisfy the court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Art. 22(5).

When the life and liberty of a citizen is involved, it is expected that the government will ensure that the constitutional safeguards embodied in Art. 22(5) are strictly observed. The gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of personal liberty is largely the history of insistence on observance of the procedural safeguards.27

Constitutionality of law relating to held, no longer open- Held, cannot be struck down on a general plea of interference with the liberties of the people if otherwise constitutional- Constitution of India, Arts. 245, 246, Schedule VII, List I, Entry 9 and List III Entry 3 – Justiciability on a due process method rejected- National Security Act, 1980 (65 of 1980) as such therefore not unconstitutional – Constitution of India, Arts. 22 and 14, 19 & 21 – Interpretation of the Constitution

So long as the preventive detention law is made within the legislative power arising out of a legislative entry and does not violate any of the conditions or restrictions on that power, such law cannot be struck down on the specious ground that it is calculated to interfere with the liberties of the people. What is provided for by the Constitution itself cannot be judged unconstitutional by importing court’s notions of what if right and wrong. One cannot therefore content that preventive detention is basically impermissible under the Indian Constitution.

Though it is now well settled that rights in Part II of the Constitution are not mutually exclusive and that therefore, a law of prevention detention under Art. 22 must also satisfy Arts. 14, 19 and 21, it is equally settled that a law of preventive detention cannot be held unconstitutional for the reason that it violates Arts. 14, 19, 21 and 22. The National Security Act, 1980 which is in pari material with MISA, 1971 is not unconstitutional on the ground that, by its very nature, it generally violates Arts. 14, 19, 21 and 22.28

Procedural safeguards available to detenu under Art. 22(5) – Any deviation therefrom calls for court’s interference – Constitution of India, Arts. 22(5) % 32, 226 and 136.

A citizen is entitled to protection within the meaning of Art. 22(5) of the Constitution of the procedural guarantees envisaged by law. The court frowns upon any deviation or infraction of the procedural requirements. That in fact is the only guarantee to the citizen against the State's action of prevention detention.  

Procedural requirement of Art. 22 and the statute must be strictly complied with - It is no answer to say that such requirements have been complied with before the date of hearing - Constitution of India, Arts. 22 and 21.

In a habeas corpus proceeding, it is not a sufficient answer to say that the procedural requirements of the Constitution and the statute have been complied with before the date of hearing and therefore, the detention should be upheld. The procedural requirements are the only safeguards available to a detenu since the court is not expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard. If a reference to an Advisory Board is to be made within three weeks, it is no answer to say that the reference, though not made within three weeks, was made before the hearing of the case. If the report of the Advisory Board is to be obtained within three months, it is no answer to say that the report, though not obtained within three months, was obtained before the hearing of the case. If the representation made by the detenu is required to be disposed of within a stipulated period, it is no answer to say that the representation, though not disposed of within three months, was disposed of before the hearing of the case.  

Any unreasonable restriction in regard to detenu's right to confer with legal adviser and meet family members and friends would violate Arts. 21 and 14 - CL. 3(b)(i) and (ii) of (Delhi) Condition of Detention Order, dated August 23, 1975 - Validity

Judicial review - Court's interference under Art. 32 or 136 or 226 not called for where requirements of Art. 22(5) satisfied - Constitution of India, Arts, 22(5), 32, 136 and 226 - Administrative Law

The High Court under Art. 226 and the Supreme Court under Art. 32 or 136 do not sit on appeal on the orders of preventive detention. The courts have only to see whether the formalities enjoined by Art. 22(5) have been complied with the detaining authority and if so, the courts cannot examine the materials before it and find that the detaining authority should not have been satisfied on the materials before it and detained the detenu under the preventive detention Act. In the present case the detaining authority neither violated the relevant provisions of the Constitution nor those of the

29.  
COFEPOSA Act under which the detenu had been detained and therefore, it is not open to the Court under Art. 32 to interfere with the order of detention.\(^\text{32}\)

Order of detention — Scope of High Court's interference under Art. 226 — High Court has only to see if the order is based on materials on record and has no jurisdiction to enquire into adequacy of those materials — COFEPOSA Act, 1974 (52 of 1974), S. 3 - Constitution of India, Arts, 226 and 22.

The High Court in its writ jurisdiction under Art. 226 of the Constitution is to see whether the order of detention has been passed on any materials before it. If it is found that the order has been based by the detaining authority on materials on record, then the Court cannot go further and examine whether the material was adequate or not, which is the function of an appellate authority or court. It can examine the material on record only for the purpose of seeing whether the order of detention has been based on no material. The satisfaction mentioned in S. 3 of the Act is the satisfaction of the detaining authority and not of the court.

In the present case the High Court was not justified in holding that there was no material on record to prove knowledge of the detenu with the contraband goods. By implication, the High Court erroneously imported the rule of criminal jurisprudence that the guilt of an accused must be proved beyond a reasonable doubt to the law of detention.\(^\text{33}\)

Detention order challenged by petition under Art. 32 — State informing that the detenu has since been released — Petition becomes infructuous.\(^\text{34}\)

Habeas corpus — Filing of another such writ though not barred, the Court can refuse to admit the writ petition if the matters being raised are under decision of a Constitution Bench or are such as could be raised earlier. Review petition may be filed after decision on the constitutional questions.\(^\text{35}\)

Habeas corpus petition — Detention order against petitioner revoked and petitioner already released — Petition becoming infructuous — But if a fresh detention order is passed subsequently and the petitioner is again detained in pursuance thereof, petitioner is entitled to maintain a fresh petition — Preventive Detention — Constitutional Rights — National Security Act, 1980 — Res judicata.\(^\text{36}\)

Habeas corpus petition — Burden of proof on the State — Court not justified in dismissing such a petition merely on ground of imperfect pleadings of the petitioner.

It was an improper exercise of power on the part of the High Court in disallowing the writ petition on the ground of imperfect pleadings. Normally, writ petitions are decided on the basis of affidavits and the petitioner cannot be permitted to raise grounds not taken in the petition at the hearing. The


same rule cannot be applied to a petition for grant of a writ of habeas corpus. It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the court that the detention of the petitioner detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accordance with the constitutional safeguards embodied in Art. 22(5).

Habeas corpus petition presented by an advocate on behalf of the detenu — Registrar and another officer of the Registry knowing language of the detenu directed to meet the detenu in camera, explain substance and nature of the petition as also nature of relief sought therein and ascertain if he desires to file the petition — Constitution of India, Art 32.

BASIS OF DETENTION

In order that an activity may be to affect adversely the maintenance of public order, there must be materials to show that there has been a feeling of insecurity among the general public. If any act of a person panic or fear in the minds of the members of the public upsetting the even tempo of life of the community, such act must be said to have a direct bearing on the question of maintenance of public order. The commission of an offence will not necessarily come within the purview of 'public order'.

Public order — Extorting money from shopkeepers of an area by threatening them and throwing bomb on police party — Held on facts, related to law and order problem — National Security Act, 1980, S. 3(2)

An act whether amounts to a breach of law and order or a breach of public order solely depends on its extent and reach to the society. If the act is restricted to particular individuals or a group of individuals it breaches the law and order problem but if the effect and reach and potentiality of the act is so deep as to affect the community at large and/or the even tempo of the community then it becomes a breach of the public order. In this case the respondents can very well proceed with the criminal case under S. 307 of IPC, execute it against the appellant and can get him punished if the case is proved beyond doubt against the appellant.

Public order — Individual actions which do not disturb the even tempo of life in the society and community or do not cause apprehension in the minds of the residents of the locality in regard to maintenance of public order, held, cannot amount to interference with the maintenance of public order — National Security Act, 1980 (65 of 1980), S. 3.

It cannot be said that the satisfaction of the detaining authority on the basis of his past terrorist and disruptive activities that if the detenu were to be

left at large he would indulge in similar activities in future and thus act in a manner prejudicial to the maintenance of public order etc. would not be based on adequate materials. Public safety ordinarily means security of the public or their freedom from danger. Public order also implied public peace and tranquillity. The terrorist and disruptive activities disrupt public peace and tranquillity and affect the freedom of the public from danger to life and property. Disruption means the act of bursting and tearing as under. Disruptive means producing or resulting from or attending disruption. Terrorism means the act of terrorising; unlawful acts of violence committed in an organized attempt to overthrow a government or like purposes. Terrorist means one who adopts or supports the policy of terrorism. The terrorist and disruptive activities are naturally disruptive of public peace, tranquillity and development.\textsuperscript{42}

Public order or law and order — Test to determine

The impact on "public order" and "law and order" depends upon the nature of the act, the place where it is committed and motive force behind it. If the act is confined to an individual without directly or indirectly affecting the tempo of the life of the community, it may be a matter of law and order only. But where the gravity of the act is otherwise and likely to endanger the public tranquillity, it may fall within the orbit of the public order. What might be an otherwise simple "law and order" situation might assume the gravity and mischief of a "public order" problem by reason alone of the manner or circumstances in which or the place at which it is carried out. Necessarily, much depends upon the nature of the act, the place where it is committed and the sinister significance attached to it.

As for example dare-devil repeated criminal acts, open shoot out, throwing bomb at public places, committing serious offences in public transport, armed persons going on plundering public properties or terrorizing people may create a sense of insecurity in the public mind and may have an impact on "public order". Even certain murder committed by persons in lonely places with the definite object of promoting the cause of the party; which they belong may also affect the maintenance of 'public order'.\textsuperscript{43}

Public order or law and order — Substance and not form of language in detention order to be seen - Verbatim use of statutory language that detenu acted in the manner prejudicial to the maintenance of public order not enough.\textsuperscript{44}

'Public order' and 'law and order'— Distinction between — When can preventive detention measures be resorted to — Activities of theft, robbery and ornament snatching by use of knives or guns in particular residential area of a metropolitan city like Delhi consistently for several years

\begin{itemize}
\item \textsuperscript{43} Angoori De. Union of India, (1989) 1 SCC 385, 389, 3 1989 SCC (Cri) 164: AIR 1989 SC 371; 15*; Cri LJ 950.
\item \textsuperscript{44} T. Devakiv. Govt. of T.N., (195 SCC 456, 469, 470; 1990 SCC (Cri) 348: AIR 1990 SC 1086; 1990 Cri LJ 1140.
\end{itemize}
by dangerous and desperate characters, held, disrupt public order and hence detention of such persons justified.

The FIR shows that the petitioner is a desperate and dangerous character. He along with his associates had been involved in series criminal activities like theft, robbery an: snatching of ornaments by the use of knives an: firearms during a span of four years only in particular residential areas of Delhi. While ht and his associates were facing trial or matters were still under investigation, the impugned order of detention under the National Security Act was served on him.

Preventive detention is devised to after protection to society. Any preventive measures even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State. Justification for such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. The Executive is empowered to take recourse to its power of preventive detention in those cases where the Court is genuinely satisfied that no prosecution could possibly succeed against the *detenu* because he is a dangerous person who has overawed witnesses or against whom no one is prepared to depose.

The distinction between the concepts of 'public order' and law and order lies in the degree and extent of the reach of the act upon society. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. What essentially is a problem relating to law and order may due to sudden sporadic and intermittent acts of physical violence on innocent victims in the metropolitan city of Delhi result in serious public disorder? It is the length, magnitude and intensity of the terror wave unleashed by a particular act of violence creating disorder that distinguishes it as an act affecting public order from that concerning law and order. Some offences primarily injure specific individuals and only secondarily the public interest, while others directly injure the public interest and affect individuals only remotely. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order.

The prejudicial activities of the *detenu*, as revealed in the grounds of detention, consist of a consistent course of criminal record. The *detenu* appears to have taken to a life of crime and become a notorious character. The fact that the petitioner and his associates are facing trial or the matters are still under investigation, only shows that they are such dangerous characters that people are afraid of giving evidence against them. The armed hold-up by gangsters in exclusive residential areas of the city where persons are deprived of their belongings at the point of knife or revolver, reveal organised crime. The particular acts enumerated in the grounds of detention clearly show that the activities of the *detenu* cover a wide field and fall within the contours of the concept of public order. The grounds furnished were also neither vague or
irrelevant or lacking in particulars nor inadequate or insufficient for the subjective satisfaction of the detaining authority.45

"Public order" and "law and order" — Creating terror or disorder, based on ideological differences between two communities in a sensitive town where one of the communities predominates, which may lead to communal violence, held, pertains to “public order” and not merely to "law and order".46

The petitioner was detained by an order dated February 29, 1984 of the DM under S. 3 (2) of the National Security Act in order to prevent him from acting prejudicially to maintenance of public order. The grounds mentioned in the detention order were (1) that on April 10, 1981 he along with his companions had surrounded one 'K' and had committed an offence under S. 307, IPC, (2) that on September 27, 1982, he collected goondas in his house and had fired at the police party when it reached to arrest the goondas, (3) that on September 27, 1982 he was arrested and a country-made tamancha and cartridges without license were recovered from his possession, (4) that on January 15, 1983 he along with his brother had shot dead one 'N' and a case under S. 302, IPC was registered against him, (5) that on October 31, 1983 he forced one 69 at the point of revolver to take a nude snap of immoral act being committed by two persons; and (6) that on February 26, 1984 he along with his associates attempted to murder one T by sprinkling kerosene and lighting it with a matchbox. The detenu's father filed a writ petition under Art. 32 challenging validity of his son's detention. Allowing the petition and quashing the detention order the Supreme Court Held:

The allegations mentioned in the grounds of detention do not pertain to 'public order', being not of such nature as to lead to any apprehension that the even tempo of the community would be endangered. Therefore, the detention of the detenu under S. 3(2) of the N.S.A. was not justified. Apart from the first ground being old and stale, it is irrelevant inasmuch as the detenu had been acquitted of the charge before the detention order was passed. The conduct alleged of the detenu in other grounds also, though reprehensible, are not of such nature which could endanger 'public order'.

The difference between law and order situation and maintenance of public order must be kept in mind. The act by itself is not determinant of its gravity. In its quality it may not differ from another but its potentiality may be very different. Therefore, the question whether a man has only committed a breach of law and order or acted in a manner likely to the disturbance of public order is a question of degree of the reach of the act upon society. It is necessary in each case to examine the facts to determine, not the sufficiency of the grounds or the truth of the grounds but nature of the grounds alleged and see whether these are relevant or not for considering whether the detention of the detenu is necessary for maintenance of public order.47

Similarly and continuous repetition of the prejudicial act or omission whether essential — Bihar Control of Crimes Act, 1981 (7 of 1981), Ss. 2(d) (i), (ii) and (iv) and 12 — Scope and interpretation of — Three separate incidents set out in grounds of detention — First incident relating to clause (i) second relating to clause (iv), and third again relating to clause (i) of S. 2 (d) though committed after a lapse of 8 years — On facts held (per majority), detenu not 'anti-social element' within meaning of S. 2 (d) and therefore, detention order under S. 12 invalid. The petitioner along with others was committed to the Court of Session for being tried for offences under S. 302 read with Ss. 120-B, 386 and 511, IPC. During pendency of the said trial the petitioner obtained from High Court an order for his enlargement on bail. Before the petitioner could furnish bail and secure his release from jail, the D.M. passed on August 16, 1983 the impugned order of his detention under S. 12 of the Bihar Control of Crimes Act read with Bihar Government Notification No. H(P) 6844, dated June 20, 1983. In the grounds of detention, the D.M. relied on the following three incidents to hold him an 'anti-social element' (i) that on 15, 1975 the petitioner along with his associates had gone to the shop of a cloth dealer and had forcibly demanded subscription at the point of a gun, (ii) that on June 17/18, 1982, the petitioner was found teasing and misbehaving with females returning from a cinema hall, and (iii) that the criminal case referred to earlier was pending against him, Held:

Per Venkataramiah, J.

The word 'habitually' used separately in (i), (ii) and (iv) of S. 2(d) means 'repeatedly' or 'persistently'. It implies a thread of continuity stringing together similar repetitive acts. Repeated, persistent and similar, but not isolated, individual and dissimilar acts are necessary to justify an inference of habit. It connotes frequent commission of acts or omissions of the same kind referred to in each of the said sub-clauses or an aggregate of similar acts or omissions. Absence of the word 'habitually' in clauses (iii) and (v) of S. 2(d) suggests that in order to treat a person as 'anti-social element', under clauses (iii) and (v) a single act or omission referred to therein may be enough, whereas in the case of clauses (i), (ii) and (iv) there should be a repetition of acts or omission of the same kind referred to therein. If the acts or omissions in question are not of the same kind or even if they are of the same kind when they are committed with a long interval of time between them they cannot be treated as habitual ones. Commission of an act or omission referred to in one of the clauses (i), (ii) and (iv) and of another act or omission referred to in any other of the clauses of S. 2 (d) would not be sufficient to treat a person as an 'anti-social element'. A single act or omission falling under clause (i) and a single act or omission falling under clause (iv) of S. 2(d) cannot, therefore, be characterised as a habitual act or omission referred to in either of them.

In the present cases the detenu cannot be called an 'anti-social element' as defined by S. 2(d) and therefore, the impugned order of detention could not have been passed under S. 12. In the first two incidents referred to in the grounds of detention, the detaining authority failed to mention how those criminal cases ended. If they had ended in favour of the detenu finding him clearly not guilty, they cannot certainly constitute acts or omissions habitually
committed by the *detenu*. Moreover, the said two incidents are of different kinds altogether. Whereas the first one may fall under clause (i), the second one falls under clause (iv) of S. 2(d). They are, even if true, not repetitions of acts or omissions of the same kind. Although the third ground which is based on the pending Sessions is of the nature of acts or omissions referred to in clause (0 but the interval between the first and the third grounds is nearly eight years and cannot therefore make the *detenu* a habitual offender of the type falling under-clause (i) of S.2(d).

Per Chinnappa Reddy, J. (concurring)

I entirely agree with my brother Venkataramiah, J, both on the question of interpretation of the provisions of the Bihar Control of Crimes Act, 1981 and on the question of the effect of the order of grant of bail in the criminal proceeding arising out of the incident constituting one of the grounds of detention. Per A.P, Sen, J. (concurring)

The Bihar Act appears to be based on the English Prevention of Crime Act, 1908. But the scheme under the English Act is entirely different where a person has to be charged at the trial of being a habitual criminal. Therefore, the considerations which govern the matter in case of the English Act do not arise in case of preventive detention under S. 12(2) of the Act.

The word 'habitually' means by force of habit. It is the force of habit inherent or latent in an individual with a criminal instinct, with a criminal disposition of mind, that makes a person accustomed to lead a life of crime posing danger to the society in general. If a person with criminal tendencies consistently or persistently or repeatedly commits or attempts to commit or abets the commission of offences punishable under Chap. XVI or Chap. XVII of the Penal Code, he should be considered to be an 'antisocial element'.

It is not required by clauses (i), (ii) and (iv) of S. 2(d) that the nature and character of the anti-social acts should be the same or similar. What have to be repetitive are the anti-social acts. It is not possible to accept the view that the commission of an act referred to in one of the clauses (i), (ii) or (iv) and any other act or omission referred to in any other of the clauses of S. 2(d) would not be sufficient to treat a person as an 'antisocial element'.

Section 12(2) should not be confined in its operation against habitual criminals who have a certain number of prior convictions for offences of the 'character' specified. The definition of 'anti-social element' in S. 2(d) nowhere requires so.48

Basis of detention – Public order or law and order – Even a single act or omission may disturb public order –

But where alleged single act of assault committed on account of business rivalry, held on facts, the act pertained to disturbance of law and order and not public order – National Security Act, 1980, S. 3(2)

The appellant was detained under S. 3(2) of the National Security Act. In the
grounds of detention it was inter alia stated that the appellant used to secure
government contracts by terrorising other tenderers, that when the offer of the
complainant-tenderer was accepted the appellant along with his companions
had attacked him by throwing hand-grenade and firing gunshots causing
commotion, traffic obstruction and disturbance of public tranquillity (though
the complainant escaped unhurt), that pursuant to FIR of the appellant a
charge-sheet had been put up against him, and that in case of his release on
bail from jail, there was possibility of his again acting in a manner prejudicial
to the maintenance of public order to prevent which it was necessary to detain
him. The High Court held that the alleged act was intended to teach a lesson
to the complainant and to act as a warning to prospective tenderers in future
who may not dare to avail of the opportunity to submit their tenders against
that of the appellants and that the impact and reach of the act went beyond
the individual and affected the community of contractors. Accordingly the
High Court upheld the order of detention. Allowing the detenu’s appeal the
Supreme Court
The alleged act of assault by firearms, which was confined to the complainant
alone and not to others, infringed law and order. The reach and effect of the
act was not so extensive as to affect a considerable number of members of the
society. The act did not disturb public tranquillity nor did it create any terror
or in the minds of the people of the locality nor did it affect in any manner the
even tempo of the life of the community. The criminal act emanated from
business rivalry between the detenus and the complainant. Therefore such an
act cannot be the basis of subjective satisfaction of the detaining authority to
pass an order of detention on the ground that the impugned act purports to
affect public order. Moreover, no injury caused to the person of the
complainant by the appellants nor any damage was caused to his car though
hand-grenade was alleged to have been thrown on the car.

A solitary act of omission or commission can be taken into
consideration for being subjectively satisfied, by the detaining authority to
pass an order of detention if the reach, effect and potentiality of the act is such
that it disturbs public tranquillity by creating terror and panic in the society
or a considerable number of the people in a specified locality where the act is
alleged to have been committed. Thus it is the degree and extent of the reach
of the act the society which is vital for considering the question whether a
man has committed only a breach of law and order or has acted in a manner
likely to cause disturbance to public order.\textsuperscript{49}

Public order — Satisfaction regarding breach of

Absence of allegation regarding disturbance of public order in FIR
lodged in connection with criminal case against detenu — Held, not material
where detaining authority had additional material, such as supervision note
of police, which satisfied him about apprehension of breach of public order.\textsuperscript{50}

Public order — Whether detenu's action prejudicial to maintenance of public order or law and order —

Depends upon facts and circumstances of the particular case— National Security Act, 1980, S. 3(2)

Conceptually there is difference between law and order and public order but what in a given situation may be a matter covered by law and order may really turn out to be one of public order. One has to turn to the facts of each case to ascertain whether the matter relates to the larger circle or the smaller circle. An act which may not at all be objected to in certain situations is capable of totally disturbing the public tranquility. When communal tension is high, an indiscreet act of no significance is likely to disturb or dislocate the even tempo of the life of the community. An order of detention made in such a situation has to take note of the potentiality of the act objected to. No hard and fast rule can really be evolved to deal with problems of human society. Every possible situation cannot be brought under watertight classifications and a set of tests to deal with them cannot be laid down. As and when an order of detention is questioned, it is for the court to apply the well known tests to find out whether the impugned activities upon which the order of detention is grounded go under the classification of public order or belong to the category of law and order.

The reference to Dr Allen's classification in Pushkar Mukherjee case, to the effect that some offences primarily injure specific persons and only secondarily the public interest while others directly injure the public interest and affect individuals only remotely, was intended to bring into bold relief the basic distinction. The guidelines indicated in that judgment falls in line with the general principles adopted by Supreme Court in several authorities. The criticism against Pushkar Mukherjee case, on ground that the test laid down by Dr Allen was not applicable to judge the validity of a detention order, is, therefore, unwarranted.51

Any disorderly behaviour of a person in the public or commission of a criminal offence is bound to some extent affect the peace prevailing in the locality and it may also affect law and order but the same need not affect maintenance of public order. There is basic difference between 'law and order' and 'public order'. The question whether a man has only committed a breach of law and order or has acted in a manner likely to cause disturbance of the public order, is a question of degree and the extent of the reach of the act upon the society. A solitary assault on one individual can hardly be said to disturb public peace or place public order in jeopardy so much as to bring the case within the purview of the Act providing for preventive detention. Such a solitary incident can only raise a law and order problem and no more. In the present case there is no material on record to show that the reach and potentiality of the single incident of attempted murderous assault on the Minister was so great as to disturb the even tempo or normal life of the community in the locality or disturb general peace and tranquillity or create a sense of alarm and insecurity in the locality. Though in the grounds of

detention the detaining authority had stated that by committing this grave
offence in public, in broad daylight, the detenu created a sense of alarm, scare
and a feeling of insecurity in the minds of the public of the area and thereby
acted in a manner prejudicial to the maintenance of public order which
affected even tempo of life of the community, but mere repetition of these
words in the grounds are not sufficient to inject the requisite degree of quality
and potentiality in the incident in question. Thus the solitary incident as
alleged in the ground of detention is not relevant for sustaining the order of
detention for the purpose of the preventing the petitioner from acting in a
manner prejudicial to the maintenance of public order.52

Public order — Dangerous person under S. 2(c) of Gujarat PASAA

Criminal cases against the detenu under Chapter XVI or XVIIIPC or
Chapter V of Arms Act referred to in grounds of detention, in respect of
which detenu has already been acquitted by court, cannot be taken into
consideration for deciding that the detenu was a dangerous person — Cases
under S. 135 of Bombay Police Act, referred to in the grounds, being not
covered by S. 2(c). of Gujarat PASAA, not relevant — Remaining cases
against, the detenu, referred to in the grounds, being still under investigation
and not yet decided, not sufficient for the detaining authority's satisfaction
that the detenu was a dangerous person — Gujarat Prevention of Anti-Social
Activities Act, 1985, S. 2(c).53

Incidents referred to in the grounds relating to private individuals—
Grounds not referring to any dangerous, harmful or adverse act or alarm
which gives rise to a feeling of insecurity for the general public amongst the
persons of a locality — Held, on facts, the incidents pertained to disturbance
of law and order — Non-application of mind — Gujarat Prevention of
Anti-Social Activities Act, 1985, Ss. 3(l) and 2(c).

The criminal cases against the detenu mentioned in the grounds of
detention were confined to certain private individuals. There was nothing in
this case to show that the petitioner was a member of a gang engaged in
criminal activities systematically in a particular locality which created a panic
and a sense of insecurity amongst the residents of that particular area in
consideration of which the impugned order was made. The alleged activities
of the detenu did not affect adversely or tend to affect the even tempo of life of
the community. They merely related to law and order problem. Their reach
and effect was not so deep as to affect the public at large and they did not in
any way pose a threat to the maintenance of public order. An act may create a
law and order problem but such an act does not necessarily cause an
obstruction to the maintenance of public order. So there has been complete
non-application of mind by the detaining authority before reaching a
subjective satisfaction to make the impugned order of detention.54

Cri LJ 1140.
(Cri) 679.
(Cri) 679.
Merely because the petitioner is a bootlegger within the meaning of S. 2(b) of the Act, he cannot be preventively detained under the Act. Under subsection (4) of S. 3 of the Act a bootlegger or a dangerous person or a drug offender shall be deemed to be acting in a manner prejudicial to the maintenance of public order; but such deeming provision will not be attracted unless the activities of the person concerned affect adversely or are likely to affect adversely the maintenance of public order. This in the present case the detaining authority has failed to substantiate.

Assaulting the contractor with a view to kill him on his refusal to pay the fees — Threatening shopkeepers in market with revolver in hand to kill if they fail to pay the fees as a result of which shops closed down— A contractor and a shopkeeper lodging report with police— Held on facts, incidents maintenance of public order — National Security Act, 1980, S. 3(2)

The demand of fees for goondagardi (chauth) from the contractor of a mango grove and the attack launched on him would show that it was not a case of singling out a particular contractor for payment of chauth but a demand expected to be complied with by all owners or contractors of mango groves in the locality. In such circumstances, the demand made and the attack launched would undoubtedly cause fear and panic in the minds of all the owners and contractors of mango groves in that area and this would have affected the even tempo of life of the community.

Similarly as regards the incident of demanding Rs 10,000 from a shopkeeper and threatening him that unless the money was paid on the following day or the day after the shopkeeper would be killed, about which the shopkeeper had informed the police and a case was registered under S. 506 IPC The demand had been made as part of a scheme to extort money from all the shopkeepers under a threat that their continuance of business and even their lives would be in danger if chauth was not paid. The demand would have certainly made all the shopkeepers in that locality feel apprehensive that they too would be forced to make payments to the detenu-petitioner and that otherwise they would not be allowed to run their shops.

The third incident of threatening the shopkeepers in the market with revolver in hand that if any one failed to pay "chauth" he would not be allowed to open his shop and he would have to face the consequences, on account of which the shopowners downed the shutters of their shops, cannot be considered as merely causing disturbance to the law and order situation but must be viewed as one affecting the even of life in the market.

In Gulab Mehra case, no shopkeeper had come forward to complain about the detenu and only a picket employed at the police station had made a report. But in the present case specific reports had been given to the police by the contractor and a shopkeeper from whom Rs 10,000 had been demanded.

Therefore, the decision in Gulab Mehra cannot be of any avail to the detenu-petitioner.56

Such act being calculated to disturb public peace and tranquillity, held, pertains to public order and not merely law and order.57

Neither maintenance of public security nor maintenance of law and order can justify detention under S. 3(2) of National Security Act, 1980 (65 of 1980).58

On facts held, activities of the detenu pertained to disturbance of public order.

The agitation on the issue of foreigners in Assam, which has been going on for years, has taken an ugly and serious turn and the statements of facts made in second and third paragraphs of the Grounds of Detention in the prevalent circumstances relate to the maintenance of public order and not merely law and order.59

Public order — fermenting communal feelings

Actions undermining public faith in police administration cause prejudice to maintenance of public order — Such attempts made at the time of communal tension affects maintenance of public order.

An order of detention was passed under S. 3(2) of the National Security Act on April 15, 1988 against the petitioner, who is a bachelor and does not own any property. In the grounds of detention it was stated that a cow belonging to Muslims was diverted by some undesirable elements towards the place where religious celebrations in connection with the Muslim festival 'Shabebarat' was going on in the night of April 2/3, 1988. At this the petitioner came to the stage, got excited and spread the rumour that "the police had not made any arrangements". It was stated that the cow belonged to the Hindus and had been deliberately sent inside the festival and "other provoking" things. Due to the aforesaid, the people started running and communal feelings got aroused. Again on April 9, 1988, it was stated, the petitioner had "provoked some persons" of the Muslim community by saying that "the administration even now has not allowed to get a loudspeaker fixed here and all of you are silent, get a loudspeaker on the mosque and we will see. I am with you" and also saying that on the occasion of "Shabebarat? Hindus had deliberately "sent their cow on the road" for their festive celebrations and the "people are silent". He had also said about teaching "them" a lesson. It was stated that due to the "aforesaid bad act" communal feelings got aroused in the city and fear and terror got spread, and in this way the petitioner had done an act which was "prejudicial to maintenance of public law and order" and as such there was possibility of the petitioner doing such an act, and therefore, in order to restrain the petitioner from doing so, it was necessary to detain him. Held:

The difference between public order and law and order is a matter of degree. If the morale of the police force or of the people is shaken or undermined by making them lose their faith in the law-enforcing machinery of the State then prejudice is occasioned to maintenance of public order. Such attempts or actions which undermine the public faith in the police administration at a time when communal tensions are high, affects maintenance of public order and as such conduct is prejudicial. Therefore, the contention that the grounds of detention were not relevant to the order of detention under the Act cannot be accepted.\(^\text{60}\)

Public order or law and order — Act of throwing bomb at election meeting pertains to public order problem — Hence detention order valid.\(^\text{61}\)

Public order or law and order — Commission of any criminal offence such as selling liquor in contravention of Prohibition Act by itself would not affect public order

There is a wide gap between law and order and public order. The criminal offence may relate to the field of law and order but such an offence would not necessarily give rise to a situation of public order. Depending upon peculiar situations an act which may otherwise have been overlooked as innocuous might constitute a problem of public order. Selling of liquor by the petitioner would certainly amount to an offence under the Prohibition Act but without something more would not give rise to a problem of public order. Similarly commission of any other criminal offence, even assault or threat of assault, would not bring the matter within the ambit of public order.\(^\text{62}\)

Public order or law and order — Detaining authority's apprehension regarding breach of public order by the \textit{detenu} normally not open to judicial review.

Throwing bomb on a person and assaulting another amongst the large gathering witnessing a cultural programme at dead of night on one occasion and opening of gun fire in a thickly populated residential area on another occasion causing panic and alarm in the area, held, amounted to breach of public order as the incidents disturbed the tranquillity and the even tempo of life of public.\(^\text{63}\)

Public order or law and order — \textit{Detenu} alleged to be a bootlegger engaged in unlawful storing and selling liquor and causing injuries to innocent persons of the locality by using lethal weapons — Six criminal cases registered against the \textit{detenu}, of which two cases ended in acquittal? three cases pending trial and the remaining case pending inquiry — Held, sufficient and adequate material not available for holding that the alleged prejudicial activities of the \textit{detenu} had either affected adversely or likely to affect


adversely maintenance of public order — Gujarat Prevention of Anti-Social Activities Act, 1985, Ss. 3(1) and 4(3).64

Public order or law and order- Grounds of detention alleging commission of offences by detenu of the nature ordinarily covered by Ss. 307, 504 and 506, IPC — Detenu a minor school-going boy at the time of his detention — Held, activities of the detenu pertained to breach of law and order and not public order — Having regard to the nature of offences and age of the detenu, held, order of detention cannot be sustained — J & K Public Safety Act, 1978, S, 8

The first ground of detention was that the detenu had attacked a bus conductor with a dagger with the intention to kill him and caused injuries to his person and the second ground was that he had threatened a lemon vendor with a dagger saying "by demanding money you are inviting your death". In respect of each incident set out in the grounds FIRs had been lodged but the D.M. passed the impugned order of detention under S. 8 of the J & K Public Safety Act. Held:

Preventive detention measures can be resorted to where a criminal conduct cannot be easily prevented, checked or thwarted, but every minor infraction of law cannot be upgraded to the height of an activity prejudicial to the maintenance of public order. In the present case there is no indication that witnesses were not forthcoming in respect of the alleged infraction of law and why the normal investigation was not pursued. Non-application of mind of the detaining authority becomes evident from the frivolity of grounds on the detention order was founded.

A greater infirmity which struck at the root of the detention order was that when the detenu was arrested and detained by the impugned order, he was a school-going boy of around 17 years. It passes comprehension to believe that he can be visited with drastic measure of preventive detention. Therefore, in the facts and circumstances of this case the detention order was wholly unwarranted and deserved to be quashed.65

Public order or law and order — Incident of murder of complainant’s brother by gunshot at night, held, affected law and order but incidents of firing on complainant and his companions in public street during daytime causing death of one of them and of firing on an undertrial prisoner in court compound, causing injuries, held, affected public order.66

Public order or law and order problem — What constitutes public order — Isolated criminal case — Policemen arrested on charge of committing cognizable offence under S. 392/34 IPC with the assistance of a member of public — After their release on bail and during pendency of investigation, detention order under S. 3(2) of National Security Act issued on ground that commission of the heinous crime by police


personnel themselves ('created a sense of insecurity in the minds of public at large and is prejudicial to the maintenance of public order" - Held, the offence involved law and order problem and did not disturb public order — Hence order of detention quashed.

The offence was committed by two misguided policemen under the cover of darkness with the assistance of a member of the public. It was certainly suicidal to those two police personnel. But it seems to have no connection whatsoever to disturb the 'public order' having regard to the circumstances of the case. It is an isolated criminal case with no sinister significance attached to it.67

Disturbance of public order or law and order — Allegation that detenu was caught with foreign liquor without any pass, permit or licence or that detenu was of high-handed and fierce in nature causing terror to public or allegation of minor incidents of beating by the detenu — Held, allegations do not establish disturbance of public order — Gujarat Prevention of Anti-Social Activities Act, 1985, S. 3(1) and (4).

The alleged offence of the detenu being caught with bottles containing foreign liquor without any pass, permit or licence has no bearing on the question of maintenance of public order.

The allegation of the detenu being of highhanded and fierce in nature may give rise to a question of law and order but, surely, they have nothing to do with the question of public order. A person may be very fierce by nature, but so long as the public generally are not affected by his activities or conduct, the question of maintenance of public order will not arise.

The alleged incidents of beating by the detenu do not have any bearing on the maintenance of 'public order'. The petitioner may be punished for the alleged offences committed by him but, surely, the acts constituting the offences cannot be said to have affected the even tempo of the life of the community.68

Public order or law and order problem — Commission of non-cognizable offence of breaking glass screens of bus and abusing its driver and conductor alleged in two separate incidents — But in both the incidents the offence was actually directed against the same person, who was the owner of the bus and on whose information or complaint the cases were registered against the detenu — Presence of passengers in the bus at the time of the incident not alleged — Held on facts, the acts alleged did not affect public order — National Security Act, 1980, S. 3(2)

The first two grounds which pertain to the commission of non-cognizable offences have no rational nexus relatable to the maintenance of public order. The alleged attacks were directed against the same individual and, even according to the police; they constituted merely offences of a non-cognizable nature. In the facts of the case, it is difficult to impart to these acts,

which were liable to be dealt with under the ordinary laws of the land, a "public order" dimension within the meaning of and for purposes of the extraordinary law of preventive detention. It is true that the acts themselves, in relation to their effect on public order, which might otherwise be free from the vice of affecting public order, might assume a sinister colour and significance from the circumstances under and the manner in which they are done. What might be an otherwise simple "law and order" situation might assume the gravity and mischief of a "public order" problem by reason alone of the manner or circumstances in which or the place at which it is carried out.69

SUBJECTIVE SATISFACTION AND JUDICIAL REVIEW

Factors influencing formation of — Inference can be drawn from past conduct and antecedent history of detenu — Government's confidential guide-lines regarding the authority's satisfaction have no binding force and failure of its strict compliance would not constitute mala fide action — Administrative Law.

The detaining authority has of necessity to into account all the relevant materials placed before it and after due consideration thereof may justifiably come to the conclusion that the activities of a particular person were such that he had a tendency to repeat his illegal activities. For this purpose the past conduct or antecedent history of a person can appropriately be taken into account by the authority in a detention order.

In the present case the detenu himself admitted in his confession that he has his home in Bombay and business in Muscat, His passport disclosed that he was frequently shuttling between Muscat and India, Admittedly he smuggled the Palladium in question in order to make profit by selling it to customers in India, The detaining authority would be within its jurisdiction to take into consideration all these facts and subjectively come to a satisfaction whether or not the offender may be repeating his activities.70

Tests of validity

There are well recognised objective and judicial tests of the subjective satisfaction for preventive detention. Amongst other things, the material considered by the detaining authority in reaching the satisfaction must be susceptible of the satisfaction both in law and in logic. The tests are the usual administrative law tests where power is couched in subjective language. There is, of course, the requisite emphasis in the context of personal liberty. Indeed the purpose of public law/ and the public law courts is to discipline power and strike at the illegality and unfairness of government wherever it is found. The sufficiency of the evidentiary material or the degree of probative


criteria for the satisfaction for detention is of course in the domain of the detaining authority.\textsuperscript{71}

The petitioners were held under S. 3(2) of the National Security Act on the ground that they addressed members of a community in a language inciting them to beat the police and PAC men as a result of which the crowd commenced pelting stones and discharged firearms on the government officials and the police personnel assembled there causing injuries. It was contended that there was no material before the District Magistrate on the basis of which he could form the opinion that the detenus would act in future in a manner prejudicial to the maintenance of public order. Accepting the contention and allowing the writ and appeals the Supreme Court

\textit{Held:}

Preventive detention is not intended as a punitive measure, as a curtailment of liberty by way of punishment for an offence already committed. The power to detain under S. 3 of the National Security Act can be exercised only with a view to preventing a person from acting in a manner which may prejudice any of the considerations set forth in the section. While detaining under S. 3(2) there must be material to show that the detenus would act in the future to the prejudice of the maintenance of public order. Though the satisfaction of the District Magistrate is subjective in nature, but even subjective satisfaction must be based upon some pertinent material. The question is not of sufficiency of that material but of the very existence of relevant material. In the present case even if it is accepted that the detenus did address the assembly of persons and incited them to lawlessness there was no material to warrant the inference that they would repeat the misconduct or do anything else which would be prejudicial to the maintenance of public order. Therefore, the detention orders must be quashed.\textsuperscript{72}

The sufficiency of the materials available to the detaining authority is not to be examined by the court. While considering the writ petition of or on behalf of the detenu the Supreme Court or the High Court does not sit in appeal over the detention order, and it is not for the court to go into and assess the probative value of the evidence available to the detaining authority. Of course, a detention order not supported by any evidence may have to be quashed, but that is not the position here. There was clearly sufficient material before the District Magistrate to justify the forming of his opinion. It was not therefore possible to accept the contention that the ground mentioned for the detention was non-existent.\textsuperscript{73}

Scope of judicial review

The executive authority is not the sole judge of what is required for national security or public order. But the court cannot substitute its decision if


the executive authority or the appropriate authority acts on proper materials and reasonably and rationally comes to that conclusion even though the court might not be in agreement with the same. It is not for the court to put itself in the position of the detaining authority and to satisfy itself that untested facts reveal a path of crime provided these facts are relevant. 74

Scope of judicial review

The subjective satisfaction of the detaining authority as regards the factual existence of the condition on which the order of detention can be made i.e. the grounds of detention constitutes the foundation for the exercise of the power of detention and the court cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining authority is based. Nor can the court, on a review of the grounds, substitute its own opinion for that of the authority. But this does not imply that the subjective satisfaction of the detaining authority is wholly immune from the power of judicial review. It inferentially follows that the subjective satisfaction being a condition precedent for the exercise of the power conferred on the executive, the court can always examine whether the requisite satisfaction was arrived at by the authority; if it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad. The simplest case is where the authority has not applied its mind at all; in such a case, the authority could not possibly be satisfied as regards the fact in respect of which it is required to be satisfied.75

Subjective satisfaction of detaining authority — Scope of judicial review of — Detention order, if made in derogation of the constitutional safeguards and provisions of relevant preventive detention law, liable to be quashed — Court should not be influenced by gnomesomeness of the crime alleged against the detenu — Constitution of India, Arts. 21, 22, 32 — Bihar Prevention of Crimes Act, 1981, Ss. 2(d) and 12(2)

Per Chinnappa Reddy, J. (concurring)

The Constitution of India does not give a carte blanche to any organ of the State to be the sole arbiter in matters of maintenance of security and public order. So it is too perilous a proposition to say that the authorities concerned with the preventive detention must be the sole judges of what the national security or public order requires. The preventive detention is within the judicial scrutiny where courts are required to examine, when demanded, whether the limits set by the Constitution and the Legislature have been transgressed resulting in an excessive detention. While adequacy or sufficiency may not be a ground of challenge, relevancy or proximity are certainly grounds of challenge. It is now well settled that remoteness in point of time makes a ground of detention irrelevant.


Per A. P. Sen, J. (dissenting)

If the persons engaged in anti-social activities seeking to create serious public disorder are being dealt with effectively by ordering their preventive detention and at the same time it is assured that the law would not be used arbitrarily to deprive the citizen of his right to life and liberty, there should not be any objection to the order of preventive detention. Those who are responsible for the national security or for the maintenance of public order must be the sole judges of what the national security or public order requires. Sufficiency of grounds is not for the court but for the detaining authority for the formation of his subjective satisfaction. The power of preventive detention by the District Magistrate under S. 12(2) is necessarily subject to the limitations enjoined on the exercise of such power by Art. 22(5). The Court must be circumspect in striking down the impugned order of detention where it meets with the requirements of Art. 22(5) and where it is not suggested that the detaining authority acted mala fide or that its order constituted an abuse of power.

Per Venkataramiah, J.

The Court should examine the case without being overwhelmed by the gruesomeness of the incident involved in the criminal trial.76

The High Court under Art. 226 and Supreme Court under Art. 32 or 136 do not sit in appeal from the order of preventive detention. But the court is only to see whether the formality as enjoined by Art. 22(5) had been complied with by the detaining authority, and if so done, the court cannot question the sufficiency of the grounds of detention for the subjective satisfaction of the authority. However, it is the duty of the Court to see that a law depriving the person of his liberty without the safeguards available even to a person charged with crime is strictly complied with. But individual liberty is to be curtailed by an anticipatory action only in interest of what is enumerated in the statute.77

If subjective satisfaction of detaining authority reached bona fide, court not competent to test adequacy of material on which such satisfaction is reached — It is for detaining authority to be satisfied that statement of detenu’s accomplice provided link between the detenu and receipt of contraband articles and the facts relating thereto even though at a trial conviction may not be possible on the basis of such statement.78

Judicial review of subjective satisfaction — Court cannot question sufficiency of grounds of detention for the subjective satisfaction of the authority.79


Adequacy of subjective satisfaction, not open to be examined by High Court under Art 226, more so where Home Minister carefully considered the entire record before the detention order was passed — High Court can only see if the detention order is based on material on record.\(^{80}\)

The court has to ensure that the order of detention is based on materials before it. If it is found that the order passed by the detaining authority was on materials on record, the Court can examine the record only for the purpose of seeing whether the order of detention was based on no material or whether the materials have rational nexus with satisfaction that public order was prejudiced. Beyond this, the Court is not concerned.\(^{81}\)

Validity — To be judged by an objective approach striking balance between need to protect the community and need to preserve liberty of a citizen having regard to all relevant circumstances and considerations.\(^{82}\)

**DETENTION ORDER**

(a) Competent authority to pass order

Subordinate authority (Dy. Secretary) only authenticating the detention order passed by competent authority (Home Minister) after careful consideration of entire material on record — Detention order, having been taken in the name of Governor and validly authenticated, held, tantamounts to an order of State Government — COFEPOSA Act, 1974 (52 of 1974), S. 3(1).\(^{83}\)

Detaining authority — Competent authority — Administrator of Union Territory, held, competent to pass detention order within his territory — Contention that order can be made only by the Chief Minister though in the name of the Administrator not acceptable — COFEPOSA Act, 1974.\(^{84}\)

Detention order made by an officer especially empowered by the Government to exercise powers under S. 3(1) of COFEPOSA Act but not one empowered to act on behalf of the Government under the Rules of Business — Held, amounts to an order made by the concerned Government itself — Detenu has no right to make representation to the officer passing the detention order before making representation to State Government and Central Government — Hence, failure to in the detention order that detenu had right to make representation to the officer passing the order apart from the State and Central Governments not fatal to the detention — Detaining authority — Representation — COFEPOSA Act, 1974, Ss. 2(a), 3, 8(b) & 11

Article 22(5) does not provide that in addition to his right to make a representation to the State Government and the Central Government, he has a

---

further right under Art. 22(5) to make a representation to the officer himself who made the order of detention.

Under the COFEPOSA Act, an order of detention made by an officer is treated as an order of detention made by the Government itself, although through the instrumentality of an officer empowered under S. 3. Any government has to function only through human agencies, viz. its officers and functionaries.

The resultant position emerging from various provisions of the COFEPOSA Act particularly Ss. 2(a), 3, 8(6) and 11 is that even if an order of detention is made by a specially empowered officer of the Central Government or the State Government, as the case may be, the said order will give rise to the obligations to be fulfilled by the Government to the same degree and extent to which it will stand obligated if the detention order had been made by the Government itself. So it is the concerned government that would constitute the Detaining Authority under the Act and not the officer concerned who made the order of detention, and it is to that government the detenu should be afforded opportunity to make representation against the detention order at the earliest opportunity, as envisaged under Art. 22(5) and not to the officer making the order of detention in order to provide the detenu an opportunity to make a further representation to the State Government and thereafter to the Central Government if the need arises for doing so. Though by reason of S. 3(1) a specially empowered officer is entitled to pass an order of detention, his constitutional obligation is only to communicate expeditiously to the detenu the grounds of detention and also afford him opportunity to make representation to the appropriate governments against his detention. The only further duty to be performed thereafter is to place the representation made by the detenu before the concerned officer or the Minister empowered under the Rules of Business of the government to deal with such representation if the detenu addresses his representation to the officer himself.

Unlike in other Preventive Detention Acts, the COFEPOSA Act does not provide for the State Government or Central Government passing an order approving a detention order made by one of its officers and therefore, the detention order will continue to be operative for the full period of detention unless the order is revoked by the State Government or the Central Government or is quashed by the court for any reason. This is an additional factor to show that an order of detention passed by an officer has the same force and status as an order of detention passed by the government itself.

Even if a detention order is made by an officer who is empowered to act but not having additional empowerment under the Rules of Business of the Government, it will have the effect of making the Government and not the officer the Detaining Authority. This difference in the conferment of powers upon the officers falling under the two categories cannot have any impact on the nature of the detention orders respectively passed by them because the common factor entitling the officers falling in the two classes is their empowerment under S. 3(1) of the Act.

From the practical or pragmatic standpoint also if an order of detention is made by a specially empowered officer and if by the time the
representation of the detenu is received by him, the officer is not there to consider the representation either by reason of his proceeding on leave or falling sick or transfer or retirement or being placed under suspension or death, then the inevitable consequence would be that the detenu has to be invariably set at liberty solely on the ground that his representation had not been considered by the very same officer who had passed the order of detention. The Act and the Constitution do not envisage such situations.  

Any government, be it Central or State, has to function only through human agencies, viz. its officers and functionaries and it cannot function by itself as an abstract body. Such being the case, even though S. 3(1) provides for an order of detention being made either by the Central Government or one of its officers or the State Government or by one of its officers, an order of detention has necessarily to be made in either of the situations only by an officer of the concerned government.

Period of detention

Period of detention is to be decided only at the time of confirming the order of detention under S. 8(f), COFEPOSA after receipt of report of Advisory Board — Neither at the stage of passing the order of detention [S. 3(1)] nor at the time of making reference under S. 8(b) is the period of detention in question — Constitution of India, Art. 22(4) and (7) — COFEPOSA Act, 1974, S. 8(b) and (f).

The obligation to specify the period of detention is upon the appropriate Government and that has to be done at the final stage, after consideration of the report of the Advisory Board. There is no intermediate stage at which any tentative conclusion is to be arrived at by the Government regarding the period of detention though, at any and every stage, the Government has the full liberty to revoke the order of detention. The act of making a reference to the Advisory Board is a mechanical or ministerial act involving no exercise of discretion. The prescription of five weeks in S. 8(b) of the COFEPOSA for the making of a reference to the Advisory Board is with a view to enable fulfilment of the constitutional requirement of Art. 22(4) and not with a view to imposing an obligation upon the Government to consider the question of the length of detention and arrive at a tentative conclusion even at that stage.

Section 3 of the Act does not oblige the detaining authority to specify the period of detention also while passing the order of detention. Under the scheme of the Act, the period of detention must necessarily vary according to the exigencies of each case, namely, the nature of the prejudicial activity.

complained of. It is not that the period of detention must in all circumstances extend to the maximum period of 12 months as laid down in S. 13 of the Act. Maximum period of one or two years, as the case may be, mentioned in S. 10 of COFEPOSA Act, 1974 will run from the date of actual detention and not from the date of the order of detention — If the detenu has served a part of the period of detention, he will have to serve out the balance.

Non-mention of period of detention in the order — Held, not fatal to the order — Detention is taken to be for the maximum prescribed period in such a situation — r.Af. Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Immoral Traffic Offenders and Slum Grabbers Act, 1982, Ss. 3(2), 8, 10, 11 and 13.

The Act nowhere requires the detaining authority to specify the period for which the detenu is required to be detained. As the detention without trial is a serious encroachment on the fundamental right of a citizen, legislature has taken care to avoid a blanket delegation of power to subordinate authorities for an indefinite period by providing in S. 3(2) that the delegation in the initial instance will not exceed a period of three months and it shall be specified in the order of delegation, But if the State Government on consideration of the situation finds it necessary, it may again delegate the power of detention to the aforesaid authorities from time to time but at no time the delegation shall be for a period of more than three months. The period as mentioned in S. 3(2) of the Act thus refers to the period of delegation and it has no relevance at all to the period for which a person may be detained. Therefore, an order of detention is not rendered illegal merely because it does not specify the period of detention. The scheme as contained in other Acts providing for the detention of a person without trial, is similar. In the absence of any period being specified in the order the detenu is required to be under detention for the maximum period prescribed under the Act, but it is always open to the State Government to modify or revoke the order even before the completion of the maximum period of detention. Thus the impugned order of detention is not rendered illegal on account of the detaining authority's failure to specify period of detention in the order.

Subsequent detention under Gujarat Prevention of Anti-Social Activities Act — Detenu remaining in jail custody as well as in detention for about 3 years except released on parole for short periods when no prejudicial activities committed by him — Held, detenu's continued detention illegal — Gujarat Prevention of Anti-Social Activities Act, 1985, Ss. 3(2) and 15(2).

---

Whether the period specified in detention order is a fixed period — Starting with the date specified in the detention order and ending with the expiry of that period or that period is automatically extended by any period of parole granted to the *detenu* — Position where *detenu* is released by High Court decision which is later reversed or if *detenu* absconds for some period and then apprehended — Question referred to a five-Judge Bench of the Court — COFEPOSA Act, 1974 - Parole.92

Communication of the grounds presupposes the formulation of the grounds and formulation of the grounds requires and ensures the application of the mind of the detaining authority to the facts and materials before it, that is to say, to pertinent and proximate matters in regard to each individual case and excludes the elements of arbitrariness and automatism. 93

Application of mind — Subjective satisfaction of detaining authority — Supply of relevant documents to detaining authority — Bail granted to *detenu* with the condition requiring to attend Enforcement Department everyday varied on *detenu*’s application requiring him to attend the Department (as and when required’) — *Detenu*’s application and order thereon for variation of bail condition, held, not vital and material document and hence failure to produce the same before detaining authority before arriving at his subjective satisfaction had not vitiated the detention order.94

Application of mind — In detention order made by Maharashtra Government *detenu* stated to be absconding whereas *detenu* claiming to have obtained an anticipatory bail from Punjab and Haryana High Court — Affidavit on behalf of Maharashtra Government reiterating that *detenu* had absconded from Bombay and could not be traced — No satisfactory material available showing detaining authority’s knowledge about the grant of anticipatory bail — Held, detention order not vitiated.95

Application of mind — Allegation of non-consideration of material documents — Application for relaxation of conditions of bail submitted by *detenu* and order relaxing the conditions of bail passed by Magistrate on the application were not material documents — Hence, non-consideration of the same by detaining authority would not impair the satisfaction arrived at by him and would not vitiate the order — COFEPOSA Act, 1974, S. 3(1). 96

Certainty and precision - Extra verbiage — After recording subjective satisfaction of the necessity for the detention for the purposes of the Act, mere use of some extra verbiage in the detention order would not render the order


ultra vires and void on ground of lack of certainty and precision as to the purpose of the detention.

The appellant/petitioner contended that the impugned order of detention was ultra vires the District Magistrate and void ab initio as there was clubbing of purposes which displayed lack of certainty and precision on the part of the detaining authority as to the purpose of detention.

The purpose of the detention is with a view to preventing the appellant from acting in any manner prejudicial to the maintenance of public order. The prejudicial activities carried on by the appellant answer the description of a 'bootlegger' as defined in S. 2(b) and therefore he comes within the purview of sub-section (1) of S. 3 of the Act, by reason of sub-section (4) thereof. The District Magistrate in passing the impugned order has recorded his subjective satisfaction with respect to the appellant that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, it was necessary to make an order that he be detained. In the accompanying grounds for detention this is the basis for the formation of his subjective satisfaction. The extra words added by way of superscription were wholly unnecessary. In future it would be better for the detaining authorities acting under Ss. 3(1) and 3(2) of the Act, to avoid such unnecessary verbiage.\(^97\)

Detention order challenged on grounds of non-application of mind and failure to consider representation under S. 8(b) of COFEPOSA Act and violation of Art 22(5) — Held, grounds not sustainable — COFEPOSA Act, 1974, S. 8(b). \(^98\)

Held, prevention of smuggling of hashish for which detenu detained under S. 3(1) of COFEPOSA Act, 1974 has nexus with the object sought to be achieved by the Act. \(^99\)

Held, detention order passed mechanically without proper application of mind — Detenus directed to be released.

Detaining authority being aware of the earlier arrest of the detenu, newspaper report about the date of such arrest not relevant for the purposes of subsequent order of preventive detention — Hence mention of incorrect inconsequential and detention order not vitiated on ground of failure to place the newspaper report before the detaining authority.

It was submitted that the detenu's arrest in connection with the Bank dacoity case is shown as August 21, 1988 when he was actually arrested much earlier in connection with the Bank dacoity as appeared in some local newspapers but those newspaper reports are not shown to have been placed before the detaining authority. On this basis, it was argued that the satisfaction reached by the detaining authority had been vitiated.

Held:

The newspaper reports indicating that the detenu was already in custody could at best be relevant only to show the fact that he was already in detention prior to the making of the detention order. Those reports were not relevant for the satisfaction needed to justify making of the detention order. The detaining authority's satisfaction was to be formed on the basis of material relevant to show the detenu's activities requiring his preventive detention with a view to prevent him from acting in a prejudicial to the maintenance of the public order. 100

Contention that persons apprehended on charge of carrying contraband narcotic drugs viz. heroin in cars driven by them did not implicate the detenu in transporting and smuggling of drugs — But facts showing that persons were well known to the detenu and detenu knowing fully well that the cars would be used for transporting heroin handed over the keys of the cars to those persons for that purpose — Held, detention order not vitiated on ground of non-application of mind — Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, S. 3(1). 101

From the facts it was quite apparent that the so-called factual misstatements are not mis-statements at all. The High Court rightly held that the alleged mistakes or infirmities were not so material or serious in nature as to vitiate the impugned order of detention. It was not possible to say on a perusal of the grounds that there was no material on which the detaining authority could have acted. The detention order was not challenged on ground of inadequacy or insufficiency of the grounds of detention. 102

Consequently detention order vitiated by non-application of mind — Gujarat Prevention of Anti-Social Activities Act, 1985, Ss. 3(2) and 6.

The requisite subjective satisfaction, the formation of which is a condition precedent to passing of a detention order, will get vitiated if material or vital facts which would have bearing on the issue and weighed the satisfaction of the detaining authority one way or the other and influenced his mind are either withheld or suppressed by the sponsoring authority or ignored and not considered by the detaining authority before issuing the detention order.

Though as per S. 6 of the Gujarat PASAA the grounds of detention are severable and the order of detention shall not be deemed to be invalid or inoperative if one ground or some of the grounds are invalid, the question is whether the detaining authority was really aware of the acquittal of the detenu in the two criminal cases mentioned in the grounds of detention, on the date of passing of the detention order. In the present case at the time of passing the

detention order, the vital fact regarding acquittal of the detenu in two criminal cases had not been brought to the notice of the detaining authority and on the other hand they were withheld and the detaining authority was given to understand that the trial of those cases were pending. The non-placing of the material facts resulted in non-application of mind of the detaining authority to the said fact which vitiated the requisite subjective satisfaction, rendering the impugned detention order invalid.103

Held on facts, order under S. 9(2) passed after considering relevant facts and circumstances — Gujarat Prevention of Anti-Social Activities Act, 1985, S. 9(2).104

Non-application of mind — Retraction of confessional statements made by detenu not referred to in grounds of detention — Held, detention order not vitiated on ground of non-application of mind if subjective satisfaction arrived at on the basis of other independent and objective/actors enumerated in the grounds — COFEPOSA Act, 1974, S. 5-A.

If even ignoring the facts stated in the confession by the detenu the inference can still be drawn from other independent and objective facts mentioned in the grounds, then the order of detention cannot be challenged merely by the rejection of the inference drawn from confession. In the present case the authorities came to the conclusion that the detenus were engaged in smuggling relying on several factors viz., the search and seizure in detenu's room and recovery of gold biscuits, the detene's failure to explain the importation of those gold biscuits, the secretive manner in which the gold biscuits were kept, the connection with various dealers and the statements of the employees of the dealers that the detenus used to come with gold bars etc. These materials were in addition to the statements and confessions made by the detenus under S. 108 of the Customs Act. So even if those statements which were retracted as such could not be taken into consideration, there are other facts independent of the confessional statement as mentioned hereinbefore which can reasonably lead to the satisfaction that the authorities have come to. In view of S. 5-A of the COFEPOSA Act there was sufficient material to sustain other grounds of detention even if the retraction of confession was not considered by the authorities.105

There would be vitiation of the detention on grounds of non-application of mind if a piece of evidence, which was relevant though not binding, had not been considered at all. If a piece of evidence which might reasonably have affected the decision whether or not to pass an order of detention is excluded from consideration, there would be a failure of application of mind which, in turn, vitiates the detention. The detaining authority might very well have come to the same conclusion after considering

this material; but in the facts of the case the omission to consider the material assumes materiality. 106

Bail applications in pending criminal case and applications to Collector of Customs made by detenu and his associate in which they had retracted their earlier confessional statements and recovery of gold and foreign currency not placed before detaining authority — Held, in absence of relevant material before the detaining authority, order of detention vitiated by non-application of mind — COFEPOSA Act, 1974, S. 3(1). 107

Sita Ram Sonani v. State of Rajasthan, 1985 Raj LR 883, reversed

Non-application of mind — Counter-affidavit stating that when detenu appeared before authorities for recording his statement under S, 108 of Customs Act, he was detained only after recording his statement, that sufficient grounds for detention existed, that detaining authority formed his subjective satisfaction after carefully scrutinising all relevant documents and facts of the case — Accordingly held, detention order not illegal or bad and nor vitiated by non-application of mind or non-consideration of relevant materials. 108

Non-application of mind — Detention order verbatim reproduction of dossier submitted by SSP to the detaining authority (D.M.) requesting detention of the petitioner-detenu — Record not showing detaining authority’s awareness of the fact that detenu was already in custody in connection with a criminal case at the time of passing detention order — Held, detention order vitiated on ground of non-application of mind to the question whether the order was necessary despite the detenu being already in custody. 109

Non-application of mind — Detenu an undertrial prisoner arrested in connection with the incidents referred to in grounds of detention and was granted bail when detention order was passed — But detention order having no mention about these facts — Held, detention order vitiated by non-application of mind on the part of the detaining authority while passing detention order — National Security Act, 1980, S, 3(2). 110

Non-application of mind — Separate detention orders made against three detenus — All grounds of detention similar excepting reference to cases registered against each of the detenus showing them as ‘dangerous persons’ within the meaning of S. 2(c) of Gujarat PASAA — Copies of the sheet showing the papers of the secret inquiry against the three detenus enclosed along with the grounds furnished to each of the detenus — Thus all


the cases noted in the enclosed sheet taken into consideration against each of the\textit{detenus} while each \textit{detenu} concerned only with a few of the cases and the remaining cases pertaining to the other \textit{detenus} — Held, orders of detention vitiated by non-application of mind and extraneous considerations viz. incidents other than those shown in the grounds of detention and with which the \textit{detenus} had no direct or indirect connection or participation. — As a result of such extraneous considerations \textit{detenus} also deprived of making effective and purposeful representations — Gujarat Prevention of Anti-Social Activities Act, 1985, S, 3(1) — Constitution of India, An. 22(5).111

Non-application of mind — Supreme-Court's interim order in pending appeal against High Court's quashing of a previous order of detention, against the same \textit{detenu} not considered by detaining authority while making the impugned subsequent order against him — By the interim order Supreme Court had permitted the \textit{detenu} to be at large on condition of his reporting to the police station daily — Held, non-consideration of the interim order which constituted a relevant and important material, fatal to the subsequent detention order on ground of non-application of mind — Plea that the detaining authority is not supposed to collect court proceedings from concerned Government departments before making the detention order strongly deprecated and disallowed — Hence notice under S. 6 and proceedings under S. 7 of SAFEMA against the \textit{detenu}'s brother liable to be quashed — Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, Ss. 2(2) (c), Explanation 2(ii), 6 and 7 — COFEPOSA Act, 1974, S. 3(1)

Absence of consideration of the interim order of the Supreme Court, which is an important document, amounted to application of mind on the part of the detaining authority rendering the detention order invalid. The order of the Court clearly indicated that the Court felt that there was no need to detain the present respondent's brother pending the appeal. If the detaining authority had considered this order, one cannot state with definiteness which way his subjective satisfaction would have reacted. This order could have persuaded the detaining authority to desist from passing the order of detention since the Court had allowed freedom of movement; or the detaining authority could still feel that an order of detention is necessary with reference to other materials which outweigh the effect of the Court's order. In all these cases, non-application of mind on a vital and relevant material need not necessarily lead to the conclusion that application of mind on such materials would always be in favour of the \textit{detenu}. Application of mind in such cases is insisted upon to enable the detaining authority to consider one way or the other, as to what effect a relevant material could have, on the authority that decides the detention.

The contention that the detaining authority is not required to collect all material about any court proceedings etc. from different Ministries or Departments for the purpose of issuance of a detention order, made on behalf

of the Government of India to meet a case that there existed an order of Supreme Court which was a relevant and vital material, betrays an attitude that lacks grace. If the sponsoring authority and the detaining authority are to adopt such cavalier attitude towards orders of courts and of the Supreme Court in particular, will have to be quashed.

Thus the order of detention against the respondent's brother was bad. Since the provisions of SAFEMA cannot be invoked in cases where there is no valid order of detention, the High Court was justified in quashing the notice issued under S. 6 and the proceeding initiated under S. 7 of the SAFEMA against the respondent.112

Non-application of mind – When before making detention order detaining authority had a copy of detenu's application for bail, statement made in grounds of detention that it was likely that the detenu may be released on bail in criminal cases against him, would not indicate that detaining authority proceeding on the assumption that in all cases the detenu had made bail applications though only in one case such application was made – Contention regarding non-application of mind on that basis not sustainable.113

Non-application of mind – When incident, which was the basis of the detention, took place in presence of detaining authority (DM) himself, the detaining authority must form his satisfaction on the basis of his own knowledge – Where instead, detaining authority formed his opinion and passed detention order on mere perusal of the materials, facts and documents placed before him the police, held, the order was by non-application of mind.

In a case where the detaining authority may not be present at the place of the incident or the occurrence, he has to form the requisite opinion on the basis of materials placed before him by the sponsoring authority but if the detaining authority was himself present and was an eye-witness to the occurrence on the basis of which detention order was made, it was imperative for the detaining authority to have honestly and bona fide formed the requisite opinion in making the order of detention on the basis of his own knowledge and perception instead of relying more on the version of the incident as placed before him by the sponsoring authority. In the instant case the detaining authority though present at the scene of occurrence did not support the incident as presented to him by the sponsoring authority. In the circumstances, there was non-application of mind by the detaining authority in making the impugned order of detention.114

Non-application of mind – Where detaining authority relied upon and referred to confessional statement of detenu (as recorded by Collector of Customs under S. 108 of Customs Act in this case) in the grounds of

detention, it is desirable that any retraction made should also be placed before detaining authority at the time of passing detention order — But detention order would not become invalid merely on failure to place such retraction before detaining authority — Even assuming that the ground relating to the confessional statement was inadmissible, order of detention shall be deemed to have been made separately on each of such ground and inadmissibility of one ground will not vitiate the entire order of detention — COFEPOSA Act, 1974, S. 5-A.115

Non-application of mind — 'Withholding of vital fact that detenu had been acquitted in the criminal case referred to in grounds of detention, held, resulted in non-application of mind of the detaining authority to that fact vitiating the order of detention. 116


No chances of detenu's involvement in prejudicial activities in future — Detention under COFEPOSA for involvement in smuggling activities — Goods imported in name of fictitious firms under exemption scheme and sold in local market in violation of condition of import licence to manufacture products with them and export within 6 months thus evading export duty and making profits — Even though term of the licence since expired, detention order cannot be quashed on ground of no more chances of detenu's involvement in smuggling activities.117

Allegation made in grounds of detention different from the statement made in counter-affidavit by detaining authority — Held, amounted to non-application of mind which rendered the detention illegal.118

Detention order passed with due application of mind in regard to grant of bail to the detenu, activities alleged against the detenu grave and prejudicial to security of the State, grounds not vague but specific and allegation that the detenu was arrested on the date of passing the detention order but was lodged in jail after a month unfounded — Held on facts, detention order valid.119

Whether a single solitary act attributed to the detenu warrants an inference that he will repeat his activity in future also and that his detention was necessary to prevent him from doing so in future — Held, an inference in each case will depend on the nature of the act and the attendant circumstances — Where detenu tried to export huge amount of


Indian currency to a foreign country in a planned and premeditated manner, held, such an inference was justified.\textsuperscript{120}

Grounds of detention of detenu-petitioner and his brother identical – Approving authority having before it grounds of detention of petitioner’s brother only – Grounds being identical the authority can be to have applied its mind also to the grounds of detention on the basis of which the petitioner was detained.\textsuperscript{121}

Having regard to the fact that the name mentioned in the order was same as that signed by detenu when the order was served on him and the averments made by the detaining authority in his counter-affidavit, held, name mentioned in the order not wrong. \textsuperscript{122}

Several cyclostyled orders passed – Held, would prima facie show non-application of mind – But this is not a universal rule and would depend on the facts and circumstances of each case. \textsuperscript{123}

Whether detention based on no material – Statements recorded under S. 40(1) of FERA by an officer of Enforcement appointed on ad hoc basis, though not a ‘gazetted officer’ within the meaning of S. 40(1), acceptable in evidence – Such statements can also be treated as statements relatable to S. 39(b) – Therefore, such statements can form basis of the subjective satisfaction of the detaining authority.

It was contended on behalf of the detenu that the impugned order of detention was based on no material on which the detaining authority could have based the subjective satisfaction under sub-sec. (1) of S. 3 of the COFEPOSA Act inasmuch as the person who issued summons and recorded the statements was not a gazetted officer of Enforcement within the meaning of S. 40 of the FERA as at that time he was continuing as an ad hoc appointee to that post. It was further contended that even assuming that the statement recorded by such a person could be treated to be statements falling under S. 39(b) of the Act, it was not possible to say whether the detaining authority would have based his satisfaction upon such material.

Held:

The detaining authority was entitled to rely upon the statements recorded by the said officer under S. 40(1) of the FERA. Even if the officer was not competent to record such statements under S. 40(1) of the FERA, the statements were clearly relatable to S. 39(b) of the Act. It cannot, therefore, be


\textsuperscript{121} Ram Baocchan Dubey v, State of Maharashtra, (1982) 3 SCC 383: 1983 SCC (Cri) 59(2).


said that there was no material on which the detaining authority could have based his subjective satisfaction under sub-sec. (1) of S. 3 of the Act.\textsuperscript{124}

But detention order would not become invalid merely on failure to place such retraction before detaining authority — Even assuming that the ground relating to the confessional statement was inadmissible, order of detention shall be deemed to have been made separately on each of such ground and inadmissibility of one ground will not vitiate the entire order of detention — COFEPOSA Act 1974, S. 5-A — Customs Act, 1962, S. 108. \textsuperscript{125}

Retraction — Consideration of — Detenu’s letter retracting his confessional statement — Not received by detaining authority at the time of passing detention order — Hence non-consideration of detenu's retraction by the detaining authority cannot be a ground for vitiating the detention order.\textsuperscript{126}

Detenu claiming to have communicated the letter of retraction under a certificate of posting — But only a photostat copy of certificate of posting and not that of the letter of retraction sent by the detenu along with his representation to the detaining authority — No letter of retraction also received in the files of customs authorities — Held, the presumption that the letter was posted and in due course reached the addressee, arising from the certificate of posting is only permissible — On facts held, no letter of retraction was posted and question of its non-consideration does not arise — Evidence Act, 1872, Ss. 16 and 114.

The certificate of posting miglU lead to a presumption that a letter addressed to the concerned authority was posted and in due course reached the addressee. But, that is only a permissible and not an inevitable presumption. Neither S. 16 nor S. 114 of the Evidence Act compels the court to draw a presumption. The presumption may or may not be drawn. On the facts and circumstances of a case, the court may refuse to draw the presumption. On the other hand, the presumption may be drawn initially but on a consideration of the evidence the court may hold the presumption rebutted and may arrive at the conclusion that no letter was received by the addressee or that no letter was ever despatched as claimed. In the circumstances of the present case, it is clear that no such letter of retraction was posted as claimed by the detenu.\textsuperscript{127}

When sufficient to snap nexus between the incident and passing of order — No fixed period — Delay of five months satisfactorily explained — Mala fides cannot be inferred — Held on facts, detention order not vitiated on ground of delay — Constitution of India, Art. 22 (5).


Where an unreasonably long period has elapsed between the date of the incident and the date of the order of detention, an inference may legitimately be drawn that there is no nexus between the incident and the order of detention may be liable to be struck down as invalid. But there can be no hard and fast rule as to what is the length of time which should be regarded sufficient to snap the nexus between the incident and the order of detention.

In the present case the lapse of time between the date of the incident and the date of the order of detention has been sufficiently explained by the detaining authority and hence it is not possible to draw the inference of mala fides merely because the order of detention happened to be made about, five months after the petitioner was found carrying foreign marked gold.128 If there is potentiality or likelihood of repetition of prejudicial activities and the delay is not unreasonable, court should not strike down the detention—Long lapse of time between date of search (September 17, 1987) and date of passing order of detention (September 21, 1988) — Absence of nexus between the incident and the detention order alleged — On facts held, delay in passing the order reasonably explained — Hence detention not vitiated on ground of such delay — COFEPOSA Act, 1974, S. 3

It cannot be contended that merely because of the delay in passing the detention order the necessary nexus got severed and that the grounds had become stale and illusory. In appreciating such a contention, the court also has to bear in mind the nature of the prejudicial activities indulged by the detenu and the likelihood of his repeating the same. It is this potentiality in him that has to be taken into consideration and if the detaining authority is satisfied on the available material then on mere delay as long as it is not highly unreasonable and undue the court should not normally strike down the detention on that ground.129

It is not right to assume that an order of detention has to be mechanically struck down if passed after some delay. It is necessary to consider the circumstances in each individual case to find out whether the delay has been satisfactorily explained or not, In the present case the ground which led the District Magistrate to pass the detention order became available in July and the order was passed only in December, The petitioner was in custody and there could not be any apprehension of his indulging in illegal activities requiring his detention until the grant of bail by the criminal court became imminent, Besides, inquiry was also pending. This aspect has been explained in the detention order itself as also by the District Magistrate in his affidavit and it is clear that there has been no undue delay on his part in taking action, Besides, the distinction between such delay and the delay in complying with the procedural safeguards of Art. 22(5) is also relevant here especially because of the background of the petitioner's antecedents taken into account by the


detaining authority showing his propensity for acts which were likely to disturb public order.\(^{130}\)

There had been delay in passing the detention order and the delay had not been satisfactorily explained. The ground mentioned in the detention order could not be a proximate cause for a sudden decision to take action under the National Security Act and this also vitiates the order.\(^{131}\)

The appellant-detenu was intercepted at Trivandrum Airport and was arrested and produced before Chief Judicial Magistrate on January 31, 1988 on charge of smuggling of gold. The Magistrate remanded him to judicial custody till February 12, 1988 when 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 “February 25, 1988”. The Collector of Customs sent the proposal for detention on May 27, 1988 along with the draft grounds. In the Screening Committee meeting held on June 21, 1988 the detenu’s case was considered to be fit for detention under the COFEPOSA Act. The impugned order of detention was thereupon passed on June 25, 1988 under S. 3(l)(i) of COFEPOSA Act by the Home Secretary, Government of Kerala with a view to prevent the appellant from smuggling gold. It was contended 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.

Held:

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 the present case it was submitted for the State that as a thorough investigation of the case was required on the part of the customs authorities both for the proceedings under the Customs Act and for prosecution in the criminal court, the proposal could not have been hurried through. These facts have not been shown to be untrue. Considering the given explanation of the period in between the interception on January 31, 1988 and the order of detention on June 25, 1988 the nexus was not snapped and the ground was not rendered stale and the order of detention was not rendered invalid thereby.\(^{132}\)

Delay in passing detention order – Inordinate and unexplained delay, held on facts, vitiates the detention order.\(^{133}\)

On facts held, the delay satisfactorily explained – Hence detention order not vitiates on ground of delay in its passing.\(^{134}\)

---

132. M. Ahamedkutty v. Union of India, (1990) 2 SCC 1, 6 to 9; 1990 SCC (Cri) 258.
Detention under COFEPOSA Act preceded by arrest under Foreign Exchange Regulation Act some eight months earlier — Delay in passing of detention order not occasioned by any laxity but result of full and detailed consideration of facts and circumstances of the case by various departments involved — Detention order passed after full application of mind — Held, detention valid.135

Delay in passing detention order and arresting the detenu — When vitiates detention — Depends upon facts and circumstances — Absence of convincing explanation — Throws doubt on subjective satisfaction of detaining authority.

Some gold biscuits and gold ingots were seized from the residence of the detenu on November 30, 1986 and December 9, 1986. An order of detention was passed under S. 3(1)(iii) and (iv) of the COFEPOSA Act against the detenu on October 7, 1987 but the detenu was arrested only on January 1, 1988. Counter was filed on behalf of the State before the Court stating that the investigating officer had to question a number of persons and to conduct extensive search of various premises in different places in connection with the information gathered during interrogation and the Superintendent of Central Excise issued summons to brothers of the detenu for appearance on March 3 and 10, 1987 but one of the brothers was absconding and that on February 10, 1987 the statement of another person referred to in the statement of the detenu was recorded and that on May 18, 1987 show-cause notices were issued to persons connected with the case and immediately after completion of the investigation the customs authorities sponsored the proposal for detention of the detenu by their letter dated August 26, 1987 and that the proposal was screened by the Screening Committee on September 11, 1987 and thereafter the detention order was passed on October 7, 1987. As regards the delay in securing the detenu by arrest it was explained that the detention order was forwarded to the concerned S.P. for its execution by letter dated October 9, 1987 but that the police executed the order on January 18, 1988. No supporting affidavit had been filed by the S.P. explaining the delay in securing the arrest of the detenu.

Held:

Leaving apart the question of delay in passing the order of detention from the date of the seizure of the gold, the fact remains that the detaining authority has failed to explain the long delay in securing the arrest of the detenu after three months from the date of the passing of the detention order and this non-explanation throws a considerable doubt on the genuineness of the subjective satisfaction of the detaining authority vitiating the validity of the order of detention.

The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and

fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely 'counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the casual connection has been broken in the circumstances of each case.

Similarly, when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in a prejudicial manner. T.A. Abdul Rahman v. State of Kerala, (1989) 4 SCC 741, 748, 749: 1990 SCC (Cri) 76: AIR 1990 SC 225.

Delay in passing, after arrest — Held, would not vitiate the detention if adequately explained by the detaining authority to the Court — But detenu cannot demand such an explanation from the authority — Constitution of India, Art. 22(5).

Delay ipso facto in passing an order of detention after an incident is not fatal to the detention of a person, for, in certain cases delay may be unavoidable and reasonable. What is required by law is that the delay must be satisfactorily examined by the detaining authority, who is under an obligation to satisfy the court as to the causes of the delay to show that there was no infraction of Art. 22(5) of the Constitution. The authority is, however, in no legal liability to tell or satisfy the detenu as to the causes of the delay.

In the present case the delay has been satisfactorily explained by the authority in its affidavit and it has not vitiatted the detention.136

Having regard to the time taken in translating the documents into Hindi and Gurumukhi, held, there were valid and sufficient reasons for the delay — COFEPOSA Act, 1974, S. 3(3). 137

Huge quantity of heroin recovered on July 19 — Persons apprehended examined and their statements recorded on July 20 — Thereafter samples of the contraband drugs taken from each packet sent for chemical examination — Test reports received by customs department on September 29, October 13 and November 15 and then screened by customs officials — After considering all the materials, detention order passed on December 20 —


In the circumstances held, the delay of five months in making the order of detention did not render the detention illegal and bad — Detention order had been made with promptitude considering the relevant and vital facts proximate to the passing of the order — Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, S. 3(1).

The appellant was carrying on the illicit business of importing Indian-made foreign liquor into Godhra in the State of Gujarat where there is total prohibition. A Godhra-bound truck carrying such liquor was intercepted on December 29/30, 1986 and the driver and cleaner of the truck made statements on January 4, 1986 implicating the appellant as the main person. The appellant thereupon absconded and moved for anticipatory bail on January 21, 1987 but no orders were passed as the police made a statement that there was no proposal at that stage to arrest him. On February 2, 1987 the appellant was arrested but later on released on bail. He was prosecuted for various offences under the Bombay Prohibition Act. After a lapse of five months i.e. on May 28, 1987 the D.M., Godhra passed the impugned order of detention and the grounds therefor were served on the appellant on May 30 when he was taken into custody. The immediate and proximate cause for the detention was the aforesaid transportation of foreign liquor on December 29/30, 1986. Incidentally the grounds furnished particulars of two other criminal cases viz. one relating to 142 bottles of foreign liquor recovered from his residence on July 21, 1982 which had ended in his acquittal, the prosecution witnesses having turned hostile and the other relating to recovery and seizure of 24 bottles of foreign liquor from his house on May 30, 1986 which case was still pending. There was also a recital of the fact that he was continuing his business surreptitiously and he could not be caught easily and therefore, unless the order of detention was made he would not stop his illicit business; hence the necessity to detain him under S. 3(2) of the Act. Besides it was further stated: "In order to safeguard the health of the people of Gujarat, for public peace and in the interest of the nation, with a view to stop such anti-national activities ... for the purpose of public order and public peace and in the interest of the State...". The appellant made a representation against his detention to the State Government and the Advisory Board on June 8, 1987 which was rejected on June 12, 1987.

The appellant/petitioner contended that the inordinate unexplained delay of five months in making the impugned order of detention by itself was sufficient to vitiate the order.

Dismissing the appeal and the writ petition of the detenu:

Held:

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 Art. 22(5). The rule as to unexplained delay in taking action is not inflexible. In cases of

mere delay in making of an order of detention under a law like the GOFEPOSA 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 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 is no real nexus between the grounds and the impugned order of detention.

In the present case even though there was no explanation for the delay between February 2 and May 28, 1987 it could not give rise to a 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 impugned order of detention.139

Delay of 11 months in passing — Explanation that investigation took five months to complete and thereafter time taken in processing the records for issuing show-cause notice as Customs Act mandatorily required issuance of such notice within 6 months from the date of detection of the case — Held, explanation not satisfactory — Delay vitiated the order—CQFEPOSA Act, 1974, S. 3

It was not incumbent on the authorities to wait till the issue of the show-cause notice. The need to issue a show-cause notice within 6 months has nothing to do with the processing of the detention papers, Therefore, the explanation is far from satisfactory.140

What amounts to unreasonable delay depends on facts and circumstances of each case — Where reason for the delay is stated to be abscondence of detenu, mere failure on the part of the authorities to take action under S. 7 of National Security Act by itself not sufficient to vitiate the order — But that the police force remained extremely busy in tackling the serious law and order problem then prevailing in the city is not a proper explanation for delay in arresting the detenu — Failure to properly explain the inordinate delay, held on facts, rendered the order bad — National Security Act, 1980, Ss. 3(2) and 7.

An order of detention was passed under S. 3(2) of the National Security Act on April 15, 1988 against the petitioner. However, the petitioner could be arrested only on October 2, 1988. By an affidavit filed on behalf of the District Magistrate, being the detaining authority, it was explained that pursuant to passing of the detention order, the authorities had raided the house of the petitioner to serve the order several times viz. one raid on May 12, 1988

followed by eight other raids up to the end of May 1988 and again on
September 23, 25 and 29, 1988, but the petitioner was not available and the
order could not be served before October 2, 1988. It was stated that during the
period from May to September, 1988 great communal tension was prevailing
in the city, a large number of people were arrested on account thereof, the
entire police force of the city was extremely busy in maintaining law and
order, but the petitioner was all along absconding in order to avoid the
service of the order. In the writ petition under Art. 32, the detention order was
challenged *inter alia* on ground of inordinate delay in arresting the detenu
pursuant to the detention order vitiated the detention. Accepting the first
contention and consequently allowing the writ petition and quashing the
order of detention.

Held:

Preventive detention is a serious inroad into the freedom of
individuals, Reasons, purposes and the manner of such detention must,
therefore, be subject to closest scrutiny and examination by the courts. There
must be conduct relevant to the formation of the satisfaction having
reasonable nexus with the action of the petitioner which are prejudicial to the
maintenance of public order and existence of relevant material in this regard
is subject to judicial review. Actions based on subjective satisfaction are
objective indication of the existence of the subjective satisfaction, Such action
should be with speed commensurate with the situation, though it is not the
law that whenever there is some delay in arresting the subjective satisfaction
of the detaining authority must be held to be not genuine or colourable.
Whether there has been unreasonable delay, depends upon the facts and the
circumstances of a particular situation.

If in a situation the person concerned is not available or cannot be
served then the mere fact that the action under S. 7 of the Act had not been
taken, would not be a ground to say that the detention order was bad. Failure
to take action even if there was no scope for action under S. 7 of the Act,
would not be decisive or determinative of the question whether there was
undue delay in serving the order of detention. In this case even though no
warrant under S. 7 had been issued in respect of the property or person of the
petitioner, it cannot be said that the respondent was not justified in raising the
plea that the petitioner was absconding. The petitioner has no propery and so
no order under S. 7 could be made.

In this case, however, there was no explanation as to why no attempts
had been made to contact or arrest the petitioner during the periods between
April 15 to May 12, 1988 and again between September 29 to October 2, 1988.
That the 'entire police force' was extremely busy in controlling the situation is
not a proper explanation. If the law and order was threatened and prejudiced,
it was not the conduct of the petitioner but because of 'inadequacy5 or
'inability' of the police force of the city to control the situation. To shift the
blame for public order situation and raise the bogey of the conduct of the
petitioner would not be proof of genuine or real belief about the conduct of
the petitioner but only raising a red herring. Thus, by the conduct of the
respondent authorities, there was undue delay not commensurate with the
facts situation in this case. There was no reasonable or acceptable explanation for the delay. In a situation of communal tension prompt action is imperative. It is, therefore, not possible for the Court to be satisfied that the District Magistrate had applied his mind and arrived at the subjective satisfaction that there was real and genuine apprehension that the petitioner was likely to act in any manner prejudicial to public order and that it was necessary to detain the petitioner to "prevent" him from wrongdoing. The condition precedent not being present, the detention order must be quashed and set aside on this ground. 141

Detenu himself absconding and trying to evade the arrest — In the circumstances held, the delay explained and the link between the grounds of detention and the avowed purpose of detention not snapped. 142

When detenu was absconding and could be arrested only when he surrendered after initiating proceedings under Ss. 82 and 83, CrPC, 1973, held, challenge to the detention order on ground of delay in arrest not sustainable — National Security Act, 1980, S. 7(2). 143

On the mere delay in arresting the detenu pursuant to the order of detention the subjective satisfaction of the detaining authority cannot be held to be not genuine. Each case depends on its own facts and circumstances. The court has to see whether the delay is explained reasonably. In the instant case, the delay, if at all, is only about 2 1/2 months and the explanation offered for the delay is reasonable. Abdu Salam v. Union of India, (1990) 3 SCC 15, 22, 23: 1990 SCC (Cri) 451: AIR 1990 SC 1446: 1990 Cri LJ 1502: (1990) 48 ELT 162: (1990) 3 Crimes 82.

Delay in execution of detention order — When caused due to abscondance of the detenu, held, order not vitiated.

The order of detention was passed on June 259 1988 under S. 3(l)(i) of COFEPOSA Act, Grounds of detention were also served on the appellant. On June 27, 1988 the Home Secretary wrote to the Superintendent of Police requesting him to arrange for the immediate execution of the detention order and on July 19, 1988 a teleprinter reminder was sent to the Superintendent, of Police. But on July 27, 1988 the Superintendent of Police, wrote back that the detenu was absconding and his 'present' whereabouts were not known and it was only on 25 1988 that the Superintendent of Police by a wireless message intimated the Home Secretary that the detention order had been served on the detenu on that date. It was contended that there was inordinate and unexplained delay of 38 days in execution of the detention order.

Held:

Where after passing of the detention order 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
ground of delay in execution of the Order. In the facts and circumstances of
the present case there was no inordinate and unexplained delay 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.
However, 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. The State should 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.144

The role of the petitioner and that of the co-accused persons were
identical and the reasonable apprehension as to their future conduct must
depend on the relevant facts and circumstances which differ from individual
to individual. It would have been wrong on the part of the detaining authority
to take a uniform decision in this regard only on the ground that the persons
concerned are all joined together as accused in a criminal case.145

Where the detention orders of co-detenus already quashed by High
Court — Held, not sustainable when detention of the detenu based on
entirely distinct and separate materials including his own confessional
statements.146

The law of preventive detention is the same for the police personnel as
well as for the public. A different standard cannot be applied in respect of acts
individually committed by any police officer. The subjective satisfaction of the
detaining authority with respect to the persons sought to be detained should
be based only on the nature of the activities disclosed by the grounds of
detention. The grounds of detention must have nexus with the purpose for
which the detention is made. 147

(h) Pendency of and liability to criminal prosecution

Pendency of criminal proceedings against detenu — Not a bar to passing
detention order on the basis of proper subjective satisfaction of detaining
authority.

Preventive detention is an anticipatory measure and does not relate to
an offence while the criminal proceedings are to punish a person for an
offence committed by him. They are not parallel proceedings. In the
circumstances the pendency of a criminal prosecution is no bar to an order of
preventive detention, nor is an order of preventive detention a bar to
prosecution. It is for the detaining authority to have the subjective satisfaction

144. M Ahamedkutty v. Union of India, (1990) 2 SCC 1, 9 to 12: 1990 SCC (Cri) 258.
SC 1763: 1990 Cri LJ 1731.
whether in such a case there are sufficient materials to place the person under preventive detention in order to prevent him from acting in a manner prejudicial to public order or the like in future. 148

The jurisdiction to make orders for preventive detention is different from that of judicial trial in course for offences and of judicial orders for prevention of offences. Even unsuccessful judicial trial or proceeding would not operate as a bar to a detention order or render it *mala fide*. A fortiori therefore the mere fact that a criminal prosecution can be instituted cannot operate as a bar against the making of an order of detention. If an order of detention is made only in order to bypass a criminal prosecution which may be irksome because of the inconvenience of proving guilt in a court of law, it would certainly be an abuse of the power of preventive detention and the order of detention would be bad. But if the object of making the order of detention is to prevent the commission in future of activities injurious to the community, it would be a perfectly legitimate exercise of power to make the order of detention. The court would have to consider all the facts and circumstances of the case in order to determine on which side of the line the order of detention falls.

In the present case, the petitioner detenu was caught in the act of smuggling gold and the circumstances in which the gold was being smuggled as also the facts set out in the written statement of the petitioner clearly indicate that the petitioner was engaged in the activity of smuggling gold. Therefore, the order of detention cannot be said to have been passed with a view to subvert, supplement or substitute the criminal law of the land. The order of detention was passed with a view to preventing the petitioner from continuing the activity of smuggling and it was therefore a valid order of detention, Shiv Ratan Makim v. Union of India, (1986) 1 SCC 404, 408, 409: 1986 SCC (Cri) 74: AIR 1986 SC 610: 1986 Cri LJ 813.

Liability to criminal prosecution — Possibility of criminal prosecution or absence of it — Though relevant factor but mere non-consideration thereof would not vitiate the detention order — Detention may instead be based on past conduct and antecedent history of the detenu — Detaining authority's satisfaction about reasonable probability or suspicion of commission of the prejudicial acts by the detenu sufficient justification for the detention — Moreover, a grievous crime against community itself justifies preventive detention — National Security Act, 1980, S.3(2).

Possibility of launching a criminal prosecution or absence of it is not an absolute bar to an order of preventive detention. Failure of the detaining authority to consider the possibility of criminal prosecution being launched before ordering preventive detention may in the circumstances of a case lead to the conclusion that the detaining authority had not applied its mind to the important question as to whether it was necessary to make an order of preventive detention but it cannot invariably render the order of detention

bad on ground of non-application of mind. In this regard the relevant facts and circumstances of the case including the time and place concerned have to be borne in mind.

The anticipated behaviour of a person based on his past conduct in the light of surrounding circumstances may provide sufficient ground for detention. But such conduct should be reasonably proximate and should have a rational connection with the conclusion that the detention of person is necessary. The question of relation of the activities to the detention order must be carefully considered. The grounds supplied operate as an objective test for determining the question whether a reasonably exists between grounds of detention and the detention order or whether some infirmities had crept in. A conjoined reading of the detention order and the grounds of detention is, therefore, necessary.

Executive can take recourse to its powers of preventive detention in those cases where the executive is genuinely satisfied that no prosecution can possibly succeed against the detenu because he has influence over witnesses and against him no one is prepared to depose. However, pusillanimity on the part of the executive has to be deprecated and pusillanimous orders avoided. In the present case prosecution might not be possible to bring home the offender to book as witnesses might not come forward to depose against the detenu out of fear or it might not be possible to collect all necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender beyond reasonable doubt. Further from the nature and contents of the detenu's speeches stated in the grounds of detention there was sufficient justification for the inference that he would repeat such speeches if not preventively detained.

Moreover, when grievous crime against the community was committed it would surely be subject to the penal law and stringent sentences, but at the same time it could be considered unsafe to allow him the opportunities to repeat prejudicial acts during the period the penal process was likely to take.

Considering the relevant facts and circumstances including the time and place, the contents of the detention order and the allegations in the grounds of detention in this case, it is clear that non-registration of any criminal case could not be said to have shown non-application of mind or absence of subjective satisfaction on the part of the detaining authority. 149

It is necessary for the detaining authority to resist the temptation to prefer and substitute, as a matter of course, the easy expedience of a preventive detention to the more cumbersome one of punitive detention. 150

A prosecution or the absence of it is not an absolute bar to an order of preventive detention. What is required is that the detaining authority is to

---


satisfy the Court that it had in mind the question whether prosecution of the offender was possible and sufficient in the circumstances of the case. The normal law is that when an isolated offence or isolated offences is or are committed, the offender is to be prosecuted. But if there be a law of preventive detention empowering the authority to detain a particular offender in order to disable him to repeat his offences, it can do so, but it will be obligatory on the part of the detaining authority to formally comply with the provisions of Art. 22(5). In case of professional criminal or international smuggling, preventive detention instead of criminal prosecution would be justified.\

Possibility of detention under criminal law — Held, not an absolute bar to an order of preventive detention.

A clear distinction has to be drawn between preventive detention in which anticipatory and precautionary action is taken to prevent the recurrence of apprehended events, and punitive detention under which the action is taken after the event has already happened. It is true that the ordinary criminal process of trial is not to be circumvented and short-circuited by apparently handy and easier resort to preventive detention. But the possibility of launching a criminal prosecution cannot be said to be an absolute bar to an order of preventive detention.

Absence of express views in that regard in counter-affidavit filed by the detaining authority immaterial where the satisfaction of the authority in this regard is clearly inferable from the counter-affidavit read as a whole.

(i) Detenu already in jail

When an incident was such that it created communal tension and the authorities were apprehensive of the breaking of a communal riot, such incident in itself may be sufficient and may afford justification for the satisfaction of the detaining authority for the detention of the detenu in order to prevent him from indulging in such activity prejudicial to public order even though, there are no antecedent acts of similar nature or past history of commission of crime by the detenu.

Detaining authority being aware about these facts, concluding that under the normal law detenu may be granted bail and in view of his antecedents regarding drug trafficking, he may be in a position to continue to pursue his nefarious activities — In the circumstances, order of detention cannot be held to be illegal merely because it was passed while detenu was already in jail —

---

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, S. 3 (1).\(^\text{156}\)

The appellants were arrested on charge of commission of offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 and were produced before the Chief Judicial Magistrate next day who remanded them to police custody and thereafter to judicial custody till October 13, 1988. Meanwhile the appellants submitted bail applications but the same were rejected. On October 11, 1988 the Joint Secretary to the Government of India, Ministry of Finance passed orders under S. 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 against the appellants stating that with a view to preventing them from engaging in the transportation and abetting in the export inter-State of psychotropic substances it was necessary to detain and keep them in custody. The order of detention was served on the appellants on October 13, 1988 while they were in custody. The appellants were also served with the grounds of detention inter alia mentioning the fact about the appellants remand to judicial custody till October 13, 1988. The writ petitions under Art. 226 challenging the detention were dismissed by the High Court. It was urged before the Supreme Court that since the appellants were in custody on the date of passing of the detention order, there was no apprehension that the appellants would be engaging in any prejudicial activity and the order for detention of the appellants under S. 3(1) of the Act could not be validly passed. Allowing the appeals

Held:

An order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu was already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu was already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

In the present case there was no material in the grounds of detention showing that the detaining authority apprehended that the further remand would not be granted by the Magistrate on October 13, 1988, and the appellants would be released from custody on that day. On the other hand the bail applications moved by the appellants had been rejected by the Sessions Judge a few days prior to the passing of the order of detention. The grounds

of detention disclose that the appellants were engaged in activities which are offences punishable with imprisonment under the Narcotic Drugs and Psychotropic Substances Act, 1985. It cannot, therefore, be said that there was a reasonable prospect of the appellants not being further remanded to custody on October 13, 1988 and their being released from custody at the time when the order for preventive detention was passed on October 11, 1988. In the circumstances, the order for detention of the appellants cannot be sustained and must be set aside and the appellants should be released forthwith.\(^{157}\)

It is 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.\(^{158}\)

If the only ground or justification for the detention is the apprehension that the detenu was likely to be enlarged on bail, the detention might be rendered infirm on the ground that the detention was solely for the purpose of rendering nugatory the order of bail, the grant of which the detaining authority had then considered quite imminent.

But, where, as here, there are other grounds, the reference by the detaining authority to the prospects of grant of bail could be no more than an emphasis on the imminence of the recurrence of the offensive activities of the detenu. Even a single instance of activity tending to harm "public order" might, in the circumstances of its commission, reasonably supply justification for the satisfaction as to a legitimate apprehension of a further repetition of similar activity to the detriment of "public order".\(^{159}\)

On the basis of facts that remand to judicial custody was for a limited period and that co-detenus had moved bail applications, detaining authority stating in the grounds that there was likelihood of filing of bail application by the detenu also and of his consequent release — In view of the facts and circumstances and statements recorded and disclosed showing abetting and smuggling of goods by detenu, detaining authority also stating in the grounds that unless prevented, detenu would continue to do so in future on being released on bail — Held, detaining authority was aware that detenu was already in jail and on his release on bail he would again indulge in prejudicial activities — Hence detention valid — COFEPOSA Act, 1974, S. 3(1).

Having regard to the material relied upon by the detaining authority it cannot be said that there was no awareness in the mind of the detaining authority about the detenu being in custody and that if he is released on bail he is likely to indulge in the pre-judicial activities. Therefore, the detention was not ordered on the mere ground that he is likely to be released on bail but on the ground that the detaining authority was satisfied that the detenu was

---

likely to indulge in the same activities if released on bail. The contention that
the bail application could be opposed if moved or if enlarged the same could
be questioned in a higher court and on that ground the detention order
should be held to be invalid cannot be sustained in this case. It is not the law
that no order of detention can validly be passed against a person in custody
under any circumstances. Therefore, the facts and circumstances of each case
have to be taken into consideration in the context of considering the order of
detention passed in the case of a detenu who is already in jail.160

An order of detention was passed under S. 8 of the National Security
Act against the detenu on May 3, 1989. The facts referred to in the grounds of
detention were that on the basis of a complaint of theft of electric wires
lodged on February 15, 1989 an FIR was registered against three persons, ‘J’,
‘S’ and ‘M’. From the house of ‘J’ some of the stolen material was recovered
and on his information about the purchaser of such material, the factory of the
detenu was raided. There ‘M’, stated to be servant of the detenu, was found to
be in possession of 20 kg of melted electric wire and that was seized under a
recovery memo. ‘M’ made a confession statement which was recorded in the
recovery memo itself. It was recorded in the recovery memo that ‘M’ had
stated that he had purchased the aluminium electric wires from ‘T’ and ‘S’,
that he had melted and sold the to the detenu and that the said wires could
not be identified after being melted and were used for making utensils
thereafter. The detenu was on May 2, 1989. On the same date the bail
application was moved on his behalf. The detention order stated that the
detenu was likely to be bailed out and was every likelihood that after coming
out of jail he will again indulge in his criminal activities. On this basis the
order stated that the detaining authority was satisfied that the detenu had
been engaged in criminal activities injurious to the maintenance of essential
services and supplies required for public life and that with a view to prevent
him from indulging in such unlawful activities it had become necessary to
keep him under detention.

Held:

The detaining authority though can take into account the possibility of
the detenu being released on bail in the criminal proceedings, has to be
satisfied, having regard to his past activities or by reason of the credible
information or cogent reasons, that if he is enlarged on bail, he would indulge
in such criminal activities. In the present case except the bald statement that
the detenu would repeat his criminal activities after coming out of jail, there is
no credible information or material or cogent reasons apparent on the record
to warrant an inference that the detenu if enlarged on bail would indulge in
such criminal activities which are prejudicial to the maintenance of essential
services. There must be something more than what is found in the record here
to come to the conclusion that this is not a case of solitary incident but a
of the detenu indulging in business of receiving stolen electric wires. On the

other hand it appears that the detention order had been made in order to supplant the criminal prosecution which is not permitted.\textsuperscript{161}

Detaining authority's satisfaction regarding— Must be based on his past activities, credible information or material or cogent reasons — Mere bald statement of detaining authority not enough — Court can look into the material on record — National Security Act, 1980, S. 8.\textsuperscript{162}

Section 3 of the National Security Act does not preclude the authority from making an order of detention against a person while he is in custody or in jail, but the relevant facts in connection with the making of the order would make all the difference in every case. The validity of the order of detention has to be judged in every individual case on its own facts. There must be material apparently disclosed to the detaining authority in each case that the person against whom an order of preventive detention is being made is already under custody and yet for compelling reasons, his preventive detention is necessary.

Every citizen in this country has the right to have recourse to law. He has the right to move the court for bail when he is arrested under the ordinary law of the land. If the State thinks that he does not deserve bail the State could oppose the grant of bail. He cannot, however, be interdicted from moving the court for bail by clamping an order of detention. The possibility of the court granting bail may not be sufficient. Nor a bald statement that the person would repeat his criminal activities would be enough. There must also be credible information or cogent reasons apparent on the record that the detenu, if enlarged on bail, would act prejudicially to the interest of public order.

In the instant case, there was no material made apparent on record that the detenu, if released on bail likely to commit activities prejudicial to the maintenance of public order. The detention order appears to have been made merely on the ground that the detenu is trying to come out on bail and there is enough possibility of his being bailed out. The order of detention could not be justified only on that basis.\textsuperscript{163}

The fact that the person sought to be detained is in fact under detention is a relevant and material factor but is not per se determinative of the validity of the detention order, nor the fact that a man was not found guilty in a criminal trial is determinative of the allegations made against him. The allegations or the incidents leading to his detention have also to be borne in mind and correlated to the object of a particular Act under which preventive detention is contemplated. All the relevant factors must be objectively considered and if there are causal connections between the facts alleged and the purpose of detention and if bona fide belief was formed then there was nothing to prevent the authority from serving an order of preventive detention even against a person who was in jail custody if there is


imminent possibility of his being released and set at liberty if the detaining authority was duly satisfied. If the person is in detention or is under trial and his conviction is unlikely but his conduct comes within the mischief of the Act then the authority is entitled to take a rational view of the matter. The grounds must be there. The decision must be bona fide. Where a person is accused of certain offences whereunder he is undergoing trial or has been acquitted, the appeal is pending and in respect of which he may be granted bail, the authority may not in all circumstances be entitled to direct preventive detention and the principle enunciated in Ramesh Yadav must apply; but where the offences in respect of which the detenu is accused are so interlinked and continuous in character and are of such nature that these affect continuous maintenance of essential supplies and thereby jeopardize the security of the State, then subject to other conditions being fulfilled, a man being in detention would not detract from the order being passed for preventive detention.

In the present case there was no infraction of any procedural safeguards engrafted in the Act. There was rational subjective satisfaction arrived at bona fide on the basis of the materials available to the detaining authority and the materials had rational nexus with the purpose and object of the detention as contemplated by the Act. The detention order was, therefore, valid.\footnote{Suraj Pal Sahu v. State of Maharashtra, (1986) 4 SCC 378; 1986 SCC (Cri) 452; AIR 1986 SC 2177; 1986 Cri LJ 2047.}

Detaining authority unaware that bail application had been rejected and thereafter no further application for bail moved by detenu — No fresh and relevant grounds mentioned justifying the satisfaction that if released detenu would indulge in prejudicial activities — Detaining authority merely denying the specific averment of detenu that no prejudicial activities committed by him — Criminal case against detenu referred to in grounds but FIR pertaining to the case not containing detenu's name — Held, subjective satisfaction of detaining authority not reached on relevant materials — Hence detention order liable to be set aside.\footnote{Abdul Razak Abdul Wahab Sheikh v. S.N. Sinha, (1989) 2 SCC 222; 1989 SCC (Cri) 326; AIR 1989 SC 2265.}

There must be awareness in the mind of the detaining authority that the detenu is in custody at the time of service of the order of detention on him and cogent relevant materials and fresh facts have been disclosed which necessitate the making of an order of detention. Considering all the facts and circumstances of the case it must be held that there has been no subjective satisfaction by the detaining authority on a consideration of the relevant materials on the basis of which the impugned order of detention has been clamped on the detenu.\footnote{Suraj Pal Sahu v. State of Maharashtra, (1986) 4 SCC 378; 1986 SCC (Cri) 452; AIR 1986 SC 2177; 1986 Cri LJ 2047.}

Non-application of mind alleged — Detenu already in jail — Grounds of detention stating that though High Court had granted a conditional bail to detenu but instead of availing it, a subsequent application for modification of the condition was moved by the detenu but the same was
rejected — Hence challenge to the detention on ground of absence of material before the detaining authority about likelihood of detenu’s release on bail, had no substance — COFEPOSA Act, 1974, S. 3(1).\textsuperscript{166}

Detenu already in jail for an alleged criminal offence when detention order passed — Order must have clear mention of this fact and indicate that such detention was not sufficient to prevent the detenu from the prejudicial activities covered by the preventive detention law — That neither the detention order nor the counter-affidavit of the State referred to it, held, proved non-application of mind rendering the detention illegal.

An order for preventive detention against a person already in jail for some offence must show awareness of that fact else an inference of non-application of mind cannot be refuted.\textsuperscript{167}

Detention on mere apprehension of grant of his bail and on the basis of some stale grounds and a ground in respect of which detenu had already been acquitted, held, not sustainable — National Security Act, 1980, S. 3.

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. If the 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.\textsuperscript{168}

If the detaining authority is satisfied, considering the past conduct antecedent history or the prior events showing the tendencies or inclinations of a man, that unless the activity is interdicted by a preventive detention order, the activity which is being indulged into is like to be repeated, then the authority can put an end to the activity by making a preventive detention order under sub-section (2) read with subsection (3) of S. 3 of the National Security Act.

Where a preventive order may have to be made against a person already confined to jail are detained the detaining authority must show awareness that the person sought to be detained is already in jail or under detention and yet a preventive detention order is a compelling necessity. This awareness would show that such a person is not a free person to indulge into a prejudicial activity which is required to be prevented by detention order, And this awareness must find its place either in the detention order or in the affidavit justifying the detention order when challenged. If the subjective satisfaction is reached without the awareness of this very relevant fact the detention order is likely to be vitiates. But it will depend on the facts and circumstances of each case.

In the present case the detention orders merely referred to the name of the detenus and the places of their residence, without indicating the fact that

\textsuperscript{166.} Alocious Fernandez v. Union of India, (1990) 2 SCC 668; 1990 SCC (Cri) 369.
they were already in jail, one being for a period of roughly two months and the other for above one month. Therefore, the subjective satisfaction arrived at clearly discloses a non-application of mind to the relevant facts and the order is vitiated.\(^{169}\)

Detenu already in jail at the time of passing detention order— No reference made in this regard in detention order or affidavit justifying the order— Held, detaining authority's awareness about detenu's preexisting confinement not shown — Hence, detention order vitiated on ground of non-application of mind.\(^{170}\)

Does not vitiate the detention if detaining authority is aware of this fact but even then is satisfied about necessity of the preventive detention.

The detenu had been called by the Customs Authorities for investigation. A statement had been made by him under S. 108 of the Customs Act and thereafter he was taken into custody and produced before the Additional Chief Metropolitan Magistrate who remanded him to custody and directed him to be produced on the following day in the court. By the time the order of detention came to be made the petitioner was in jail for at the most one day. Charge-sheet had not been submitted against him in the criminal case and he had been remanded to the judicial custody with the direction to be produced before the Metropolitan Magistrate next day. It was contended that since the detenu was already in custody, the order of detention was liable to be quashed. Rejecting the contention, the Supreme Court.

Held:

The fact that the detenu is already in detention does not take away the jurisdiction of the detaining authority in making an order of preventive detention. What is necessary in such a case is to satisfy the court when detention is challenged on that ground that the detaining authority was aware of the fact that the detenu was already in custody and yet he was subjectively satisfied that his order of detention became necessary. In the facts of the present case, there was sufficient material to show the same.\(^{171}\)

Detaining authority's awareness of this fact as also his satisfaction about likelihood of recurrence of the prejudicial activities in case of detenu's release on bail not shown — Held, detention order invalid — National Security Act, 1980, S. 3(2)

There was nothing to show that there was awareness in the mind of the District Magistrate, the detaining authority, of the fact that the appellant was in jail at the 'time of clamping of the order of detention, and that the detaining authority was satisfied in considering his antecedents and previous criminal acts, that there was likelihood of his indulging in criminal activities


jeopardizing public order if he is enlarged on bail and that there is every likelihood that the appellant will be released on bail within a short time. On this ground alone, the order of detention is invalid.

The respondents could very well proceed with the criminal case pending against the detenu-appellant, oppose the bail application, execute it against the appellant and could get him punished if the case is proved. If at all the appellant is released on bail the respondents are not without any remedy. They can also file application in revision for cancellation of the bail application. In such circumstances, the passing of the order of detention of the appellant who is already in custody is bad and invalid in law. 172

Detenu's release or prospect of his imminent release not considered — Held, continued detention illegal on ground of non-application of mind to relevant factors even if detention otherwise found to be justified - National Security Act, 1980, S. 3(2). 173

Per Dutt, J.

When a detenu is already in jail for an offence at the time of his preventive detention, two facts must appear from the grounds of detention, namely, (1) awareness of the detaining authority of the fact that the detenu is already in detention and (2) compelling reasons justifying such detention, despite the fact that the detenu is already under detention. The question whether or not a particular offence, for which a detenu has been detained, is a bailable or non-bailable offence, does not have any bearing on the question of passing an order of detention. Even though an offence is a non-bailable one, an accused may be enlarged on bail. Again, an offence for which a detenu has been put under detention, may be a bailable offence. Whether an order of detention can be against a person who is already in detention or in jail, will always have to be determined in the facts and circumstances of each case. In the present case the detaining authority was aware of the fact that the appellant was arrested and produced before the Additional Metropolitan Magistrate, New Delhi. The grounds of detention also disclosed compelling reasons that the appellant should be preventively detained under the Act in spite of his detention on a charge under S. 135 of the Customs Act.

Per Shetty, J. (concurring)

The detaining authority must have awareness of the fact that the detenu is already in custody and yet for compelling reason his preventive detention is found necessary. The compelling reasons justifying the preventive detention have to be found out from the grounds of detention and not apart from the grounds. The satisfaction of the detaining authority cannot be reached on extraneous matters. The need to put the person under preventive detention depends only upon the grounds of detention. The activities of the detenu may not be isolated or casual. They may be continuous

or part of a transaction or racket prejudicial to the conservation or augmentation of foreign exchange. Then there may be need to put the person under preventive detention, notwithstanding the fact that he is under custody in connection with a case. There cannot, however, be any uniform principle to be applied in this regard. Each case has to be judged on its own facts and on its own grounds of detention. If the grounds are germane it would be perfectly legitimate exercise of power to make an order of detention. In the instant case there is hardly any justification to find fault with the order of detention.\textsuperscript{174}

Where a preventive order is to be made against a person already confined to jail or detained, the subjective satisfaction of the detaining authority must comprehend his awareness of the very fact that the person sought to be detained is already under confinement in respect of the same offence and yet a preventive detention is a compelling necessity. If the subjective satisfaction is reached without the awareness of this very relevant fact the detention order is likely to be vitiated. But it will depend on the facts and circumstances of each case.

Moreover, the detention order must show on the face of it that the detaining authority was aware of the situation. Otherwise the detention order would suffer from vice of non-application of mind.

In the present case there was not even a whimper of the detenu being in jail for nearly three weeks prior to the date on which the detention order was made. Therefore, the subjective satisfaction arrived at clearly disclosed a non-application of mind to the relevant facts and the order is vitiated.\textsuperscript{175}

Mere apprehension of detenu's release on bail and his resort to anti social activities again, not enough.\textsuperscript{176}

Detenu already in jail — Absence of detaining authority's satisfaction about likelihood of detenu's release on bail, held on facts and circumstances, rendered the detention order invalid — Principles laid down in Rameshwar Shaw case and followed in subsequent decisions reiterated — National Security Act, 1980, S. 3(1)

An order of detention was passed against the appellant's husband on September 7, 1988. The detention order and its accompanying annexure show that the detaining authority was aware and conscious of the fact that the detenu was already in custody in connection with a criminal case (bank dacoity) at the time of making the detention order. The detenu's application for grant of bail in the dacoity case had been rejected on August 22, 1988 and he was remanded to custody for the offence of bank dacoity. In the detention order the detaining authority recorded its satisfaction that the detenu's

\begin{itemize}
\item \textsuperscript{174} Vijay Kumar v. Union of India, (1988) 2 SCC 57, 70: 1988 SCC (Cri) 293; AIR 1988 SC 934; (1988) 17 ECC 82.
\end{itemize}
preventive detention was necessary to prevent him from indulging in activities prejudicial to maintenance of public order in which he would indulge if he was allowed to remain at large.

Held:

The detention order read along with its annexure nowhere indicated that the detaining authority apprehended the likelihood of the detenu being released on bail in the dacoity case and, therefore, considered the detention order necessary. On the contrary the detention order and its annexures show the satisfaction of the detaining authority that there was ample material to prove the detenu's complicity in the Bank dacoity including sharing of the booty in spite of absence of his name in the FIR as one of the dacoits. On these facts, the order of detention and the order of its confirmation by the State Government were clearly invalid since the same were when the detenu was already in jail custody for the offence of bank dacoity with no prospect of his release. The test indicated by the Constitution Bench in Rameshwar Shaw case was not satisfied.

[The Court however clarified that the detenu would continue to be held in connection with the case under S. 397, IPC and if and when he is released this judgment would not prevent the authorities from considering his preventive detention according to law.]

Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case; preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc. ordinarily it is not needed when the detenu is already in custody; the detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order; but, even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made even in anticipation to on his release.

The above is the summary and reiteration of the principle settled by the Constitution Bench of the Supreme Court in Rameshwar Shaw case. All the subsequent decisions of the Court on this aspect have to be read in the light of this decision. The conclusion about validity of the detention order in each case was reached on the facts of the particular case and the observations made in each of them have to be read in the context in which they were made. None of the observations made in any subsequent case can be construed at variance with the principle indicated in Rameshwar Shaw case for the obvious reason that all subsequent decisions were by benches comprised of lesser number of judges. 177

It was contended on behalf of the petitioner that the detention order was passed with a view to frustrate the bail allowed to the detenu-petitioner in the criminal case.

Held:

In case of passing of an order of detention against an accused immediately after he is allowed bail or at a point of time when he is likely to be enlarged on bail, great caution should be exercised in scrutinising the validity of the order, which is based on the very same charge which is to be tried by a criminal court.

In the present case the District Magistrate being detaining authority did not act for defeating the bail order. He was of the view that having regard to the entire circumstances appearing from the records placed before him, the petitioner when let out on bail, was likely to create public order problem. The District Magistrate came to this conclusion on the consideration of relevant materials. Copies of the documents were served on the petitioner along with the grounds, considering the entire circumstances of the case was no fault in the detention order. 178

Detention order passed, detaining authority being apprehensive of likelihood of detenu's release on bail and being satisfied about necessity of preventing him from acting in a manner prejudicial to public order in case of his release — Held, detention order would not become invalid merely because detenu was in jail at the time of passing the order. 179

Even assuming that the original office file containing a note mentioning that the detenu was already in custody and was likely to be released soon, cannot be relied on to establish that the detaining authority was aware of these facts and that the awareness of the detaining authority ought to have appeared from the grounds of detention themselves, a perusal of the grounds in the present case which ran into many pages clearly indicated that the detaining authority was conscious of the fact that the detenu was in judicial custody and was apprehensive that he would be released on bail. 180

The detention order cannot be made for the purpose of circumventing the expected bail order. The object of detention has to be prevention of a detenu from indulging in activities prejudicial to the conservation of foreign exchange resources, and not to facilitate his trial in a criminal case nor as a punitive measure. However, the grounds of detention in this case indicated that the offences in respect of which the detenu was accused were "so interlinked and continuous in character and are of such nature" that they fully justify the detention order. In the circumstances, the satisfaction of the

detaining authority as specifically recorded in the grounds cannot be doubted.\textsuperscript{181}

Detenu already in jail and likely to be released on bail — Governments failure to oppose the bail application, does not invariably lead to the inference that the detention was not called for — COFEPOSA Act, 1974, S. 3(1).

Merely because the prayer for bail made on behalf of the detenu was not opposed on behalf of the respondents before the Magistrate, it cannot be held that his detention was not called for. Having regard to the circumstances arising in this case no such inference is permissible to be drawn in favour of the petitioner. Besides, according to the respondents, the bail application was as a matter of fact opposed. In any view, this factor is not of much consequence in the facts of the present case.\textsuperscript{182}

Detaining authority's satisfaction that detenu's bail application likely to be granted by criminal court — Does not mean that the bail application was not opposed by the State — National Security Act, 1980, S. 3.

The apprehension of the District Magistrate that the prayer in regard to grant of bail was likely to be granted does not mean that the application was unopposed. The District Magistrate was expecting an adverse order on account of the fact that the witnesses of the incident appeared to be reluctant to support their earlier statements.\textsuperscript{183}

Detenu already in jail — Mere possibility of his release on bail not enough for preventive detention — Material justifying apprehension that detenu would indulge in prejudicial activities in case of his release on bail essential — National Security Act, 1980, S. 3.

Every citizen has right to move the court for bail when he is arrested under the ordinary law of the land, and he cannot be interdicted from moving the court for bail or clamping an order of detention. The possibility of the court granting bail may not be sufficient. Nor a bald statement that the person would repeat his criminal activities would be enough. There must also be credible information or cogent reasons apparent on the record that the detenu, if enlarged on bail, would act prejudicially to the interest of public order, In the instant case, there was no material made apparent on record that the detenu, if released on bail, is likely to commit activities prejudicial to the maintenance of public order. The detention order had been made merely on the ground that the detenu was trying to come out on bail and there was enough possibility of his being bailed out.

(j) Detention after grant of bail application


Detenu already in jail released on bail— Detaining authority aware of this fact — Detention order valid. 184

Detenu already in jail in connection with a criminal case — Bail application granted by court — But prior to his release on bail, preventive detention order passed against him on grounds including the charges made in the pending criminal case — Validity of the detention order must be examined very carefully in such circumstances

Per Venkataramiah, J.

The law of preventive detention should not be used merely to clip the wings of an accused who is involved in a criminal prosecution. It is not intended for the purpose of keeping a man under detention when under ordinary criminal law it may not be possible to resist the issue of orders of bail, unless the material available is such as would satisfy the requirements of the legal provisions authorising such detention. When a person is enlarged on bail by a competent criminal court, great caution should be exercised in scrutinising the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal court.

Per A. P. Sen, J.

Merely because there was pending prosecution and the detenu was already in jail, there is no impediment for his detention if the detaining authority is satisfied that his being enlarged on bail would be prejudicial to the maintenance of public order. 185

Detenu released on bail or acquitted— Facts and circumstances involved in the criminal proceedings can be taken into account in forming subjective satisfaction for passing detention order

Even if a prosecution against a person fails or bail is granted an order of detention could be passed drawing the satisfaction therefor from the facts and circumstances involved in the criminal proceedings. An offender might secure an acquittal by intimidating witnesses. It all depends upon the circumstances of each case. But it is necessary for the detaining authority to resist the temptation to prefer and substitute, as a matter of course, the easy expedience of a preventive detention to the more cumbersome one of punitive detention. Ayya v. State of U.P., (1989) 1 SCC 374, 383: 1989 SCC (Cri) 153: AIR 1989 SC 364: 1989 Cri Lj 991.

Non-application of mind — Detaining authority aware about detenu's anticipatory bail application — Grounds showing likelihood of recurrence of anti-social activities by the detenu and compelling necessity of his detention — Held on facts, non-application of mind by detaining authority not established — Gujarat Prevention of Anti-Social Activities Act, 1985, S. 3(2).


The appellant/petitioner contended that there was non-application of mind on the part of the detaining authority inasmuch as there was nothing to show his awareness of the fact that the appellant had applied for grant of anticipatory bail and his satisfaction about the compelling necessity to make an order for detention which, it is said, was punitive in character. Dismissing the appeal and the writ petition of the detenu.

Held:

Earlier two incidents stated in the grounds were not really the grounds for detention but they, along with the transaction in question of importation of foreign liquor in bulk, show that his activities in this transaction afforded sufficient ground for the prognosis that he would indulge in such anti-social activities again, if not detained. Having regard to the recital in the grounds of detention as also the counter-affidavit of the detaining authority stating that he was aware of the fact that the detenu had on January 21, 1987 applied for anticipatory bail but no orders were passed, there is no force in the contention about non-application of mind.186

Detention order challenged on ground that continued detention caused detenu's mental disorder — Psychiatrist reporting to the contrary — Detention order not open to challenge on this ground.187

The contention that the detention would be illegal in view of dismissal of detenus from service is really without merit. The subsequent order of dismissal is not germane to examine the validity of the detention.188

COMMUNICATION OF GROUNDS OF DETENTION

Article 22(5) requires that the grounds of detention must be 'communicated' to the detenu. "Communicate" is a strong word which means that sufficient knowledge of the basic facts constituting the 'grounds' should be imparted effectively and fully to the detenu in writing in a language which he understands. The whole purpose of communicating the 'grounds' to the detenu is to enable him to make a purposeful and effective representation. If the 'grounds' are only verbally explained to the detenu and nothing in writing is left with him, in a language which he understands, then that purpose is not served, and the constitutional mandate in Art. 22(5) are infringed.189

Communication of grounds — Government letter to the detenu claiming privilege in respect of certain information — Letter signed by Assistant Secretary using first person (word T) — Contention that it was Government and not the Assistant Secretary that could claim the privilege, held, untenable

---

as the use of the first person by the Assistant Secretary was a mere clerical mistake which Government rectified later. 190

There is an inexorable connection between the obligation on the part of the detaining authority to furnish the 'grounds' and the right given to the detenu to have an 'earliest opportunity' to make the representation. Since preventive detention is a serious inroad on individual liberty and its justification is the prevention of inherent danger of activity prejudicial to the community, the detaining authority must be satisfied as to the sufficiency of the grounds which justify the taking of the drastic measure of preventive detention. The requirements of Art. 22(5) are satisfied once 'basic facts and materials' which weighed with the detaining authority in reaching his subjective satisfaction are communicated to the detenu. The test to be applied in respect of the contents of the grounds for the two purposes are quite different. For the first, the test is whether it is sufficient to satisfy the authority, for the second, the test is whether it is sufficient to enable the detenu to make his representation at the earliest opportunity which must, of course, be a real and effective opportunity. The court may examine the 'grounds' specified in the order of detention to see whether they are relevant to the circumstances under which preventive detention could be supported e.g. security of India or of a State, conservation and augmentation of foreign exchange and prevention of smuggling activities, maintenance of public order, etc. and set the detenu at liberty if there is no rational connection between the alleged activity of the detenu and the grounds relied upon, say public order. 191

Meaning of effective representation and need to furnish copies of documents and other materials relied upon in grounds of detention, restated — Constitution of India, Art. 22(5). 192

Non-furnishing of relevant material and vital facts to detenu would vitiate the detention.

If "material and vital facts" which would influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order, are not placed, it would vitiate the subjective satisfaction rendering the detention order illegal. That was not so in the present case. There was ample material before the District Magistrate for him to base his subjective satisfaction as to the necessity for passing the impugned order, as stated by him in his affidavit. 193

Habeas corpus petition under Art. 226 on ground that documents referred to in grounds of detention not supplied to detenu— Held, High Court cannot

---

decide their relevancy by itself examining them — Constitution of India, Arts, 226 & 22(5).

It is not open to the High Court to wade through the confidential file of the government in order to fish out a point against the detenu. Further, the question of relevance is not to be decided by the court by the detaining authority which alone has to consider the representation of the detenu on merits and then come to the conclusion whether it should be accepted or rejected. 194

(b) Language of communication

Grounds are always required to be furnished in a language which is understood by the detenu and this requirement is not limited to only where the grounds are complicated or lengthy — Detenus being not conversant with English Language, held, supply of the grounds in that language vitiates their detention — Constitution of India, Art. 22(5). 195

Communication of grounds of detention — Language of communication — Whether known to the detenu — Should be ascertained by court in the facts and circumstances of the case by applying commonsense — On facts held, detenu feigning ignorance of the language in which grounds were communicated to him — COFEPOSA Act, 1974, S. 3(3) — Constitution of India, Art. 22(5)

Whether grounds were communicated or not depends upon the facts and circumstances of each case. Court should apply commonsense while considering constitutional provisions for safeguards against misuse of powers by authorities though these constitutional provisions should be strictly construed.

In the present case in the background of the facts that the grounds of detention were given to the detenu following search and seizure of gold biscuits from his room in his presence, that a mercy petition was made by him to the Government which was written in English though signed by him in Gujarati, and that he was in constant touch with his daughter and sons who knew English and Hindi, it cannot be said that the grounds were not communicated in the sense the grounds of detention were not conveyed to the detenu. The detenu was merely feigning ignorance of English in which the grounds were furnished to him. The mere fact that Hindi translation of the grounds was served beyond the period of 5 days stipulated in S. 3(3), COFEPOSA Act is inconsequential even in absence of any exceptional circumstances because his daughter and sons knew both English and Hindi. Prakash Chandra Mehta v. Commr, and Secy, Govt, of Kerala, 1985 Supp SCC 144: 1985 SCC (Cri) 332: AIR 1986 SC

Grounds of detention — Communication of — Language — Grounds of detention as well as the entire documents and materials relied upon therein


must be supplied to the detenu in the language known to him — Such supplies must be made within 5 days and in exceptional circumstances within 15 days from the date of detention — Written reasons indicating the exceptional circumstances in justification of delay up to 15 days must be communicated to the detenu along with the grounds, documents and materials — Non-compliance with any of these mandates would vitiate the detention order — COFEPOSA Act, 1974 (52 of 1974), S. 3(3) — Constitution of India, Art. 22(5)

On a combined reading of Art. 22(5) of the Constitution and S. 3(3) of the COFEPOSA Act and having regard to the case-law evolved through the decisions of the Supreme Court, the following propositions emerge in the context:

(a) All documents, statements and other materials incorporated in the grounds by reference and which have influenced the mind of the detaining authority in arriving at the requisite subjective satisfaction must be furnished to the detenu in a script or language which he understands.

(b) All these materials must be furnished to the detenu along with grounds or in any event not later than five days ordinarily and in the exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of his detention.

(c) The detenu must be informed about the existence of exceptional circumstances and what they were for delay in supplying grounds of detention and/or documents and statements incorporated therein in the language which he understands. This flows from the right which is conferred upon the detenu to make representation against his detention inasmuch as the detenu is entitled to satisfy either the superior authority or the Advisory Board that the delay that has occurred in the supply of requisite material to him was not justified either because exceptional circumstances did not exist or those put forward were unreal or invalid. Obviously, the detenu will not be in a position to do so if the alleged exceptional circumstances are not communicated to him. In other words, what he has done before the Court now, he could have done before the superior authorities or the Advisory Board.

Failure to comply with any of the above requirements would amount to breach of the mandate contained in Art. 22(5) read with S. 3(3), COFEPOSA Act. In preventive detention jurisprudence whatever little safeguards the Constitution and the enactment authorising such detention provide assume utmost importance and must be strictly adhered to.

In the present case supply of bulk of documents and statements incorporated in the grounds in the script or language understood by the detenu was delayed beyond the normal period of five days. The respondents filed an affidavit and also produced the office notings before the Court which explained the reason for the delay, by stating that there were a large number of documents requiring translation and on account of the holy month of Ramzan Urdu translators were not available and those handful of translators
who were available and were put on the job were prepared to work only from 12 noon to 4 p.m. Such an explanation cannot be regarded as constituting exceptional circumstances justifying the delay. Since the petitioner was already in judicial custody and no bail had been granted, there was no fear of his abscondence and no urgency and therefore, the detaining authority could have kept all the material ready in Urdu and supplied the same to him immediately after detaining him second time. Moreover, the office noting neither gave particulars of how many Urdu translators were put on the job except vaguely stating 'handful of translators' were available, nor indicated whether and if so what efforts were made to avail the services of the additional Urdu translators who had nothing to do with the observance of Ramzan fasts.

Further, the alleged exceptional circumstances contemplated by S. 3(3), COFEPOSA Act were not communicated to the detenu at the time of the delayed supply of the concerned documents and statements in Urdu language.

Lastly, Urdu translations of quite a few documents and statements referred to in the grounds of detention and relied upon by the detaining authority were not supplied to the detenu at all. The petitioner is a Pakistani national and Urdu seems to be his mother tongue and a little knowledge of English figures, ability to read English words written in capital letters and a smattering knowledge of Hindi or Gujarati would not justify the denial of Urdu translations to him of the material documents and statements referred to as incriminating documents in the grounds and relied upon by the detaining authority in arriving at its subjective satisfaction.

The aforesaid failures on the part of the authorities constituted breach of Art. 22(5) of the Constitution read with S. 3(3) of the COFEPOSA Act and vitiated the continued detention of the petitioner. 196

Grounds of detention must be explained in the language and script understandable to the detenu — Detenu specifically stating to be knowing Arabic language only — Hence, explaining the grounds in Hindi inconsequential — Averment in the counter-affidavit that the detenu made his submission in Hindi before Advisory Board, wholly Inadmissible in absence of testimony of any reliable witness — In absence of any proof of explaining the grounds in Arabic, held, continued detention of the detenu illegal

Orders of detention which touch the valuable rights of citizens and their liberty are matters of moment and cannot be dealt with in a casual or routine manner. The necessary safeguards laid down by the Supreme Court and enshrined in Art. 22(5) of the Constitution have to be complied with however onerous and difficult the task may be. Moreover, with huge resources at the command of the State, it is not at all difficult for the detaining

---

authority to see that these little things are complied with so that the detenu
does not complain that the authorities try to play with his liberty.

There is no cogent proof in this case that the detenu who admittedly is
an Arab knew Hindi at all or that the grounds were actually explained and
translated to him. If the detenu did not know Hindi, explaining the grounds
in Hindi to him is absolutely of no consequence. On this ground alone, the
detenu is entitled to be released as his continued detention becomes legally
invalid.\footnote{Nafisa Khalifa Ghanem v. Union of India, (1982) 1 SCC 422; 1982 SCC (Cri) 236.}

Language — Grounds must be in the language which detenu understands —
Strict compliance with this requirement essential — Test of prejudice caused
to the detenu as a result of language used in the grounds not material for
determining effective communication of the grounds — While detenu
claiming to know Ladhaki language only grounds supplied in a different
language — Held, requirements of law not complied with — Fact that the
detenu’s wife understands the language in which grounds were supplied not
SCC (Cri) 275: AIR 1987 SCI 192: 1987 Cri L 988.}

Language — Detenu held under S, 3(1) (i) of COFEPSONA Act alleging that
English version of the grounds stated that detention intended to prevent him
from indulging in smuggling activities which is covered by S. 3(l) (i) but
Tamil version disclosed that it intended to prevent him from transporting
contraband goods which is covered by S. 3(l) (iii) — Held, on facts, the two
versions not so different as to cause any prejudice to the detenu —
1725.}

“Communicate’ is a strong word. It requires that sufficient knowledge
of the basic facts constituting the grounds should be imparted effectively and
fully to the detenu in writing in a language which he understands, so as to
enable him to make a purposeful and effective representation. Where the
grounds are couched in a language which is not known to the detenu, unless
contents of the grounds are fully explained and translated to the detenu, it
would tantamount to not serving the grounds to the detenu and would thus
vitiating the detention ex facie. If the grounds are only verbally explained to the
detenu and nothing in writing is left with him in a language which he
understands, then that purpose is not served and Art. 22(5) is infringed. Thus
what is considered necessary is a working knowledge of the language
enabling the detenu to understand the grounds or full explanation or
translation thereof in the language understood by the detenu.

It would be open for the court to consider the facts and the
circumstances of a case to reasonably ascertain whether the detenu is feigning
ignorance of the language or he has such working knowledge as to
understand the grounds of detention and the contents of the documents
furnished. It would involve a subjective determination. It would, of course,
always be a safer course in such cases to furnish translations in the detenu's own language.

In the present case when the detention order and the grounds of detention were served the detenu received them and acknowledged the receipt thereof, as it appears from the records, putting his signature in English. He did not complain that the grounds of detention were not understood by him. On the other hand in the very grounds of detention it was stated that in course of interrogation he answered the questions in English including the questions as to how he happened to learn English. The gist of his answers in this regard was also given in the grounds of detention. The statements contained number of informations peculiar to the detenu himself which could not have been communicated by him to the interrogators unless he knew the English language. In several places he corrected the statements putting appropriate English words and signing the corrections; No objection regarding non-communication of the grounds in a language understood by the detenu was made within the statutory period for furnishing the grounds. The representation was beyond the statutory period, almost a month after the grounds were served, along with the detenu’s statements as to how he learnt English. In the meantime bail petitions were moved on his behalf before the Chief Judicial Magistrate and the High Court. There is nothing to show that he did not give instructions to his counsel. In the circumstances of the case it must be held that the detenu understood the English language, had working knowledge of it and was feigning ignorance of it, and there was no violation of Art. 22(5) of the Constitution on the ground of non-communication of the grounds of detention in a language understood by him.200

Communication of detention order — Order reciting S. 3(1) of the COFEPOSA Act served in English but grounds of detention together with basic materials served, along with the order, in the language known to the detenu — Held, on facts, neither Art. 22(5) violated nor was detenu handicapped in submitting his representation.201

It is imperative that the detaining authority has to serve the grounds of detention which include also all the relevant documents which had been considered in forming the subjective satisfaction by the detaining authority before making the order of detention and referred to in the list of documents accompanying the grounds of detention in order to enable the detenu to make an effective representation to the Advisory Board as well as to the detaining authority. Hence the refusal on the part of the detaining authority to supply legible copies of the said relevant document to the detenu for making an effective representation infringed the detenu’s right under Art. 22(5) of the Constitution. The order of detention is, therefore, set aside and the detenu is


Supply of illegible copies of documents— Detention order confirmed before supply of legible copies made — Held, right of making representation denied — Constitution of India, Art 22.203

Supply of illegible copies of documents— Held, procedural safeguards provided by Constitution violated — Detention quashed — On facts of the case Supreme Court did not go into question whether those documents were relevant or material — Constitution of India, Art. 22(5). 204

Delay in supplying documents and materials in support of the grounds of detention, held, would vitiate the detention — The detention also stands vitiated by the delay of more than a month in disposing of the representation — Constitution of India, Art 22(5). 205

Delay in serving beyond mandatory period under S. 8(1) of National Security Act— Rigours of limitation prescribed under S. 8(1) to be literally interpreted and strictly followed — No relaxation permissible merely because detenu had been released on bail or parole and hence was not in detention — Where detention order sewed on September 29, detenu released on bail on October 2, police officer sent to Bombay for serving the grounds going back to Delhi having failed to trace the detenu though his address was well known and grounds ultimately served on October 14, held, inaction after October 6 till October 14 sufficient for violation of S. 8(1) in absence of satisfactory and acceptable explanation — Detention order quashed — National Security Act, 1980, S. 8(1)— Constitution of India, Art. 22

In this case there is no acceptable or satisfactory explanation as to what the officer or the officers did after October 6, 1986, this inaction after October 6, 1986 till October 14, 1986, by itself is sufficient for us to hold that S. 8(1) has been violated by the officer concerned and on that ground alone the order of detention has to be quashed.

An attempt was made to contend that the delay in communicating the grounds of detention caused in this case has to be condoned and the rigour of the section relaxed since the detenu had been released on October 2, 1986, and hence was not in detention. This according to us is specious plea which cannot stand legal scrutiny. If this contention is to be extended to its logical conclusion it would be clothing the authorities with powers to delay communication of the grounds of detention indefinitely, whenever a detenu secures from a court of law either bail or parole. To accept this contention would be to destroy the effect of the mandate of the section. As indicated earlier, the mandate enacted in the section is a safety valve for a citizen who is

robbed of his liberty and to disable the authorities from manipulating the grounds of detention. The section has to be interpreted literally. No relaxation is permissible. If the original time of 5 days has to be extended, such extension must be supported by an order recording reasons. If reasons are not so recorded the order of detention will automatically fail. Even if reasons are recorded they have to inspire confidence in the court and are subject to legal scrutiny. If the reasons are unsatisfactory courts would still quash the order of detention.\textsuperscript{206}

Documents and materials mentioned in grounds of detention to be supplied to the detenu immediately on demand — Explanation for delay of about 28 days in supplying the same not convincing — Hence, continued detention of the detenu illegal — Constitution of India, Art. 22(5)

A demand for documents should not be taken lightly but the detaining authority must be prepared to supply at least those materials or documents which are clearly mentioned in the grounds of detention and he must have those material ready with him so as to be given to the detenu as and when asked for, with utmost despatch. The dilatory procedure adopted by the detaining authority in referring the question of supplying of documents to various authorities and inviting their comments is condensable. The detenu cannot make any effective representation unless he gets copies of the documents which are expressly mentioned in the grounds of detention. In the present case the explanation given by the detaining authority for delay of about 28 days in sending the documents to the detenu does not appear to be satisfactory or convincing. The continued detention of the detenu therefore, becomes illegal on this ground also.\textsuperscript{207}

Grounds of detention must be furnished as soon as practicable and need not be furnished simultaneously along with the detention order — Grounds furnished within two days of the detention — Held, delay reasonable and therefore the detention order not vitiated on ground of such delay alone — Constitution of India, Art. 22(5) — National Security Act 1980 (65 of 1980), S. 8.

There is no constitutional imperative that no person shall be detained under preventive detention law without being informed of the grounds for such detention. The law is that the detaining authority must, as soon as may be, i.e. as soon as practicable, communicate to the detenu the grounds on which the order of detention has been made. That period has been specified by S. 8 of the Act to mean a period ranging from five to 10 days depending upon the facts and circumstances of each case.

In the present case the detenu was served with the grounds of detention within a period of two days, that is, within the period allowed by S. 8 of the Act and that was "as soon as practicable", In absence of any allegations as to mala fides on the part of the detaining authority or that the


\textsuperscript{207} Naftsa Khalifa Ghanem v. Union of India, (1982) 1 SCC 422: 1982 SCC (Cri) 236.
detention was for non-existent grounds, the order of detention is not rendered invalid merely because the grounds of detention were furnished two days later. 208

Documents and materials relied upon in grounds of detention — Copies of, supplied to the detenu more than one month after furnishing of grounds of detention — Held, detenu thereby deprived of his constitutional right to make effective and expeditious representation — Hence, continued detention of detenu rendered void — COFEPOSA Act, 1974 (52 of 1974), S, 3.209

Documents relied upon in the grounds not supplied to detenu within 15 days from the date of order of detention — On "detenu's request by his representation dated April 6, the documents supplied to him on April 24 and the representation disposed of by Advisory Board on April 29 — Held, failure on the part of the detaining authority to supply the material documents prevented the detenu from making an effective representation against the grounds of detention and as such mandatory requirements of Art. 22(5) of the Constitution r/w S. 3(3) of COFEPOSA Act not complied with — Order of detention, therefore, illegal and bad and liable to be quashed — COFEPOSA Act, 1974, S. 3(3) and (1) — Constitution of India, Art. 22(5). 210


Prevention of Elicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, Ss. 3(3) and 10(1) — Period of limitation prescribed under S. 3(3) is for communicating the grounds to detenu and not applicable to declaration under S. 10(1) — Detention order passed on December 19 and grounds furnished and declaration made on December 20 and declaration served on February 2 — Period taken in serving the declaration adequately explained — Held on facts, grounds furnished to the detenu within the period prescribed by S. 3(3) and detenu had also not been denied any opportunity of making effective representation against the declaration under S. 10(1).211

The order of detention was passed on March 5, 1986 and served on March 6, 1986 when the appellant was already in jail in connection with other cases. Even so the grounds of detention were served on May 11, 1986, i.e. more than two months after the service of the order of detention.

There is clear contravention of S. 17 of the Bihar Act. The order of detention is therefore quashed. 212

Supply of relevant material to detenu— Whether delayed — Information as to whether exporters were interrogated to find out circumstances under which gold came to be exported — Statements of the exporters, having not been recorded at the time of making detention order, not forming part of the materials placed before detaining authority — Reply to the desired information therefore sent after obtaining comments of customs authorities — In the circumstances and having regard to the promptness with which the matter moved in the office, held, supply of the information to the detenu not delayed — Constitution of India, Art. 22(5).

Copies of documents and materials relied upon in grounds of detention and forming basis of the detention order must be furnished to the detenu along with the grounds of detention — Supply of such copies seven days after furnishing of the grounds rendered detention illegal and void — Constitution of India, Arts. 22(5) and 21 — COFEPOSA Act, 1974 (52 of 1974), S. 3(3).

The documents and materials in support of the grounds on the basis of which the detention order has been made, the same being ex hypothesi in existence at the time of the issuance of the detention order and framing of the grounds, should be supplied to the detenu along with the grounds. Non-supply of such material and documents along with the grounds would clearly amount to a violation of the safeguard guaranteed under Art. 22(5) of the Constitution. Since in the instant case that safeguard afforded to the detenu has been violated, further detention of the detenu would be illegal and void.

Detenu has right to have copies of vital documents irrespective of whether he knows about their contents or not. The detenu has the right to be furnished with the grounds of detention along with the documents 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 guaranteed under Art. 22(5). It is immaterial whether the detenu already knew about their contents or not. The question of demanding the documents is also wholly irrelevant and the infirmity in that regard is violative of Art. 22(5).

Documents and materials to be supplied — Confessional statements of detenu on which grounds of detention based not supplied to the detenu along with grounds of detention — Held, detention illegal in view of failure to furnish necessary documents to the to make a proper representation — National Security Act, 1980, Ss. 3(2) and 8.

Documents forming vital part of the grounds not supplied to detenu — Held, detenu entitled to be released.

Documents to be supplied — Allegation that summons issued under S. 108(1) of Customs Act not supplied to the detenu despite demand — S. 61, Criminal Procedure Code, 1973 requiring the summons to be in writing — In view of positive case of the State that no summons had been issued and the detenu had only been orally directed to attend the office of the authorities concerned, held, no summons was in existence and therefore, detenu suffered no prejudice — COFEPOSA Act, 1974, S. 3(l).

Documents to be supplied — Bail application and bail order — Constituted vital materials — Non-consideration of, by detaining authority or non-supply of copies thereof to detenu would be violative of Art 22(5) and continued detention would be illegal — Constitution of India, Art. 22(5)

The appellant-detenu was intercepted at Trivandrum Airport and was arrested and produced before Chief Judicial Magistrate on January 31, 1988 on charge of smuggling of gold. The Magistrate remanded him to judicial custody till February 12, 1988 when 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 "February 25, 1988". The Collector of Customs sent the proposal for detention on May 27, 1988 along with the draft grounds. In the Screening Committee meeting held on June 21, 1988 the detenu's case was considered to be fit for detention under the COFEPOSA Act. The impugned order of detention was thereupon passed on June 25, 1988 under S. 3(l)(i) of COFEPOSA Act by the Home Secretary, Government of Kerala with a view to prevent the appellant from smuggling gold. It was contended that non-furnishing of the bail application and the bail order vitiated the detention order.

Held:

It is 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 present case it appears from the records that the bail application and the bail order were furnished to the detaining authority on his enquiry and therefore it cannot be said that the detaining authority did not consider or rely on them. It was stated in the grounds of detention that the detenu was remanded to judicial custody and he was subsequently released on bail. 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. Considering the facts the bail application and 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 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 without them the grounds themselves could not be
said to have been complete. It must therefore, be held that it amounted to
denial of the detenu’s right to make an effective representation and that it
resulted in violation of Art. 22(5) rendering the continued detention of the
detenu illegal and entitling the detenu to be set at liberty in this case. 219

Documents to be supplied — Only copies of documents on which order
of detention primarily based should be supplied to detenu and not any and
every document. 220

Material document relied upon by detaining authority in forming its
subjective satisfaction — Copy of, not supplied to the detenu — Held, order
of detention rendered void — COFEPOSA Act, 1974 (52 of 1974), S. 3.221

Material document relied upon by detaining authority in forming its
subjective satisfaction — Copy of, not supplied, to the detenu — Held, order
of detention rendered void — COFEPOSA Act, 1974 (52 of 1974), S. 3.222

Non-supply of relevant documents to detenu — Copies of statements
recorded under S. 161, CrPC furnished long after passing of order of
detention and communication of the grounds — Held, order of detention
illegal and bad. 223

Basic facts and materials which influenced the mind of detaining authority
in making detention order must be supplied to the detenu within the time
stipulated in S. 3(3), COFEPOSA Act, 1974 (52 of 1974) — All the documents
and materials relied upon by the detaining authority in passing the order of
detention must be supplied to the detenu, as soon as practicable, to enable
him to make an effective representation.

In the instant case, the materials and documents which were not
supplied to the detenu were evidently a part of those materials which had
influenced the mind of the detaining authority in passing the order of
detention. In other words, they were a part of the basic facts and materials,
and therefore, should have been supplied to the detenu ordinarily within five
days of the order of detention, and, for exceptional reasons to be recorded,
within fifteen days of the commencement of detention as contemplated in S.
3(3) of the COFEPOSA Act.224

Copies of material documents referred to in the grounds of detention cannot
be denied to the detenu on the mere ground that the detenu was already

627: AIR 1982 SC 300.
aware of the contents of those documents — Held, failure to furnish to the
on demand vitiated the detention — Constitution of India, Art 22(5).225

Documents and materials forming part of grounds of detention — Whether
supplied to detenu or not? is a question of fact — Findings of High Court in
this regard not open to interference under Art 136 — Constitution of India,
Art 136.226

Documents and materials which form the basis of detention order must be
supplied to the detenu along with grounds of detention — Where grounds
of detention not accompanied by these documents and materials and disposal
of detenu’s representation delayed for 25 days, held, continued detention of
the detenu void — Both Arts. 21 and 22(5) must be fully and strictly complied
with — Government officials responsible for the lapse resulting in release of
the detenu must be held personally responsible or at least must owe an
explanation — Constitution of India, Arts. 21 and 22(5)

It is of the utmost importance that all the necessary safeguards laid
down by the Constitution under Art. 21 or Art. 22(5) should be complied with
fully and strictly and any departure from any of the safeguards would void
the order of detention. The law of preventive detention has now to satisfy a
twofold test: (1) that the protection and the guarantee afforded under Art.
22(5) is complied with, and (2) that the procedure is just and reasonable. If a
procedure under Art. 21 has to be reasonable, fair and just, then the words
‘effective representation' appearing in Art. 22(5) must be construed so as to
provide a real and meaningful opportunity to the detenu to explain his case to
the detaining authority in his representation. In this view of the matter, unless
the materials and documents relied on in the order of detention are supplied
to the detenu along with the grounds, the supply of grounds simpliciter
would give him not a real but merely an illusory opportunity to make a
representation to the detaining authority.

For the above reasons the continued detention of the detenu is void,
whenever a detention is struck down by the High Court or the Supreme
Court, the detaining authority or the officers concerned who are associated
with the preparation of the grounds of detention, must beheld personally
responsible and action should be taken against them for not complying with
the constitutional requirements and safeguards (viz. delay in disposing of the
representation, not supplying the documents and materials relied upon in the
order of detention pari passu the order of detention, etc. etc.) or, at any rate,
an explanation from the authorities concerned must be called for by the
Central Government so that in future persons against whom serious acts of
smuggling are alleged, do not go scot-free. In the instant case, not only were
the documents and materials not supplied along with the order of detention,
but there has been a delay of about 25 days in disposing of the representation

1861: 1981 Cri LJ 1283,
of the detenu and no explanation for the same has been given. These are matters which must be closely examined by the government. 227

Documents forming basis of the grounds of detention not supplied to the detenus – Detention, held, improper.228

Documents which are only referred to in the grounds of detention must also be supplied along with the grounds – Constitution of India, Art 22(5).

Once the documents are referred to in the grounds of detention it becomes the bounden duty of the detaining authority to supply the same to the detenu as part of the grounds or pari passu the grounds of detention. There is no particular charm in the expressions 'relied on', 'referred to' or 'based on' because ultimately all these expressions signify one thing, namely, that the subjective satisfaction of the detaining authority has been arrived at on the documents mentioned in the grounds of detention. The question whether the grounds have been referred to, relied on or based on is merely a matter of describing the nature of the grounds. This having not been done in the present case the continued detention of the petitioner must be held to be void.229

Failure to supply the documents and materials forming basis of detention order to the detenu along with the order of detention and unexplained delay of a month in disposing of the detenu's representation would render continued detention of the detenu void – Constitution of India, Art 22(5).230

Supply of copies of documents on which detention order is based— Held, mandatory under National Security Act also, like that under COFEPOSA Act.231

Detenu, held, deprived of his right of representation by delayed supply of some of the documents relied upon in the order of detention – Detention rendered void – Constitution of India, Art, 22(5).232

Non-production of relevant and vital materials before detaining authority — Application of the co-accused as well as statement made in the bail application filed on behalf of the detenus alleging that the detenus had been falsely implicated and police report thereon not produced before detaining authority before passing the detention order – Held, order of detention invalid and illegal – National Security Act, 1980, S. 10. 233

---


Non-supply of copies of documents relied upon by detaining authority in the detention order, along with grounds of detention, would render continued detention of the detenu void.234

(iii) Documents and materials which need not be supplied

Particulars to be supplied — If ground supported is precise containing all relevant details, held, absence of those details, in extracts of CID report enclosed with the would not vitiate the detention on ground of denial of opportunity to make effective representation and non-application of mind — Extracts to be read together with the ground — National Security Act, 1980, S. 3(2), (3).

The ground of detention mentioned each and every one of the material particulars which the respondent was entitled to know in order to be able to make a full and effective representation against the order of detention. This is not a case in which the ground of detention contains a bare or bald statement of the conclusion to which the detaining authority had come, namely, that it was necessary to the order of detention in order to prevent the detenu from acting in a manner prejudicial to the interest of public order. The CID report was furnished to the detenu as forming the source of information leading to the conclusion that he had made a speech which necessitated his detention in the interests of public order. In the circumstances, the grounds and the material fur-to the detenu have to be read together as if the material in the form of the CID report was a continuation of the ground of detention. Although the extracts of the CID report did not refer to the details which were mentioned in the ground, that did not cause any prejudice to the respondent, nor did that introduce any obscurity in the facts stated in that ground or detract from the substance of the allegations mentioned in that ground. The detaining authority had before it the whole of the CID report on the basis of which it passed the order of detention. What was omitted from the extract furnished to the respondent was incorporated in the ground. It is therefore, not possible to accept the argument that detention was bad because the detaining authority did not apply its to the question as to whether there was material on the basis of which the respondent could be detained.

The detenu is not entitled to be informed of the source of information received against him or the evidence which may have collected against him as? for example, the evidence corroborating that the report of the CID is true and correct. His right is to receive every material particular without which a full and effective representation cannot be made. If the order of detention refers to or relies upon any document, statement or other material, copies thereof have, of course, to be supplied to the detenu. But the furnishing of the CID report, of which a truncated extract was furnished to the respondent, was a superfluous exercise in the light of the facts of the instant case.

However, the detaining authority lessly applied his scissors excising the which mentioned the date, the place, the time and the occasion of the meeting. While passing orders of detention, great care be to bear on their task

by the Preventive detention is a necessary evil but essentially an evil. Therefore, deprivation of personal liberty, if at all, has to be on the strict terms of the Constitution.235

Documents and materials relied upon in grounds of detention - Respondent claiming privilege in respect of document not supplied - But proper affidavit not filed - Hence privilege claim fails and detention is vitiated - Affidavit.236

Documents materials to be supplied - confidential source of information relied on in making the detention order - need not be supplied to the detenu.

The detenu is not entitled to a disclosure of the confidential source of information used in the grounds or utilised for the making of the order. What is necessary for the making of an effective representation is the disclosure of the and not the source thereof. By indicating that the facts have been gathered from confidential reports, a suggestive disclosure of the source has also been made. In the present case there had been no infraction of the law in not supplying the respondent copies of the reports or disclosing the source thereof. The respondent had actually been given in the grounds all material details necessary for making an effective representation.237

Documents to be supplied to detenu - Copies of documents (bail application filed by detenu himself) not relied upon but only incidentally referred to in the grounds - Refusal to supply, if not handicapped the detenu in making effective representation, would not violate Art, 22(5) and vitiate the detention— Gujarat Prevention of Anti-Social Activities Act, 1985, S. 3(1) — of India, Art 22(5).238

Non-supply of copies of documents which are not material documents will not vitiate the detention — COFEPOSA Act, 1974, S.3(1).

The application for relaxation of the conditions of bail submitted by the petitioner and the order relaxing the conditions of bail passed by the Additional Chief Metropolitan Magistrate on the said application were not material documents and were not required to be considered by the detaining authority. Therefore, the non-supply of the copies of the same to the petitioner would not result in denial of the right of the petitioner to make a representation under Art. 22(5). 239

Non-supply of relevant document viz, bail application and order thereon - Bail application having been rejected after passing of detention order, neither considered by detaining authority in coming to his subjective

satisfaction, nor referred to in grounds — In the circumstances held, non-supply of the documents to the detenu did not prejudice him in making effective representation — Interim order of Supreme Court in SLP against rejection of bail that the detenu shall not be arrested in the meantime, not relevant as that SLP was not against the detention order. Syed Farooq Mohammad v. Union of India, (1990) 3 SCC 537, 544, 545: 1990 SCC (Cri) 500: AIR 1990 SC 1597: 1990 Cri LJ 1622.


Supply of relevant documents to detenu — It is not necessary to furnish to the detenu copies of all the documents under S. 37 of the FERA from him which are not material and relevant for reaching subjective satisfaction of detaining authority merely because they were mentioned in pan-chnama — Moreover in absence of any application from the detenu requesting detaining authority to furnish copies of such documents, held, detention order not vitiated on ground that failure to supply those documents infringed fundamental right to make effective representation — Constitution of India, Art 22(5) – Foreign Exchange Regulation Act, 1973, S. 37 – National Security Act, 1980, S. 3, Haridas Amarchand Shah v. K.L. Verma, (1989) 1 SCC 250, 254 255: 1989 SCC (Cri) 111: AIR 1989 SC 497: 1989 Cri LJ 983: (1989) 19 ECC 196.


Documents and materials forming basis of detention — Once supplied to the detenu, held, further information regarding particular grounds which influenced subjective satisfaction of detaining authority not required to be furnished — Authorities also not bound to furnish legal information such as the particular provisions of law prohibiting the smuggling activity alleged in the grounds — Constitution of India, Art. 22(5)

When an order of detention together with the grounds of detention is served on a detenu, the detenu may ask for particulars on which a ground is based if they are not already there. When a document containing what are called "grounds" which often consist of the background of a case, narration of facts and instances of the detenu's activities, is supplied to the detenu, the detenu is not entitled to know which part or parts of the "grounds" was or were taken into consideration and which not. The Court may not take into consideration any reply given by the detaining authority to such an enquiry, for, the reply may be an afterthought. It will be for the Court to judge whether the facts narrated constitute a ground of detention or which facts might possibly enter and influence the detaining authority in coming to its subjective satisfaction. In the present case the request of the detenu for
"information" whether his detention was inter alia based on seizures of certain articles mentioned in the list of grounds of detention and the reply of the authority to the request were irrelevant.

Further, the Government is not under any liability to furnish the detenu with legal information available from legal literature. The liability of the detaining authority is only to comply with the requirement of Art. 22(5) of the Constitution. In the present case, therefore, the "information" sought by the detenu regarding the provision under which the import of the article in question (Palladium) is prohibited is untenable, for it is an information on a question of law and can be obtained from statutes, rules or notifications. Moreover, the plea that the Government's failure to furnish, him with that "information" prevented him filing a proper representation is not permissible on the ground of public policy, for, any detenu may plead that he does not know whether the entry of the item smuggled by him is restricted.240

Copy of State Government's order under s. 3 (3) of NJSL Act, 1980, authorizing District Magistrate or Commissioner of Police to make order of detention not required to be supplied to detenu.

The Act does not provide for supplying a copy of an order under S. 3(3) of the Act. The said order has not been relied upon by the Commissioner of Police in passing the impugned order of detention in the present case. Though by virtue of the order passed under S. 3(3), the Commissioner of Police could exercise the powers of the detaining authority under that section, but that has nothing to do as to the subjective satisfaction of the Commissioner of Police in making the impugned order of detention. 241

Documents to be supplied — Copies of FIRs — Where under S. 173(5), CrPC all the documents or relevant extracts thereof on which the prosecution relied on in criminal cases against the detenu "were supplied to him, held, failure to furnish copies of FIRs filed against him would not deprive him of his right to make effective representation. 242

Failure to furnish copy of a mere forwarding letter which does not form the basis of grounds of detention would not vitiate the detention order. 243

Failure to supply the documents materials which are only casually or passing referred to in the course of narration of the facts in the grounds of detention and are not relied upon by the detaining authority in making detention order, held 5 would not render the detention illegal.244

Particulars to be supplied to the — Evidence gathered by detaining authority against detenu and details of sources of information need not be furnished to the detenu.245

Documents and material relied upon in grounds — Intelligence report — No privilege against disclosure of, claimed — But failure to furnish copy of intelligence report, on facts held, caused on prejudice to the detenu as adequate material had been supplied to him.246

The documents are such that even in their absence subjective satisfaction would not be affected, then failure to place the documents before the detaining authority would be immaterial — Documents having bearing on the subjective satisfaction of detaining authority but not relied upon by him must be placed before the detaining authority at the time of passing of detention order.247

The grounds of detention served along with the order are nothing but a narration of facts.248

The ‘grounds’ under Art, 22(5) of the Constitution do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences.249

Scope of the word ‘grounds’ — Basic facts and subsidiary facts

While the expression ‘grounds’ includes not only conclusions of fact but also all the “basic facts” on which those conclusions were founded, they are different from subsidiary facts or further particulars or the basic facts.250

Constituents of — ‘Basic facts’ and ‘subsidiary facts’ — Distinction between — Non-compliance of S. 3(3), COFEPOSA Act and Art, 22(5) in communicating basic facts to the detenu would be fatal to the detention order, but a marginal delay in furnishing supplementary or additional materials may in the particular circumstances not vitiate the detention — Where grounds elaborately stated contained basic facts, delay of 17 days in furnishing copies of documents and particulars relied upon in the grounds of detention, being only additional in nature, held in the totality of facts and circumstances of the case, not so unreasonable as to deny detenu’s right to make effective representation — COFEPOSA Act, 1974, 5. 3(3) — Constitution of India, Arts. 19, 21 and 22.


The expression 'grounds' in Art. 22(5), and for that matter, in S. 3(3) of the COFEPOSA Act, includes not only conclusions of fact but all the 'basic facts' on which conclusions are founded. The basic facts are different from subsidiary facts or further particulars of the basic facts. If in a case the so-called 'grounds of detention' communicated to the detenu lack the basic or primary facts and this deficiency is not made good and communicated to the detenu within the period specified in S. 3(3), the omission will be fatal to the validity of the detention. If, however, the grounds communicated are elaborate and contain all the 'basic facts' but are not comprehensive enough to cover all the details or of the 'basic facts', such particulars, must be supplied to the detenu, if asked for by him with reasonable expedition, within a reasonable time. What is reasonable time conforming with reasonable expedition, required for the supply of such details or further particulars, is a question of fact depending upon the facts and circumstances of the particular case. In the circumstances of a given case, if the time taken for supply of such additional particulars, exceeds marginally, the maximum fixed by the statute for communication of the grounds, it may still be regarded 'reasonable', while in the facts of another case, even a delay which does not exceed 15 days, may be unjustified, and amount to an infraction of the constitutional imperative of affording the earliest opportunity for making the representation.

In the instant case, the grounds supplied to the detenu were elaborate and full and contained all the 'basic facts', although they did not set out all the details or particulars of those 'basic facts' relied upon or referred to therein. There was thus no breach of the first constitutional imperative embodied in Art. 22(5).

However, there had been a delay of about 17 days (excluding the time taken for communications in transit) in the supply of the further particulars of the basic facts to the detenu. But in the facts and circumstances of the case the period of 17 days was not an unreasonably long one which could amount to a denial of the detenu's right to make an effective representation. Several causes had contributed to this 'delay'. [The Supreme Court after con-the circumstances found them relevant for condoning the delay and that the delay of 17 days could not be said to be so unreasonable as to amount to an infraction of Art. 22(5)].

Interference of Court with grounds — Court cannot examine the propriety or sufficiency of the grounds — Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980, S. 3.

The subjective satisfaction of the detaining authority as regards the factual existence of the condition on which the order of detention can be made, namely, the grounds of detention constitute the foundation for the exercise of the power of detention and the court cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining authority is based. Nor can the court, on a review of the grounds,
substitute its own opinion for that of the authority. In the instant case the ground of detention was only one, viz, the detenu was acting prejudicial to the maintenance of supplies of commodity, that is, levy cement, essential to the community by diverting it to the open market. The question whether the detenu was acting in a manner prejudicial to the maintenance of supplies essential to the life of the community is a matter of inference to be drawn from facts. It appears from the grounds, i.e., the facts set out that the detenu had made a statement admitting that he had diverted 600 bags of levy cement issued to him for use in the masonry ballast wall along the railway track and therefore the District Magistrate was justified in coming to the conclusion that he (the detenu) was acting in a manner prejudicial to the maintenance of supplies of the commodity essential to the community.252

Reliance inter alia on certain grounds found to be bad and unsustainable would be fatal to the entire order of detention — National Security Act, 1980 (65 of 1980), Ss. 3 and 8. 253

(b) What should be stated in grounds

Criminal cases in which detenu found to be not guilty was acquitted — Held, cannot form part of the grounds and hence cannot be taken into consideration — National Security Act, 1980 (65 of 1980), Ss. 3(2) and 8.254

It is not necessary to mention in the grounds the reaction of the detaining authority in relation to every piece of evidence separately — Detaining authority’s view that not much credence could be attached to a particular document need not be mentioned in the grounds especially when it was stated in the grounds that the detaining authority formed his opinion after consideration of that document — COFEPOSA Act, 1974, S, 3.255

Mere allegations against the detenu in an FIR, without showing that the authorities had any valid reasons to believe those allegations to be true— Held, cannot constitute a ground even while the case registered on that complaint pending trial.256

Particular of prejudicial activities need not be specified in the detention order if subsequently furnished in ground of detention— National Security Act, 1980, S. 3.

A notification dated February 8, 1982 was published in the Gazette specifying 16 items of supplies and services and which were essential to the community. An order of detention was passed thereafter under S. 3(2) read with S. 3(3) of the National Security Act against the respondent without

---

specifying the particulars of the activities of the detenu which were prejudicial to the essential supplies and services. But the grounds of subsequently served on the detenu contained full particulars in that regard. Before the High Court the detenu inter alia contended that in absence of specification in the detention order as to which particular supply and/or service the detaining authority had in mind while making the order, the order was bad. Accepting the contention the High Court set aside the order.

Held:

It is manifest from the statutory scheme that the detenu's right to represent is after the grounds are served on the detenu. A full disclosure made in the grounds in no way prejudices the right guaranteed to the detenu to make an effective representation challenging his detention. Therefore non-specification of the required particulars in the order of detention would not vitiate the order as long as the particulars are provided in the grounds in support of the order of detention which in quick succession of the detention order are served on the detenu. 257

(c) Reading of the grounds
Detention order must be read with the grounds

In actual practice the grounds supplied operate as an objective test for determining the question whether a nexus reasonably exists between grounds of detention and the detention order or whether some infirmities had crept in. A conjoined reading of the detention order and the grounds of detention is therefore necessary. 258

Mode of interpreting 'grounds'

The concept of 'grounds' has to receive an interpretation which will keep it meaningfully in tune with the contemporary notions of the realities of the society and the purpose of the Act in question in the light of concepts of liberty and fundamental freedoms guaranteed by Arts. 19(1), 21 and 22 of the Constitution. Reviewing several decisions in the case of Hasmukh Bhagwanji v. State of Gujarat, (1981) 2 SCC 175: 1981 SCC (Cri) 387, Supreme Court held that a democratic Constitution is not to be interpreted merely from a lexicographer's angle but with a realisation that it is an embodiment of the living thoughts and aspirations of a free people. The concept of 'grounds' used in the context of detention in Art. 22(5) of the Constitution and in subsection (3) of S. 3 of COFEPOSA, therefore, has to receive an interpretation which will keep it meaningfully in tune with contemporary notions. 259

Preamble or introductory para — Whether part of the grounds is to be seen on the facts and circumstances of each case — On facts held, the first para of the grounds was only a preamble — Hence its vagueness not fatal.

The grounds of detention may contain a preamble or introductory paragraph. The preamble betokens that which follows. It is a preliminary statement, a preface, a prelude.

Whether a particular paragraph in the grounds amounts only to a preamble or introduction is to be determined on the facts and circumstances of each case and it is open to the court to come to its own conclusion whether that paragraph is only an introductory para or contains the grounds on the basis of which the detaining authority had the subjective satisfaction for passing the order of detention.

In the present case the first paragraph of the grounds of detention, in substance, only indicates the modus operandi adopted by the various organizations to the current agitation on foreigners issue in Assam. The second and third paragraphs of the grounds alleged a specific part played by the detenu in the agitation. Reading the grounds of detention as a whole it is clear that the first paragraph of the grounds was only a preamble, prelude or introductory para. In view of this position the vagueness cannot be made a ground of attack on the impugned order of detention.

[The observations made in Mohd. Yqusuf Rather case (1979) 4 SCC 370, do not indicate that there can be no preamble or introductory para in the grounds of detention. The observations only mean all allegations of facts which have led to the passing of the order of detention will form part of the grounds of detention.]260

(d) Relevancy of grounds

(i) Generally

Relevancy — Ground of inciting and fomenting communal hatred and violence and creating an atmosphere of fear and tension in the town— Grave communal disturbances then prevailing in the town— Criminal cases pending against detenu and detention order served in view of possibility of detenu's release on bail — In the circumstances held, grounds not irrelevant. 261

Relevancy of grounds — Relevancy of single ground sufficient under S, 3(1) of COFEPOSA Act, 1974.

The Court is only concerned whether there are relevant materials on which a reasonable belief or conviction could have been entertained by the detaining authority on the grounds mentioned in S. 3(1) of the Act. Whether other grounds should have been taken into consideration or not is not relevant at the of the passing of the detention order. 262

Grounds — Relevancy of material —

Reading grounds together held, allegations made in the grounds were factual inferences justifiably drawn from the circumstances — Hence grounds cannot be held to be based on without material. 263

Three incidents mentioned in the grounds — First and third incidents relating to public order problem — Detention order passed pursuant to the third incident — Held, mention of the first two incidents also in the grounds, not fatal to the detention specially when the first incident to the order problem — Basis of detention — Public Order. 264

Irrelevant ground — Ground of causing communal riot — Offences causing outbreak of riot alleged to have been committed by detenu after 9 a.m. on May 19 but communal riot breaking out in the night intervening between 18/19 May — Held, it was inaccurate to state that riot broke out due to the incidents attributed to the detenu on May 19. 265

(ii) Past records or antecedents of detenu

History sheet not linking to the proximity of two alleged incidents of extorting money by threatening the shopkeepers and throwing bomb on police party another day — Held on facts, 'detention order invalid'. 266

Past prejudicial conduct or antecedent of detenu when can be considered by detaining authority.

The past conduct or antecedent history of a person can appropriately be taken into account in making a detention order. It is indeed usually from prior events showing tendencies or inclination of a man that an inference is drawn whether he is likely in the future to act in a manner prejudicial to the maintenance of public order. Of course, such prejudicial conduct or antecedent history should ordinarily be proximate in point of time and should have a rational connection with the conclusion that the detention of the person is necessary. 267

Past antecedents of detenu — Reliability of

It is usually from prior events showing or inclinations of a man that an inference can be drawn whether he is likely, in the future, to act in a manner prejudicial to the maintenance of public order. It is not correct to say that merely because there was an acquittal of an 'anti-social element', the detaining authority cannot take the act complained of leading to his trial into consideration. 268

Past conduct or antecedent history can be taken into consideration — The past conduct or antecedent history of a person can appropriately be taken into account in making a detention order — It is usually from prior events showing tendencies or inclinations of a man that an inference can be drawn whether he is likely, in the future, to act in a manner prejudicial to the maintenance of public order.\textsuperscript{269}

Antecedents of detenu — Future conduct of detenu can be assessed on the basis of his past conduct

The basis for an order of preventive detention is the reasonable prognosis of the future behaviour of the person based upon his past conduct. It is open to the detaining authority to take note of the past conduct of a detenu and apprehending repetition of such conduct in future an order of detention can be made with a view to preventing such action. If past conduct confined to any or all of the notified items of supplies and services which were essential to the community could be satisfied, the detaining authority could also on the basis of reasonable apprehension of repetition of such conduct in future make an order of detention for its prevention.\textsuperscript{270}

Relevancy of grounds — Anticipated behaviour based on past conduct may provide sufficient ground

The power of preventive detention is precautionary power exercised reasonably in anticipation and may or may not relate to an offence. It cannot be considered to be a parallel proceeding. The anticipated behaviour of a person based on his past conduct in the light of surrounding circumstances may provide sufficient ground for detention. It cannot be said that the satisfaction of the detaining authority on the basis of his past activities that if the detenu were to be left at large he would indulge in similar activities in future and thus act in a manner prejudicial to the maintenance of public order etc. shall not be based on adequate materials.\textsuperscript{271}

Relevancy of grounds — Past criminal record — Theft case against detenu relied on the grounds — Recovery memo. — In absence of any past criminal history, on the part of detenu, held, statement found in recovery memo not form basis of satisfaction for detention.\textsuperscript{272}

(iii) Consequence of irrelevancy

Irrelevancy or non-existence of one of the grounds would not vitiate the detention order in view of S. 5-A of COFEPOSA Act.

There is, no authority to hold that even if one of the grounds or reasons which led to the subjective satisfaction of the detaining authority is non-

\begin{footnotesize}
\begin{itemize}
\end{itemize}
\end{footnotesize}
existent or misconceived or irrelevant, the order of detention would be invalid despite introduction of S. 5-A of the COFEPOSA Act. 273

(e) Extraneous considerations

Detention based on single ground — Some extraneous materials also taken into consideration by detaining authority in passing the detention order — Held, detention order vitiated thereby and cannot be saved under S. 5-A of National Security Act on the plea that the order could be sustained on the basis of the ground itself — National Security Act, 1980, S. 5-A.

The contention based on S. 5-A of the National Security Act that the extraneous materials have no bearing on the validity of this impugned order which can be sustained on the material set out in the grounds of detention itself cannot be sustained. Section 5-A can be invoked where there are two or more grounds covering various activities of the detenu. In the present case the order had been passed on the sole ground relatable to a single incident. The conclusion is only on the basis that the extraneous materials, placed before the detaining authority, might have influenced the mind of the detaining authority. It is not on the ground that one of the grounds of the detention order has become invalid or inoperative for the mentioned in S. 5-A(a). 274

Detention on a ground which was not before the detaining authority at the time of making detention order — refuting detenu's allegations in this regard, without filing any affidavit — State's stand not acceptable

High Court's decision allowing habeas corpus petition, upheld — Practice — Affidavit.275

Extraneous consideration — Police report making averments reflecting on character of detenu, though furnished with the sole ground, but not mentioned in the ground itself— These averments, being extraneous in nature, might have influenced the mind of the detaining authority — Hence detention order vitiated by consideration of extraneous material — National Security Act, 1980, S. 3(3).

An order of detention was passed against the detenu under S. 3(3) of the National Act. The only ground of detention furnished to the detenu was that he (along with the associates) had at the time of auction of liquor held in the campus of Collectorate threatened the bidders that they along with their family members would be shot down if they dared to bid the shop falling within his area and that when police officials advanced towards the detenu, he fired gun-shots at the police party, exploded bombs and fled away creating panic among the people and completely disturbing the public order. Along with the ground of detention four documents viz. a report of SSP, a report of SHO, a copy of the chik of the case registered against the detenu in connection


with the incident stated in the ground and a copy of general diary relating to
the offence were furnished. The averments made in the police reports
unequivocally and clearly spell out that the detenu was a hardened criminal,
having a his control often committing heinous crimes, that many cases against
the detenu were registered in various police stations and that he was in the
habit of committing offences. Question was whether the sponsoring authority
had placed extraneous materials which had influenced the mind of the
detaining while passing the detention order and as such the detention order
was liable to be quashed. Quashing the detention order.

Held:

The above averments which are extraneous touching the character of
the detenu, though not referred to in the grounds of detention, might have
influenced the mind of the detaining authority to some extent one way or
other in reaching the subjective satisfaction to the decision of directing the
detention of the detenu. Had these extraneous materials not been placed
before the detaining authority, he might or might not have passed this order.
The detention order was suffering from the vice of the consideration of
extraneous materials vitiating the validity of the order. 276


Extraneous considerations — Affidavit in opposition showing that in arriving
at the subjective satisfaction, detenu's association with a political party
operating in the country — Whether consideration extraneous or irrelevant
which would vitiate the detention order, not considered. 277

(f) Vagueness of grounds

Vague grounds — Particulars about victims and places of offence alleged
against detenu not mentioned in grounds — Held, grounds vague —
Detenu could not make effective representation against his detention —
Hence detention order illegal and bad — Constitution of India, Art. 22(5).278

Vague grounds violative of Art. 22(5) — Detenu alleged to be a dangerous
person within the meaning of S. 2(c) of Gujarat PASAA — In absence of
particulars regarding the victims and places of the alleged offences, held on
facts, grounds vague — Statement that the alleged activities of the detenu was
coming in the way of maintenance of public order also vague — In the
circumstances detenu not able to make proper and effective representation —
Hence, Art. 22(5) violated — Gujarat Prevention of Anti-Social Activities Act,
1985, Ss. 2(c) and 3(1) — Constitution of India, Art 22(5).

Article 22(5) requires that the grounds must not be vague but must be
specific, relevant in order to enable the detenu to make an appropriate and
effective representation against the same before the Advisory Board as well as


SC 1543: 1982 CriLJ 2357._

(Cri) 664: AIR 1989 SC 1812: (1989) 3 Crimes 24._
before other authorities including detaining authority. The grounds and the averments made in the grounds which were served on the detenu are vague and as such they are violative of Art. 22(5). 279


Vagueness — Allegations should not be vague and general in nature and should be supported by particular incidents — On facts held, grounds vague.280

Vagueness — Grounds to be construed in the context of facts.281

Vagueness — Absence of particulars or details regarding pendency of many cases/offences as well as other allegations against detenu made in the documents furnished along with the sole ground — Held, allegations vague which prevented the detenu from making effective representation — Constitution of India, Art. 22(5).

No particulars or details had been given in the police report enclosed with the grounds of detention in regard to the alleged 'many cases/offences' said to have been registered in various police stations against the detenu and in regard to the allegations that he was a hardened criminal and had a gang often committing heinous crimes and that it had become the habit of the detenu to commit offences. There is therefore force in the submission that the had been deprived of making an effective and purposeful representation as envisaged under Art. 22(5). 282

Vagueness — Facts on which conclusion regarding detention drawn by detaining authority constitute the grounds — Document containing the grounds must be read as a whole for ascertaining subjective satisfaction of the authority — Vagueness of any ground will violate Art. 22(5) and render the detention order void — But absence of minute details in the grounds will not denote vagueness — Vagueness to be determined on facts and circumstances of each case — On facts held, grounds not vague — National Security Act, 1980 (65 of 1980), S. 3(3) — Constitution of India, Art. 22(5)

The grounds of detention must be in existence on the date when the order was passed and the authority concerned has to be satisfied about the grounds of detention on the date of the order and the satisfaction of the detaining authority must be clear on the face of it from the grounds of detention itself. The material facts on the basis of which subjective satisfaction was derived for passing the order of detention become a part and parcel of the grounds and must be supplied to the detenu. It is the document itself which will be taken to be the proof of what weighed with the detaining


authority while passing the order of detention and for this no extraneous evidence is admissible.

The Inclusion of an or non-existent ground, among other relevant grounds is an infringement of the right to be informed, as soon as may be, of the grounds which led to the subjective satisfaction of the detaining authority and the inclusion of an obscure or vague ground among clear and definite grounds is an infringement of the right to be furnished with sufficient particulars to enable the detenu to make a representation provided under Art. 22(5).

The question whether a particular ground is vague will depend on the facts and circumstances of each case because vagueness is a relative term; If the basic facts have been given in a particular case constituting the grounds of detention which enable the detenu to make an effective representation, merely because meticulous details of facts are not given will not vitiate the order of detention. 283

Vagueness — Material disclosed vague with reference to the persons affected or victimised by detenu as also time and place of such victimisation — Consequently detenu unable to make an effective representation — Held, detention order vitiated and violative of Art. 22(5). 284


Vagueness — Separate incidents of extorting money from shopkeepers by threatening them and of throwing bomb on police party causing panic alleged in the grounds — Particular of names of persons who had been threatened for money and names of witnesses in whose presence threat was given or alleged bomb was thrown not furnished — Held, grounds vague — Constitution of India, Art. 22(5) — National Security Act, 1980, S. 3(2)

The grounds were vague and it was not possible for the detenu to give an effective representation against the grounds which is one of the requirements enjoined in Art, 22(5). The police personnel who witnessed the incidents and those who recorded the FIR could have come forward to give evidence. In such circumstances, the open statement made in the affidavit of the Sub-Inspector of Police that the witnesses were afraid of disclosing their names and coming forward to give evidence is wholly incredulous and it cannot be accepted. The prosecution of the appellant for the substantive offences can be properly proceeded with in this case. 285


Vagueness — Statement of witnesses who had deposed against detenu supplied to detenu without disclosing their names — Detaining authority stating that disclosure of the names might have led to infliction of bodily injuries or even death of the witnesses — Though there may be certain

situations where disclosure of names has to be withheld but question whether on facts such withholding would by itself vitiate the detention order need not be decided.286

Where each activity of the detenu is a separate ground by itself, then the order of detention will not be vitiated merely because one of the grounds of detention is vague or irrelevant — Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of S. 5-A -Object and scope)

What S. 5-A provides is that where there are a number of grounds of detention covering various activities of the detenu spreading over a period or periods, each activity is a separate ground by itself and if one of the grounds is irrelevant, vague or unspecific but the grounds are clear and specific, then that by itself would not vitiate the order of detention of Gujarat v. SonL (1981) 2 SCC 24; 1981 SCC (Cri) 311: AIR 1981 SC 1480: (1981) 2 SCR 500: 1981 Cri LJ 1042: (1981) 51 Com Cas 631.

Expressions like 'defence of India', 'relations of India with foreign powers', Security of India', 'security of the State' and acting in any manner prejudicial to the maintenance of and services essential to the community so vague, general broad as to be on ground of and uncertainty. Held, the first four expressions are constitutional but must be narrowly construed — The power under the last expression is made subject to the prior enumeration and publicity of the supplies and services to be regarded as essential — National Security Act, 1980, S. 3(1)(a) & (2) Constitution of India, Arts. 14, 19 & 22(5).

It was contended on behalf of the petitioners that the various regarding of detention in S. 3(1)(a) and (2) were so vague, and elastic that besides not so grave conduct even lawful conduct can be included depending on the whim and caprice of the detaining authority to the detriment of the liberty of the subject. Rule of law requires that citizens must know when lawful conduct ends and unlawful conduct begins.

Held:

It is true that the vagueness and the consequent uncertainty of a law of preventive detention bears upon the unreasonableness of that law. A person cannot be deprived of his liberty by a law which is nebulous and uncertain in its definition and application.

But expressions may not be capable of precise definition. Formulation of definitions cannot be a panacea to the evil of vagueness and uncertainty. Even so the impossibility of framing a definition with mathematical precision cannot either justify the use of vague expressions or the total failure to frame any definition at all which can furnish, by its inclusiveness at least, a safe guideline for understanding the meaning of the expressions by the legislature. But the point to note is that there are expressions which inherently comprehend such an infinite variety of situations that definitions, instead of lending to them a definite meaning, can only succeed either in robbing them of their intended amplitude or in making it necessary to frame further

definitions of the terms defined. Acts prejudicial to the 'defence of India', 'security of India', "security of the State", and 'relations of India with foreign powers' are concepts of that nature which are difficult to encase within the straitjacket of a definition. The use of language carries with it the inconvenience of the imperfections of language.

What is expected is that the language of the law must contain an adequate warning of the which may fall within the prescribed area when measured by common understanding, In criminal law, the legislature vague expressions.

If it is permissible to the legislature to enact laws of preventive detention, a certain amount of minimum latitude has to be conceded to it in order to make those laws effective. In other words, though an expression may appear in cold print to be vague and uncertain, it may not be difficult to apply it to life's practical realities. This process undoubtedly involves the possibility of error but then, there is hardly any area of adjudicative process which does not involve that possibility.

The impugned expressions in the very nature of things are difficult to define. They cannot therefore, be struck down on ground of their vagueness or uncertainty. In practice, courts must strive to give to those concepts a narrower construction than what the literal words suggest. While construing laws of preventive detention like the National Security Act, care must be taken to restrict their application to as few situations as possible.

The same cannot, however, be said regarding the expression "acting in any manner prejudicial to the maintenance of supplies and services essential to the community", which supplies and services are essential to the community can easily be defined by the legislature. Reading it along with the Explanation, this power is therefore capable of wanton abuse in that, the detaining authority can place under detention any person for possession of any commodity on the basis that the authority is of the opinion that the maintenance of supply of that commodity is essential to the community. This provision therefore violates Art. 21 on ground of vagueness and uncertainty.

The other part of the expression, namely "services essential to the community" also requires a prior enumeration of the services as are considered essential to the community. People have to be forewarned if new categories are to be added to the list of services which are commonly accepted as being essential to the community.

Since the object of the above provision is justified, the power is not being struck down and it is held, that no person can be detained with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies and services essential to the community unless, by a law or notification or published fairly in advance, the supplies and services, the maintenance of which is regarded as essential to the community and in respect of which the
order of detention is proposed to be passed, are made known appropriately, to the public.287

(g) State grounds

State or irrelevant or vague grounds sufficient to render detention order invalid. Grounds of detention must be pertinent and not irrelevant, proximate and not state, precise and not vague. Irrelevance, stateness and vagueness are vices, any single one of which is sufficient to vitiate a ground of detention. And, a single vicious ground is sufficient to vitiate an order of detention.

In the present case the order and the grounds of detention were served on the detenu-petitioner in November 1980 while the incidents enumerated in one of the grounds were of the years 1974, 1975, 1977 and 1978. That ground thus suffered from the vice of stateness because of the passage of time since the happening of some of the incidents. Moreover, that ground was to the effect that the detenu and his associates had terrorised the common man in the area by various criminal acts which disturbance to public peace and public safety. Several incidents were narrated to substantiate this ground. Thus the incidents are related to 'law and order' and not to the maintenance of 'public order'. That ground, therefore, also suffered from the vice of irrelevance. Hence the detenu is entitled to be released, Shiv Prasad Bhatnagar v. State of M.P. (1981) 2 SCC 456: 1981 SCC (Cri) 489: AIR 1981 SC 870: (1981) 3 SCR 81: 1981 Cri LJ 594,

State grounds - Proximity of time between events referred to in grounds and passing of detention order - Determination of - Two old incidents of more than 5 and 2 years prior to the date of order of detention mentioned in the grounds - All the incidents proximate to each other showing history of prejudicial activity of the detenu - Order of detention, if vitiated - National Security Act, 1980, S. 3(2).

An order of detention was passed against the petitioner under S. 3(2) of the National Security Act. The grounds of detention mentioned seven incidents in which the petitioner was involved. Those incidents occurred on March 20, 1978, August 9, 1980, July 13, 1982, July 26, 1982, September 8, 1982, January 1, 1983 and March 25, 1983 respectively. The petitioner contended in the present writ petition that the first two grounds were state and not proximate to the time when the detention order was made and therefore, they were irrelevant and vitiated the detention order.

Held:

Per Chinnappa Reddy and Varadarajan, JJ.

It is not open to the detaining authority either to pick up an old and state incident and hold it as the basis of an order of detention under S. 3(2) of the Act, or to contend that it has mentioned only to show that the detenu has a tendency to create problems resulting in disturbance to public order, for as a matter of fact it has been mentioned as a ground of detention.

In the present case the two were too remote and not proximate to the order of detention. In absence of any provision in the National Security Act similar to S. 5-A of the CQFEPOSA Act it cannot be postulated what view would have been taken by the detaining authority about the need to detain the petitioner under S. 3(2) of the Act if he had not taken into account the and not proximate grounds into consideration in arriving at the subjective satisfaction. Therefore, the petitioner's detention is unsustainable in law and accordingly the detention order must be quashed.

Per Desai, J. (dissenting)

The detaining authority may examine the history of the criminal activity of the detenu and take into account a continuous course of conduct showing repeated indulgence into prejudicial activity which may permit an inference that unless preventive detention is resorted to it would not be possible to wean away such person from such prejudicial activity, for ordinarily a single stray incident may not, unless contrary is shown, be sufficient to invoke the drastic power of preventive detention. However, if there is a big time lag between the last of the events leading to the detention order being made and the remote earlier event, the same cannot be treated as showing a continuity of criminal activity. But if events in close proximity with each other are taken into account for drawing a permissible inference that these are not or spasmodic events but disclose a continuous prejudicial activity, the reference to earlier events cannot be styled as state or remote which would vitiate the order of detention. The test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the offending acts the order of detention. The question is whether the past activities of the detenu are such that the detaining authority can reasonably come to the conclusion that the detenu is likely to continue in his unlawful activities.

In the present case if each event is examined in close proximity with each other, the events of 1978 and 1980 referred to in the first two grounds cannot be rejected as stray or not proximate to the making of the detention order. They provide the genesis of the continuity of the prejudicial activity of the detenu and they appear to have been relied upon for that limited purpose. Therefore, the detention order cannot be quashed on the short ground that incidents set out in the first two grounds were state and irrelevant. 288

State ground — Two incidents regarding instigating members of a particular community to communal violence referred to — Second incident taking place after a lapse of a year — But both the incidents having rational nexus with the subjective satisfaction of the detaining authority — Held, first ground not state. 289

State grounds — Remoteness of — Alleged speeches of detenu referred to in ground made in February or earlier and detention order passed in January


next year — But speeches mentioned in the ground as a part of the continuous course of conduct brought out by the remaining grounds — Held, allegation regarding speeches in the ground not too remote to make it irrelevant.290

Punitive and state order of detention — Commission of alleged criminal offences by the detenu about one and a half years back forming basis of detention order — No explanation given for failure to take action under preventive detention law at the earliest after commission of the offence — Detenu appearing before magistrate on all dates of hearing in criminal case pending against him for the alleged offences even after passing the detention order but no reason given for failure to take him under custody during that period — Held, the charge too to have any real nexus with the detention and in the circumstances the detention is punitive rather than preventive in nature and therefore, vitiated — COFEPOSA Act, 1974 (52 of 1974), S. 3(1). 291

Alleged incidents about one year old — But proximity between the incidents existing indicating detenu's criminal propensity — In the circumstances, held, conclusion of the detaining authority that detenu was habitually committing or abetting commission of offences, not open to interference by Court — Bihar Control of Crimes Act, 1981, Ss. 2(d) & 12(2).

Upon the materials the DM in his order of detention under S. 12(2) of the Bihar Control of Crimes Act, 1981 stated that he was satisfied that the detenu was an anti-social element and was habitual in committing offences punishable under Chs. XVI and XVII, IPC and as such his movements and acts adversely affected the public order. The incidents referred to in the grounds of detention showing criminal propensity of the detenu had taken place one year prior to the date of passing of the detention order.

Held:

While adequacy or sufficiency is no ground for a challenge, relevancy or proximity is relevant in order to determine whether an order of detention was arrived at irrationally or unreasonably.

In the background of the present case and having regard to the definition of anti-social element in S. 2(d) of the Bihar Control of Crimes Act, if an appropriate authority charged with the implementation of the Act comes to the satisfaction that the detenu is one who is habitually committing or abetting the commission of offences, such a conclusion is neither irrational nor unreasonable. Anti-social elements creating havoc have to be taken care of by law. The power of preventive detention cannot be said to have been used to clip the 'wings of the accused' who was involved in a criminal prosecution. The fact that the detenu was in jail had been taken into consideration. All the relevant documents were in fact supplied and no other document was asked for. In the facts of this case and having regard to the nature of the offences, the impugned order cannot be said to be invalid and improper one. There was,
therefore, no ground for the Court's interference with the order of detention. 292

Remoteness in time with the activity — Smuggled electronic goods seized on February 4 — Detention order under COFEPOSA passed on September 19, held, could not be said to be very remote from the fact of seizure of smuggled goods. 293

Grounds of detention — Proximity of time between incidents mentioned in the ground — Long lapse of time between two prejudicial acts or omissions of the detenu — Whether detenu can be said to be habitual offender of public order — Bihar Control of Crimes Act, 1981 (7 of 1981), S. 17.

Per Venkataramiah, J.

The third ground which is based on the pending Sessions case is no doubt of the nature of acts or omissions referred to in sub-clause (i) of S. 2(d) but the interval between the first ground which falls under this sub-clause and this one is nearly eight years and cannot, therefore, make the petitioner a habitual offender of the type falling under sub-clause (i) of S. 2(d).

Per A.P. Sen, J.

On merits the impugned order cannot be to be vitiated because of some of the grounds of detention being non-existent or irrelevant or too remote in point of time to furnish a rational nexus for the subjective satisfaction of the detaining authority. 294

(h) Solitary ground

Detention order based on solitary incident when proper — COFEPOSA Act, 1974, S. 3(1).

It was contended that there was no necessity to pass an order for the detention of the petitioner because except the solitary incident mentioned in the grounds of detention involving the recovery of seven gold bars from the person of the petitioner there is no reference in the grounds of detention to any antecedent activity involving smuggling of goods by the petitioner. It is urged that a single incident could not afford the basis for arriving at the satisfaction that the petitioner might repeat such acts in the future and it was necessary to detain him in order to prevent him from doing so.

Held:

An order for preventive detention is founded on a reasonable prognosis of the future behaviour of a person based on his past conduct judged in the light of the surrounding circumstances. Such past conduct may consist of one single act or of a series of acts. It must be of such a nature that an inference can reasonably be drawn from it that the person concerned


would be likely to repeat such acts as to warrant his detention. The question which, therefore, needs to be considered is whether from the past conduct of the petitioner as set out in the grounds of detention it could reasonably be inferred that the petitioner would be likely to repeat such acts in the future.

In the present case the evidence would show that the petitioner was indulging in the activity of smuggling of gold as a carrier for monetary consideration. This was a deliberate act on the part of the petitioner and he had prepared himself for it by obtaining a passport in a false name and acquiring requisite skill to conceal such a large quantity of gold in his body. Taking into consideration the circumstances an inference could reasonably be drawn that unless detained the petitioner would be likely to indulge in smuggling of goods in future and, therefore, there was a reasonable basis for the detaining authority to arrive at the requisite satisfaction. 295

Solitary ground — When not sufficient to sustain detention — Further grounds cannot be supplemented by filing affidavit — National Security Act, 1980, S. 3(3).

Even one ground may be regarded as sufficient if the activity alleged is of such a nature that the detaining authority could reasonably infer that the detenu must be habitually engaged in such activity or there may be other circumstances set out in the grounds of detention from which the detaining authority could reasonably be satisfied even on the basis of one ground that unless the detenu is detained, he might indulge in such activity in future. But in the instant case the only ground alleged against the petitioner was that he, along with others, jointly committed murder in broad daylight. No other circumstances were mentioned. It was difficult to infer from the solitary ground that the act alleged to have been committed by the petitioner would have disturbed public order as distinct from law and order or that one single act committed by the petitioner was of such a character that it could reasonably be inferred by the detaining authority that if not detained, he would be likely to indulge in such activity in future. Therefore, the ground of detention given in support of the order of detention was irrelevant.

The detaining authority cannot by an affidavit filed in court supplement what is stated in the grounds of detention or add to it. 296

Solitary incident of smuggling — Facts and circumstances giving rise to the inference that detenu was member of a smuggling syndicate — Merely because only one incident coming to light does not mean that it was his maiden act of smuggling — Held, detaining authority justified in reaching satisfaction that detenu was engaged in smuggling — COFEPOSA Act, 1974, S. 4. 297

Sufficiency of, for passing detention order — Quality and nature of the incidents and not their quantity material — Even one incident may be sufficient to satisfy the detaining authority — On facts held, subjective satisfaction arrived at by detaining authority on the basis of two incidents referred to in the grounds proper. 298

(i) Identical grounds to different detenus

Same ground, different detenu — Identical ground, on which another person involved in the same transaction, found by Advisory Board as insufficient for sustaining that person's detention — Held, is a highly relevant circumstance, though not binding, in the context of detention of the petitioner-detenu — Failure to place that circumstance before the detaining authority when it passed order of detention against the petitioner, held, amounted to non-application of mind — Hence, detention order against the petitioner must be set aside. 299

REPRESENTATION BEFORE APPROPRIATE AUTHORITY/GOVT.

Expeditious consideration of detenu's representation — Detenu's right to and detaining authority's corresponding obligation in regard to, held, is a constitutional imperative under Art. 22(5) and is not dependant on any particular preventive detention legislations which must conform to Art 22(5) — An unreasonable delay in considering the representation cannot be justified on the ground that unlike COFEPOSA Act, National Security Act makes the delay inevitable — Administrative red tapism cannot afford a valid explanation for such delay — On facts, held, unreasonable and unexplained delay rendered continued detention of the detenus illegal — Constitution of India, Art 22(5) — National Security Act, 1980 (65 of 1980), Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974), S. 3(3). 300

The detenu has an independent constitutional right to make his representation under Art. 22(5) of the Constitution of India. Correspondingly, there is a constitutional mandate commanding the concerned authority to whom the detenu forwards his representation questioning the correctness of the detention order clamped upon him and requesting for his release, to consider the said representation within reasonable dispatch and to dispose the same as expeditiously as possible. This constitutional requirement must be satisfied with respect but if this constitutional imperative is observed in breach, it would amount to negation of the constitutional obligation rendering the continued detention constitutionally impermissible and illegal, since such a breach would defeat the very concept of liberty — the highly cherished right — which is enshrined in Art 21.

True, there is no prescribed period either the provisions of the Constitution or under the concerned detention law within which the representation should be dealt with. The use of the word "as soon as may be" occurring in Art. 22(5) reflects that the representation should be expeditiously considered and is disposed of with due promptitude and diligence and with a sense of urgency and without avoidable delay. What is reasonable dispatch depends on the facts and circumstances of each case and no hard and fast rule can be laid down in that regard. However, in case the gap between the receipt of the representation and its consideration by the authority is so unreasonably long and the explanation offered by the authority is so unsatisfactory, such delay could vitiate the order of detention. 301

It is not possible to treat representations from whatever source addressed to whomsoever officer of one or other department of the Government as a representation to the Government requiring the appropriate authority under the COFEPOSA to consider the matter. Neither the countless petitions, memorials and representations presented to the Prime Minister and other Ministers are statutory appeals or petitions, nor the diplomatic communications between one country and another are representations to the statutory authorities functioning under the Act which are to be considered and disposed of in the manner provided in the Act. The Bout de Papier and the reminder being diplomatic communications between the Governments of the two countries cannot be treated as representations to the Central Government under S. 11, COFEPOSA Act and will be attended to and answered through appropriate diplomatic channels in proper time and with necessary expedition. 302

Representation made to President amounts to representation to Central Government by virtue of S. 3(8) of General Clauses Act — National Security Act, 1980, S. 14. 303

Detenu falsely claiming to have sent his written representation to the President of India through another person — Government preferring application under S. 340 Criminal Procedure Code, 1973 for prosecution of the persons responsible for forging the documents and making interpolations in dak register of President's Secretariat — CBI enquiring into the matter — Hence passing of final orders on the application under S. 340 deferred till completion of investigation by CBI — Criminal Procedure Code, 1973, S. 340.304

Comments of detaining authority on the representation — Effect of — When representation is made to government, comments called for from detaining

authority would not vitiate government order rejecting the representation on ground that such comments would influence mind of the government.

Unless the comments of the relevant authorities are placed before the Minister, it will be difficult for him-to properly consider the representation. There is no substance in the contention that any comment from the detaining authority would influence the mind of the government. Such assumption is without any foundation. 305

Non-application of mind in rejecting representation alleged on ground that all relevant material not taken into consideration by detaining authority — Held on facts, allegation not made out. 306

Right to make effective representation— Denial of — Discrepancy between statements in detention order and grounds of detention as also between the English version and the regional language in which the order and the grounds had been served — In the regional language necessity of detention stated in the detention order to be to prevent the detenu from smuggling and abetting the smuggling under S, 3(1 )(i) & (ii) of COFEPOSA Act whereas the necessity stated in the grounds to be to prevent from concealing, transporting smuggled goods falling under S. 3(l)(ii) and (iv) of that Act — English version of detention order stating that the order passed only for abetting the smuggling of goods — Held, discrepancy caused confusion, as a result of which detenu was unable to make effective representation and thereby his right under Art. 22(5) denied — COFEPOSA Act, 1974, S. 3(1) — Constitution of India, Art. 22(5). 307

Only written and not oral representation permissible which may be sent through Jail Authorities or any other suitable mode — Constitution of India, Art. 22(5). 308


The power of revocation conferred on the Central Government under S. 14 of the National Security Act is a statutory power which may be exercised on information received by the Central Government from its own sources including that supplied by the State Government under S. 3(5) or from the detenu in the form of a petition for representation. It is for the Central Government to decide whether or not it should revoke the order of detention in a particular case.

At one time it was thought that S. 14 of the Maintenance of Internal Security Act, 1971 which was in pan materia with S. 14 of the National Security Act, did not confer any right or privilege on the detenu but there is a definite shift in the judicial attitude, for which there appears to be no discernible basis.

In the present case, the detenu was not deprived of the right of making a representation to the detaining authority under Art. 22(5) of the Constitution read with S. 8(1) of the Act. Although the detenu had no right to simultaneously make a representation against the order of detention to the Central Government under Art. 22(5) and there was no duty cast on the State Government to forward the same to the Central Government, nevertheless the State Government forwarded the same forthwith. The Central Government duly considered that representation which in effect was a representation for revocation of the order of detention under S. 14. Therefore, it was not obligatory on the part of the Central Government to consider a second representation for revocation under S. 14. 309


The obligation rests on the detaining authority to establish that sufficient particulars of the grounds of detention were furnished to the respondent so as to enable him to exercise effectively his constitutional right of making a representation against the order of detention. The rigour of the obligation cannot be relaxed under any circumstances. In the present case the State has discharged its obligation. 310

(b) Consideration of representation independent of reference to Advisory Board

Appropriate Government obliged to consider detenu's representation independent of consideration by Advisory Board — Representation must be considered at the earliest — Held on facts, representation considered by State


Government, the detaining authority, without any delay — Constitution of India, Art. 22(5).

Article 22(5) itself does not say to whom the representation is made or who will consider the representation. By virtue of provisions of the statute under which he has been detained, the appropriate government is legally obliged to comply with these requirements. It is obligatory on the appropriate government to consider the detenu's representation separate from other consideration of the detenu's case by the Advisory Board. The Central Government which has the power to revoke the detention order passed by the State authority, is also under legal obligation to dispose of the representation without delay. 311

*Khudiram Das v. State of W.B., (1975) 2 SCC 81:1975 SCC (Cri) 435, relied on*

The failure on the part of the State Government to consider the representation made by the appellant addressed to the Chief Minister without waiting for the opinion of the Advisory Board also rendered the continued detention of the appellant invalid and constitutionally impermissible. The constitution of an Advisory Board under S. 8 of the Act does not relieve the State Government from the legal obligation to consider the representation of the detenu as soon as it is received by it. 312

*Narendra Purshotam Umrao v. B.B, Gujral, (1979) 2 SCC 637:1979 SCC (Cri) 557, followed*

In case of preventive detention of a citizen, the obligation of the appropriate government is two-fold: (i) to afford the detenu the opportunity to make a representation and to consider the representation which may result in the release of the detenu, and (ii) to constitute a Board and to communicate the representation of the detenu along with other materials to the Board to enable it to form its opinion and to obtain such opinion. The former is distinct from the latter. Corresponding to this obligation there is a twofold right in favour of the detenu to have his representation considered by the appropriate government and to have the representation once again considered by the Government in the light of the circumstances of the case considered by the Board for the purpose of giving its opinion.

In the present case the State Government failed to discharge the first of the two-fold obligation and waited till the receipt of the Advisory Board's opinion which resulted in non-consideration of the representation for an unexplained period of twenty-four days. This shows there was no independent consideration of the representation by the State Government which is a clear non-compliance of Art. 22(5). The order of detention is, therefore, liable to be quashed. 313

---

Detaining authority not justified in deferring its decision on the representation till receipt of Advisory Board's report — Constitution of India, Art 22(5).

The detenu has an independent constitutional right to have the representation considered by the detaining authority irrespective of whatever the Advisory Board may do in the present case although the representation was received by the detaining authority on February 25, 1980, it was rejected on March 13, 1980, a day after the Advisory Board had given its opinion. The Collector's remarks which were sent for were available to the detaining authority as far back as on March 6; 1980 and there could be no reason for the detaining authority to have deferred its decision on the representation till the receipt of the opinion of the Advisory Board. 314

Representation made after confirmation of detention by Advisory Board — Non-consideration by detaining authority on the ground that the detenu had requested that his representation be forwarded to the Advisory Board also — Held, improper — Art 22(5) contravened — COFEPOSA, S. 11.315

(c) Competent authority to consider representation

Competent authority to consider — Chief Minister — Held, competent to dispose of the representation where statute requires the representation to be made to appropriate Government — National Security Act, 1980 (65 of 1980), S. 8.

It follows from the specific provision in S, 8 of the National Security Act for affording earopportunity to make representation not to the detaining authority but to the appropriate Government that the appropriate Government must consider the representation. Where the Chief Minister considered the representation and rejected it after calling for parawise remarks of the detaining authority, the failure of the detaining authority to consider the representation would not invalidate the detention order. 316

Competent authority to consider—Home Secretary or Home Minister — Held, competent under Maharashtra Rules of Business — Maharashtra Government Standing Order No. SI. 3(A) PSA 1181 dated October 13, 1981 — COFEPOSA Act, 1974 (52 of 1974), S. 3(1). 317

Competent authority to consider — Held, need not be the detaining authority itself — Any other authorised person, such as State Home Minister, is competent to dispose of the representation, for and on behalf of the State Government — Rules of Business of Government of Maharashtra, Rr. 6 and 15.

Whether the detaining authority or the State Home Minister disposed of the representation, would be immaterial since both had authority to act for the State Government and whatever be the instrumentality, it would be the State Government which would be considering and dealing with the representation. There is no requirement express or implied in any provision of the COFEPOSA Act that the same person who acts for the State Government in making the order of detention must also consider the representation of the detenu. The only requirement of Art. 22(5) is that the representation of the detenu must be considered by the detaining authority which in the present case is the State Government and this requirement was clearly satisfied.

Competent authority to consider — May be other than the detaining authority — State Home Minister competent to deal with the representation where authorised to do so by relevant rules and orders of the Government — Maharashtra Government Rules of Business, R. 6.

The Minister of State for Home Affairs, Government of Maharashtra was entitled to deal with the representation of the detenu, by virtue of the Standing Order made by the Chief Minister and the State Home Minister read with R. 6 of the Maharashtra Government Rules of Business made undiff Art. 166(2) and (3) of the Constitution. There is no substance in the suggestion that it would have been more appropriate if the representation had been considered by the very individual who had exercised his mind at the initial stage of making the order of detention, namely the Secretary to the Government.

[Ed: See also Mamma v. State of Maharashtra, (1981) 3 SCC 566 where the Court has affirmed the above view]

Detaining authority itself must take a decision on the detenu's representation so as to afford remedy to the detenu to approach the higher authorities in case of rejection of his representation — Constitution of India, Art 22(5) — COFEPOSA Act, 1974 (52 of 1974), Ss. 3 and 11.

Under Art. 22(5) as also under S. 11 COFEPOSA Act a representation should be considered by the detaining authority, who on a consideration thereof can revoke the detention order and if the representation is rejected by detaining authority it is open to the detenu to approach the State Government for revocation of the order and failing that it is open to him to approach the Central Government to get the detention order revoked.

In the present case the Chief Secretary, Delhi Administration, who was the detaining authority, considered the detenu's representation on receipt of comments of Secretary, Law and Justice, but instead of himself rejecting it, he submitted, the same to the Administrator with an endorsement to the effect "the representation may be rejected". The Administrator made, an endorsement below that of the Chief Secretary to the effect that he had considered the representation as well as the comments of the Customs

Department and after examination thereof he agreed that the representation had no merit and must be rejected. It is thus clear that the representation had only been considered by the detaining authority at the highest but he did not take the decision to reject the same himself and as such the constitutional safeguard under Art. 22(5) had not been strictly observed or complied with. The continued detention of the detenu was therefore illegal Santosh Anand v. Union of India, (1981) 2 SCC 420: 1981 SCC (Cri) 456.

Representation — Must be considered and rejected by the detaining authority — Where detaining authority is Home Minister, but detenu's representation rejected by Secretary, held, the Secretary had no jurisdiction to consider or pass any orders on the representation and hence the continued detention of the detenu becomes void.320

(d) Delay in transmitting representation

Representation to Central Government — Failure of jail authorities to forward detenu's representation to Central Government either directly or through State Government — Representation lying unattended for several months — Held, detention illegal — COFEPOSA Act, 1974 (52 of 1974), S. 11.

Section 11(1) of the COFEPOSA Act confers upon the Central Government the power to revoke an order of detention even if it is made by the State Government or its officer. That power, in order to be real and effective, must imply the right in a detenu to make a representation to the Central Government against the order of detention.

The failure of the Jail Superintendent to either forward the representations to the Government concerned or to have forwarded them to the State Government with a request for their onward transmission to the Central Government has deprived the detenu of his valuable right to have his detention revoked by that Government. The continued detention of the detenu must therefore be held illegal and the detenu be set free.321

Delay of one month, five days in communicating representation of detenu from jail to detaining authority — Held, right to representation under Art. 22(5) contravened — Detention held illegal.322

Representation to Central Government — Detenu has right to make representation under S. 14(1), N.S.A. — Unexplained delay on the part of State Government in forwarding detenu's representation to Central Government resulting in delay of more than two months in considering the representation by Central Government — Held, the delay rendered continued detention of the detenu illegal — National Security Act, 1980, S. 14(1) — Constitution of India, Art. 22(5).

Section 14(1) of the Act confers upon the Central Government the power to revoke an order of detention even if it is made by the State

Government or its officer. That power, in order to be real and effective, must imply a right in a detenu to make a representation to the Central Government against the order of detention. Thus, the failure of the State Government to comply with the request of the detenu for the onward transmission of the representation to the Central Government has deprived the detenu of his valuable right to have his detention revoked by that Government. That being so, the continued detention of the detenu must be held to be illegal and constitutionally impermissible. 323

Representation for, made by detenu to President and Prime Minister received in Ministry of Home Affairs after about two months and one week and disposed of within a week by the Home Ministry — Delay in Secretariats of President and Prime Minister not explained — Held, part of the delay may be due to detenu's failure to send the representation direct to the concerned ministry viz, the Home Ministry but that cannot justify the enormous delay — In view of unexplained and unduly long delay in disposal of the representations, further detention of the detenu, held, illegal NSA, 1980, Ss. 14 & 3. 324

(e) Delay in disposal of representation

Inordinate delay in disposal of, in absence of proper explanation, violates Art 22(5) — Constitution of India, Art, 22(5).

The detenu submitted representation against his detention originally on January 1, 1988 which he got back and resubmitted it on February 2, 1988. It was stated on behalf of the State that the representation dated February 2, 1988 was received in the COFEPOSA section of Ministry of Finance on February 16, 1988 with a letter dated February 5, 1988 from the Government of Kerala; that as certain information was not available with the Central Government, the Collector of Customs, was asked to get a copy of the representation from the State Government and to send his comments; that Collector of Customs, informed the Central Government by a telex message dated March 1, 1988 which was received in the COFEPOSA section on March 8, 1988 informing that the representation was not available with the Home Department; that thereafter a copy of the representation was forwarded to the Collector of Customs by post on March 8, 1988; that the comments of the Collector were received back on March 28, 1988; that then the representation along with the comments were placed before the Joint Secretary, COFEPOSA section on March 30, 1988, who forwarded the same to the Minister of State for Revenue on the same day and on April 4, 1988 the Minister of State forwarded his comments to the Finance Minister who considered and rejected the representation on April 8, 1988.

Held:

The representation of the detenu had not been given prompt and expeditious consideration, and was allowed to lie without being properly

attended to. The explanation that the delay has occurred in seeking the comments of the Collector of Customs etc. is not a convincing and acceptable explanation. The delay of 72 days in the absence of satisfactory explanation is too long a period for ignoring the indolence on the part of the concerned authority. Hence, the unexplained delay in disposal of the representation of the detenu is violative of Art. 22(5) rendering the order of detention invalid.\textsuperscript{325}

Non-disposal of — Request describing as representation made for furnishing translated copies of the grounds of detention in the language known to the detenu — Addressed to Chairman, Central Advisory Board sent through Jail Superintendent — Held, amounted to a representation to the appropriate government, which was obliged to consider and dispose it of independently irrespective of reference to the Board — Failure to do so violated Art, 22(5) and vitiated the detention — Constitution of India, Art 22(5) — COFEPOSA Act, 1974.

Under Art. 22(5) no proforma for representation has been prescribed. Opportunity to make a representation comprehends a request for supply of translated copies. Therefore, the detenu's 'representation' asking for copies of documents must be held to have amounted to a representation.

Article 22(5) does not say which is the authority to whom representation shall be made or which authority shall consider it. But it is indisputable that the representation may be made by the detenu to the appropriate government and it was mandatory on the part of the appropriate government to consider and act upon it at the earliest opportunity and failure to do so would be fatal to the detention order. In the present case though the representation was addressed to the Chairman, Central Advisory Board the same was forwarded by the Jail authorities and it must be taken to have been a representation to the appropriate government which was to consider it before placing it before the Advisory Board. But there was no consideration before and even after the Advisory Board considered the case of the detenu. It is settled law that delay in disposing the representation when inordinate and unexplained the detention would be bad and the detenu must be ordered to be released forthwith. Therefore, Art. 22(5) was violated.\textsuperscript{326}

Non-consideration of representation alleged — Absence of counter-affidavit by State — Allegation remaining uncontraverted — Continued detention of detenu, held, illegal and constitutionally impermissible — Detention quashed — National Security Act, 1980, S. 3(2) — Constitution of India, Art, 22(5). \textsuperscript{327}

Representation to appropriate authority — Should be disposed of expeditiously — Delay in disposal should be satisfactorily explained by all the concerned authorities individually where detaining authority is unable to personally explain delay at various stages — Inordinate and unexplained delay in disposal of the representation of the detenu is violative of Art, 22(5) rendering the order of detention invalid.\textsuperscript{325}


delay fatal to the detention irrespective of enormity and gravity of
allegations made against the detenu — COFEPOSA Act, 1974, S. 3(1)

In the counter-affidavit filed by the Joint Secretary, Department of Revenue, Ministry of Finance it was stated that the petitioner had made his representation on August 21, 1989 and not on August 18, 1989 as alleged by the detenu-appellant and that it was received in the office of his department on August 23, 1989 and the same was forwarded to the concerned sponsoring authority on August 25, 1989. The sponsoring authority sent his comments only on September 11, 1989. Thereafter, the representation along with the comments was processed and put up before the Minister of State for Revenue, who considered and rejected the same on September 15, 1989 subject to the approval of the Finance Minister. On September 18, 1989 the file was received back from the Finance Minister's office and the memorandum was issued on September 19, 1989 rejecting the representation. It was contended on behalf of the detenu that there was an inordinate delay in considering and disposing of the representation and as such continued detention of the detenu was violative of Art. 22(5). Allowing the appeal and directing that the detenu be set at liberty forthwith.

Held:

Except merely mentioning that the representation was forwarded to the concerned sponsoring authority on August 25, 1989 and the comments from the sponsoring authority was received by the department on September 11, 1989, there is absolutely no explanation as to why such a delay had occurred. This undue and unexplained delay is in violation of Art. 22(5) rendering the detention order invalid.

A representation of a detenu whose liberty is in peril should be considered and disposed of as expeditiously as possible; otherwise the continued detention will render itself impermissible and invalid as being violative of Art. 22(5). If any delay occurs in the disposal of a representation, such delay should be explained by the appropriate authority to the satisfaction of the court. In case the appropriate authority is to explain personally the delay at various then it will be desirable — indeed appropriate — for the concerned authority or authorities at whose hands the delay has occurred to individually explain such delay. In absence of any explanation, court cannot wink at or skip over or ignore such an infringement of the constitutional mandate and uphold an order of detention merely on the ground that the enormity of allegations made in the grounds of detention is of a very serious nature as in the present case. 328


On September 1, 1988 the detenu filed representation against his detention addressed to the President of India through the Home Secretary, Government of Punjab and the Superintendent of District Jail, Agartala (Tripura). The State Government was not aware of pendency of any such representation with it. On September 13, 1988 the Central Government issued a teleprinter message which was duly received on September 14, 1988 in which the Central Government wanted to know the date on which the grounds of detention were supplied to the detenu and also sought para wise comments on the representation of the detenu. However, the Central Government did not send any copy of the representation to the State Government. Even so, it directed the police, vide letter dated September 14, 1988, to supply the required information to the Central Government. It was intimated to the Central Government that para wise comments on the representation could not be offered as copy of the representation was not available with the State of Punjab. The Central Government vide teleprinter message dated October 6, 1988 which was received on October 10, 1988 intimated that the photostat copy of the representation had been sent along with the post copy of the teleprinter message. The representation was duly received on October 19, 1988 by the State of Punjab and it was examined at various levels on October 19, 1988, (October 20, 1988 was a holiday), October 21, 1988 (October 22, 1988 and October 23, 1988 were holidays), October 24, 1988 (October 24, 1988 was again a holiday), October 26, 1988, October 27, 1988 and October 28, 1988. The representation was duly put up before the competent authority who rejected it after deliberation and consideration on October 28, 1988. It was contended on behalf of the appellant State that the delay was caused by the representation having been addressed to the President of India, even though the detention order itself stated that if the detenu wished to make such representation, he should address it to the State Government through the Superintendent of Jail as soon as possible.

Held:

The clear instructions in the grounds of detention that the detenu should address the representation to the State Government through the Superintendent of the Jail where he was detained should have been followed. May be this was due to the fact that Punjab was under President's rule at the relevant time but Rashtrapati Bhawan, New Delhi was not the proper destination of the representation to the State Government. However, from the facts of the case it is clear that after receipt of the xerox copy from the Central Government, the State Government took only 13 days including 4 holidays in disposing of the representation. Considering the situation prevailing and the consultation needed in the matter, the State Government could not have been unmindful of urgency in the matter. But, it took more than two months from the date of submission of the representation to the date of informing the detenu of the result of his representation. Eight days were taken after disposal of the representation by the State Government. The result is that the detenu's constitutional right to prompt disposal of his representation was denied and the legal consequences must follow. It is a settled law that in cases of
preventive detention expeditious action is required on the part of the authorities in disposing of the detenu's representation.  

Delay in considering — Determination of, would depend upon facts and circumstances of each case — Unavoidable delay would not render continued detention invalid.

The question whether the representation submitted by a detenu has been dealt with all reasonable promptness and diligence is to be decided not by the application of any rigid or inflexible rule or set formula nor by a mere arithmetical counting of dates, but by a careful scrutiny of the facts and circumstances of each case; if on such examination, it is found that there was any remissness, indifference or avoidable delay on the part of the detaining authority/State Government in dealing with the representation, the court will undoubtedly treat it as a factor vitiating the continued detention of the detenu; on the other hand, if the court is satisfied that the delay was occasioned due to unavoidable circumstances or reasons entirely beyond his control such delay will not be treated as furnishing a ground for the grant of relief to the detenu against his continued detention. In the present case there was no avoidable delay on the part of the District Magistrate in forwarding the petitioner's representation.


The word 'earliest' in S. 13 of the Jammu and Kashmir Public Safety Act, which qualifies "opportunity" must equally qualify the corresponding obligation of the State to deal with the representation, if and when made, as expeditiously as possible. The 'opportunity' contemplated by the section is the opportunity to make a representation against the detention order to the Government.

If the Government enacts a law like the present Act empowering certain authorities to make the detention order and also simultaneously makes a statutory provision of affording the earliest opportunity to the detenu to make his representation against his detention, to the Government and not the detaining authority, of necessity the State Government must gear up its own machinery to see that in these cases the representation reaches the Government as quickly as possible and it is considered by the authorities with equal promptitude. The intermediary authorities who are communicating authorities have also to move with an equal amount of promptitude. The corresponding obligation of the State to consider the representation cannot be whittled down by merely saying that much time was lost in the transit. Any slackness in this behalf not properly explained would be denial of the


protection conferred by the statute and would result in invalidation of the order.

In the present case the representation handed over by the detenu in jail to the Jail Superintendent at Jammu was received by the Government in Srinagar after 14 days. While forwarding the representation the Jail Superintendent had also sent a wireless message on the same day informing the Government that the representation had been sent by post. But in spite of being aware that a representation had been made, when it reached the concerned office in Srinagar, the Government took 19 days in its disposal. Thus there are two vital time-lags and the delay, apart from being inordinate, is not explained on any convincing grounds. Thus the representation was not dealt with as early as possible or as expeditiously as possible, and, therefore, there would be contravention of S. 13 of the Act which would result in the invalidation of the order.331

Under the COFEPOSA Act, a detenu has the right to simultaneously make a representation to the detaining authority which has to be considered by the Advisory Board, as also the right to apply to the Central Government for revocation of the detention order under S. 11. It is wrong to contend that the power of revocation by the Central Government under S. 11 is not attracted till the State Government has considered the representation of the detenu and rejected it and till the Advisory Board has submitted its Report to the State Government.

When a simultaneous representation under S. 11(1)(b) is endorsed to the Central Government, the State Government has the corresponding duty not to withhold but to forward it to the Central Government forthwith for necessary action. A lapse on the part of the State Government in forwarding the representation simultaneously made by the detenu to the Central Government for revocation of the order of detention under S. 11 would result in striking down the detention order.

In the present case the representation made by the detenu was forwarded to the Central Government after a lapse of 2 months and 15 days. But the Central Government acted with great promptitude in dealing with the representation and found no ground to interfere with the order of detention. Thus there is nothing but the unexplained delay on the part of State Government and that by itself is not sufficient to invalidate the order of detention. The detenu was not deprived of the right of making a representation to the State Government, i.e. the detaining authority, as well as of the right of making a representation to the Central Government for revocation of the order of detention under S. 11 of the Act. The Court must look at the substance of the matter and not act on mere technicality.332

The supine indifference, slackness and callous attitude on the part of the Jail Superintendent who had unreasonably delayed in transmitting the

representation as an intermediary, had ultimately caused undue delay in the
disposal of the appellant's representation by the government which received
the representation 11 days after it was handed over to the Jail Superintendent
by the detenu. This avoidable and unexplained delay has resulted in
rendering the continued detention of the appellant illegal and constitutionally
impermissible.

When it is emphasised and re-emphasised by a series of decisions of
the Supreme Court that a representation should be considered with
reasonable expedition, it is imperative on the part of every authority, whether
in merely transmitting or dealing with it, to discharge that obligation with all
reasonable promptness and diligence without giving room for any complaint
of remissness, indifference or avoidable delay because the delay, caused by
slackness on the part of any authority, will ultimately result in the delay of the
disposal of the representation which in turn may invalidate the order of
detention as having infringed the mandate of Art. 22(5). It is neither possible
nor advisable to lay down any rigid period of time uniformly applicable to all
cases within which period the representation of detenu has to be disposed of
with reasonable expedition but it must necessarily depend on the facts and
circumstances of each case. 333

Representation before Central Government — Should be disposed of with
reasonable expedition — No rigid rule laid down — Delay of one month and
five days in disposal of the representation, in absence of negligence, callous
inaction and avoidable red-tapism, held, not fatal to the detention —
COFEPOSA Act, 1974, Ss. 11 & 3.

Though strictly speaking the Central Government is not the detaining
authority within the meaning of Art. 22(5) yet they are under legal obligation
to dispose of the representation as early as possible. But such delay by the
Central Government should not be subjected to such a rigorous scrutiny as is
done in the case of a delay caused by the appropriate government namely the
detaining authority. The Central Government should consider the
representation with reasonable expedition. What is reasonable expedition
depends upon the circumstances of the particular case. No hard and fast rule
as to the measure of reasonable time can be laid down. But it certainly does
not cover the delay due to negligence, callous inaction, avoidable red-tapism
and unduly protracted procrastination, From the explanation given in the
present case for the delay of one month and five days on the part of the
Central Government in disposal of the representation, it is clear that the
representation was considered most expeditiously and there was no
"negligence or callous inaction or avoidable red-tapism". Therefore, the
detention was not vitiated due to the delay. 334

Delay in disposal of — Explanation for — Representation alleged to have
been made on behalf of the detenu by his advocate who had no authority to

make the same or whose authority had not been checked — Such allegation not made in counter-affidavit — No enquiry made about authority of the advocate — Held, making of the representation by an advocate failed to explain the delay in its disposal.

The contention regarding the authority of the advocate to file representation on behalf of the detenu had not been taken up in the counter-affidavit and cannot be urged merely at the hearing of the petition. There is nothing in law which prevents a representation being made by an advocate on behalf of the detenu. If there was any difficulty on that ground, enquiries should have been made with the advocate as to what was his authority to represent the detenu, but no such enquiry had been made in the present case. Thus, in the present case, the fact that the representation was made by the advocate does not explain the delay in dealing with that representation.335

Delay in disposal of — Explanation for — That delay caused no prejudice to the detenu as he had filed a writ petition before High Court against his detention which had been dismissed — When cannot furnish a good explanation — Constitution of India, Arts. 32 and 226.

Although the detenu-petitioner had preferred a writ petition before the High Court, but a special leave petition filed against that decision is pending in the Supreme Court. Moreover, at the time when the writ petition was dismissed, the detenu-petitioner had not made any representation to the State Government at all and hence the dismissal of his writ petition by the High Court cannot be regarded as any substitute for consideration of his representation by the State Government which, unlike the court, might be entitled to go into the factual merits of the grounds forming the basis of detention order. 336

Delay in disposal of — Held on facts, there was no laches or negligence on the part of the detaining authority or the other authorities concerned in dealing with the less representation of the detenu — Detaining authority explained the delay and hence detention order not vitiated on ground of delay. 337

Inordinate and unexplained delay in disposal of detenu's representation to Chief Minister, held rendered continued detention of the detenu illegal and unconstitutional — Explanation that Chief Minister remained on tour and busy with important matters of the State not acceptable — Mandate of Art 22(5) explained — Constitution of India, Art. 22(5).

The District Magistrate passed an order of detention against the appellant under S. 3(2) of the NSA on September 7, 1986. The appellant was taken into custody or September 8 and grounds of detention were served on

---

him on September 14. On September 22, he made a representation to the Chief Minister through the Jail Superintendent. The Jail Superintendent forwarded it to the Home Department on September 24. The Home Department received it on September 26 and forwarded it to the District Magistrate on the same day for his comments. The District Magistrate returned the representation along with his comments on October 3 which was received by the Government on October 6. The State Government, in the mean while, under S. 3(4) of the Act accorded its approval to the impugned order of detention on September 18, 1986. On October 6, 1986 the appellant made another representation to the Advisory Board which met and considered the same on October 8, 1986. On October 13, 1986 the advisory Board after considering the representation made by the appellant together with the materials placed before it forwarded its report to the Government recommending confirmation of the impugned order of detention. It is said that thereafter the representation was processed together with the report of the Advisory Board and was forwarded to the Chief Minister's Secretariat where the same was received on October 23, 1986. Acting upon the report of the Advisory Board, the State Government by its order dated November 19, 1986 confirmed the order of detention. The appellant filed a habeas corpus petition before the High Court contending that there was unexplained, unreasonable delay in disposal of the representation which was sufficient to render his continued detention illegal. The High Court dismissed the petition mainly on ground of imperfect pleadings regarding delay in the disposal of the representation. In the appeal before the Supreme Court the detaining authority i.e. the District Magistrate and the Desk Officer, Home Department (Special) filed counter-affidavits. The District Magistrate generally denied that there was any such delay in disposal of the representation. But the Desk Officer explained the delay by saying that the Chief Minister remained preoccupied with very important matters of the State which involved tours as well as two Cabinet meetings on October 28 and 29 and November 11 and 12, 1986.

Held:

The continued detention of the appellant was illegal and he must be set at liberty forthwith. The representation made by the appellant addressed to the Chief Minister could not lie unattended to in the Secretariat while the Chief Minister was attending to other political affairs. Nor could the Government keep the representation in the Secretariat till the Advisory Board submitted its report.

In view of the wholly unexplained and unduly long delay in the disposal of the representation by the State Government the further detention of the appellant must be held illegal. There was utter callousness on the part of the State Government to deal with the representation to the Chief Minister. There was no reason why the representation submitted by the appellant could not be dealt with by the Chief Minister with all reasonable promptitude and diligence. The explanation that he remained away from Bombay is certainly not a reasonable explanation.338

Representation before Central Government — Delay in disposal of — Material evidencing that after receipt of the representation of the petitioner, it was sent to the detaining authority for his comments and immediately after receipt of the comments of the detaining authority the same were processed and put up before the Minister concerned who rejected the representation after considering the comments of the detaining authority and the State Government — Held, delay of one month properly explained. 339

Representation before Central Government — Delay of 6 days in disposal, held, not unduly long.

The time actually taken by the Central Government in considering the representation was six days. The said period of six days cannot, be regarded as unduly long. It is therefore, not possible to hold that there was inordinate delay in consideration of the representation of the petitioner by the Central Government and the detention of the petitioner cannot be held to be invalid on that basis. 340

Representation made to detaining authority — After rejection of the representation by the detaining authority for-warding the file to Minister for his consideration — Held, that would be inconsequential and would not vitiate the detention.341

Second representation — Delay in disposal of — Detenu has no right to get his successive representations based on the same grounds rejected earlier to be formally disposed of again — No period of detention having been fixed under the Act, rejection of the second representation on the same ground three months after its filing not open to challenge — Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980, S. 14. 342

Representation sent on January 31 by jointly addressing to State Government, Central Government and Advisory Board — Representation rejected by State Government on February 21 and by Central Government on March 3 — On facts held, the adequate and detailed reasons given by High Court in holding that the delay had been explained acceptable. 343

Declaration by Central Government under S. 9(1) of COFEPOSA Act for detention beyond three months without Advisory Board's opinion — Detenu's representation rejected and declaration under S. 9(1) made on the same day but in different files — Mere non-reference to the representation in the declaration would not show failure of detaining authority to consider


the representation before making the declaration — Held on facts, there was ample evidence to show consideration of the representation before the declaration — COFEPOSA Act, 1974, S. 9(1). 344

Delay in considering representation caused in soliciting comments from other departments and allowing the representation to lie unattended — Held, the delay would render the detention unconstitutional — Representation must be taken up for consideration by detaining authority as soon as received and unless it is absolutely necessary to wait for some assistance, it must be dealt with continuously until final decision is taken and communicated to the detenu — Constitution of India, Arts. 22(5) and 226. 345

Delay in disposal of — Detailed representation challenging detention made by an association on behalf of detenu disposed of expeditiously — Another representation made by petitioner on behalf of the detenu, found by High Court to be second one, mainly concentrating on necessity of keeping the detenu in a Bombay jail instead of sending him elsewhere and only casually impugning the detention — On facts, held, delay in disposal of petitioner's representation did not prejudice detenu's case. 346

Delay of one and a half months in considering — In absence of satisfactory explanation fatal to continuance of detention. 347

Rejection of representation about two months after the date of detention without any reasonable explanation, held, is sufficient to vitiate detention order — Representation must be considered by government within a reasonable time without waiting for opinion of Advisory Board — Constitution of India, Art 22(5) and (7). 348

Representation — Delay in considering — There is no absolute time factor in considering representation — Detaining authority returning to India from a foreign trip three days after receipt of the representation and disposing of the representation three days thereafter — Held, delay not unreasonable.

The time imperative can never be absolute or obsessive. The occasional observations made by the Supreme Court that each day's delay in dealing with the representation must be adequately explained are meant to emphasise the expedition with which the representation must be considered and not that it is a magical formula, the slightest breach of which must result in the release of the detenu. 349

Representation to Central Government – Must be considered and disposed of with utmost expedition - COFEPOSA Act, 1974 (52 of 1974), S. 11.

In matters touching the personal liberty of a person preventively detained, the constitutional imperative embodied in Art. 22(5) is that any representation made by him should be dealt with utmost expedition. In the present case this constitutional mandate has been honoured in breach regarding the representation sent by the detenu to the Central Government.\(^{350}\)

Delay of one day on the part of Senior Technical Officer to put up the matter before detaining authority after receiving comments from DRI as he had to be present before Advisory Board on the due date with relevant records in connection with hearing of detenu's case – Held, delay justified.\(^{351}\)

Disposed of within 4 days – Held, disposal not delayed.

The appellant/petitioner contended that there was delay in the disposal of the representation made by the appellant to the State Government which rendered his continued detention invalid and constitutionally impermissible.

Held:


A week's time taken by Central Government in considering and disposing of the representation – Held, delay reasonable.\(^{352}\)

Unexplained delay of about 20 days on the part of jail authorities in forwarding the representation to DM. and of three days on the part of D.M. in forwarding it to the Government – As a result of the delay, the representation could not be forwarded to Advisory Board, which after giving a personal hearing to the detenu, submitting its report – Government considering the representation thereafter and rejecting it – Held, the delay rendered continued detention of the detenu illegal – Constitution of India, Art. 22(5).\(^{353}\)

Twenty-one days taken by State Government in examining the representation under S. 8 of the National Security Act, 1980 – Disposal of the representation, held, inordinately delayed in view of the period fixed under S, 3(4) for the same – In absence of any explanation delay would vitiate the detention order.\(^{354}\)

---

Unexplained delay of more than three weeks in supplying copies of documents and statements referred to or relied upon in grounds of detention and of 37 days in considering the representation of the detenu, held, unreasonable and vitiates the detention order — COFEPOSA Act, 1974, S. 3(3).

Under Art. 22(5) of the Constitution, the detenu has got a two-fold right: First, the detenu has a right to be served with the grounds of detention as soon as practicable. [Under subsection (3) of S. 3 of COFEPOSA, such grounds must be communicated to the detenu within five days, and in exceptional cases, for reasons to be recorded, within 15 days of his detention.]

Secondly, he should be furnished with all the basic facts and materials, with reasonable expedition, which has been relied upon in the grounds of detention. The unreasonable delay of more than three weeks in supplying the detenu with copies of those basic documents had infringed this constitutional imperative, and had stultified and impeded his constitutional right to make a speedy and effective representation. 355

Unexplained delay of 22 days in disposing of the detenu's representation, held, rendered continued detention void. 356

Representation before detaining authority — Delay of 27 days in disposal of — Explanation given in counter-affidavit filed by a Dy. Superintendent of Police instead of detaining authority or any other responsible officer personally connected with the case, not acceptable — In absence of any other explanation, held, delay vitiates the detention — Constitution of India, Art 22(5) — Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, S. 3(1). 357

Delay in disposal of — Delay of over one month and ten days without any proper explanation, held, vitiates order of detention. 358

Delay in considering — Period of 4 or 5 days taken by customs authorities in furnishing their parawise comments on the representation — Consequent delay, held, not unreasonable. 359

Unexplained failure on the part of State Government to dispose of detenu's representation, held, rendered his further detention illegal— Disposal of a representation by detaining authority would not be substantial compliance of Art 22(5) as detenu has right to make representation to State Government

also — Gujarat Prevention of Anti-Social Activities Act, 1985, S. 3(2) — Constitution of India, Art. 22(5).\textsuperscript{360}

\textit{Mohinuddin v. District Magistrate, Seed, (1987) 4 SCC 58:1987 SCC (Cri) 674, relied on}

Writ petition against detention filed almost simultaneously with the receipt of the representation by the government — Government hardly having time to consider the representation, held, petition on ground of delay not maintainable — Constitution of India, Arts. 32, 22(5).\textsuperscript{361}

A fortnight's time taken by State Government in considering the representation at all levels, held on facts, does not amount to undue delay.\textsuperscript{362}

Total delay of 28 days in disposal of representation — Nine days taken by detaining authority in examining the representation and forwarding its comments — Remaining period taken in rotating files at governmental levels — Held, delay inordinate and vitiating the detention order.\textsuperscript{363}

Delay in disposal of — Inordinate and unexplained delay in disposal may vitiate the detention order — Representation disposed of by Central Government after 28 days and order of rejection of the representation communicated to detenu after 32 days of receipt of the representation on the sole explanation that further information required from State Government received by it after 14 days and the representation disposed of 10 days thereafter within which period there were certain holidays — Held, delay inordinate and unreasonable and explanation unsatisfactory and unacceptable — Hence detention order set aside on ground of breach of Art. 22(5) — Constitution of India, Art. 22(5) — National Security Act, 1980, S. 8 — National Security (Conditions of Detention) (Maharashtra) Order, 1980.\textsuperscript{364}

Delay in considering — Government examining and rejecting the representation and referring it to Advisory Board two days after it was made — Advisory Board fixing a date for production of the detenu in accordance with the detenu's request and tendering its advice to the Government about 19-20 days after the reference — Held on facts, delay not unreasonable.\textsuperscript{365}

9. ADVISORY BOARD

(a) Constitution of the Board

Board not yet constituted — Passing of detention orders in such situation deprecated — Constitution of India, Art. 22(4).

\begin{itemize}
  \item \textsuperscript{361} Iris Fernandes v. Union of India, (1981) 3 SCC 663: 1981 SCC (Cri) 788.
\end{itemize}
That an order for preventive detention was passed knowing fully well
that there was no Advisory Board to whom it could be referred to betrays a
casual and indifferent approach to citizens' rights and has to be deprecated.\textsuperscript{366}

Constitution of Advisory Board under National Security Act — Held, cannot
be judged with respect to proposed amendment to Art. 22(4) by the
Constitution 44th Amendment — States, however, free to constitute Advisory
Boards according to proposed amendment — National Security Act, 1980, Ss.
9, 10 & 11.

The constitutionality S. 9, NSA providing for constitution of Advisory
Boards cannot be judged with reference to Art. 22(4) as it would stand
amended when S. 3 of the Constitution 44th Amendment is enforced.

Of course Parliament is free to amend S. 9 to bring it in line with the
proposed Art. 22(4). So also can the executive appoint members according to
the proposed amendment. The standard of the present Art. 22(4) cannot be
derogated from but can be improved upon. It is hoped that the Parliament
will take the earliest opportunity to amend S. 9 of the NSA by bringing it in
line with S. 3 of the 44th Amendment as the Ordinance did and that, the
Central Government and the State Governments will constitute Advisory
Boards in their respective jurisdictions in accordance with S. 3 of the 44th
Amendment, whether or not S. 9 of the Act is so amended.\textsuperscript{367}

(b) Reference to the Board

Reference to — Statutory requirement to refer the case to the Board mandatory
— Non compliance with the requirement will result in order ceasing to be in
force after the specified period of three months — A.P. Prevention of
Dangerous Activities of leggers, Dacoits, Drug Offenders, Goondas,
Immoral Traffic Offenders and Land Grabbers Act, 1986, S. 10 — Constitution
of India, Art, 22(7).

The case of the appellant was not at all referred to the Advisory Board
as required by S. 10 of the Act and by Art. 22. Section 10 prescribes a period of
three weeks from the date of detention irrespective of whether the person
continues to be in detention or not. Therefore, even though the detenu was
released, if the detention order was in force, his case was required to be
the Advisory Board. This being a mandatory provision and having not been
complied with the detention order even if otherwise it was in force cannot be
said to have been in force after three weeks.\textsuperscript{368}

Detenu's right to make representation against detention order and right to be
heard by Advisory Board — Requirement to apprise detenu of his rights,
mandatory — But failure to do so would not vitiate the detention order where
the detenu, being an enlightened person, is well aware of such rights —

\textsuperscript{366} Abdul Latif Abdul Wahab Sheikh v. B.K. Jha, (1987) 2 SCC 22, 25: 1987 SCC (Cri) 244:

Cri LJ 340: 1982 MLJ (Cri) 524

\textsuperscript{368} SMD. Kiran Pasha v. Govt. of A.P., (1990) 1 SCC 328, 343, 344: 1990 SCC (Cri) 110.

Statutory requirement to refer the case to the Board mandatory — Non-compliance with the requirement will result in order ceasing to be in force after the specified period of three months — A. P. Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986, S. 10 — Constitution of India, Ar. 22(7).

Duty to make a reference to Advisory Board is on Government and not on any officer of the Government — COFEPOSA ACT, 1974, S. 8.

In the matter of making a reference of the case of a detenu to the Advisory Board under S. 8(b), the duty of making the reference is cast only on the Central Government or the State Government as the case may be, and not on the officer of the Central Government or the State Government if he makes the order of detention in exercise of the powers conferred on him under S. 3(1).

(c) Delay in placing representation before the Board

Delay in placing the representation before Advisory Board — In absence of negligence on the part of the State Government and prejudice to the detenu, High Court erred in quashing the detention order on ground of such delay — But in view of long lapse of time since the quashing of the detention order, no interference with High Court's order called for — Constitution of India, Art. 136.

Hari Singh Thakur v. Union of India, 1985 All LJ 1126, reversed

Placing of representation before Advisory Board — Requirement under S. 10, National Security Act, held, mandatory — Where representation made by detenu "within reasonable time, the same must be placed before the Board promptly — Failure to do so fatal to the detention — Where detention order made on August 7 but representation made by detenu on August 16 which reached State Government through jail authorities and District Magistrate on August 25 and received by the Board on August 29 i.e. 22 days after detention, held, detention not vitiated.

Requirement of placing before the Board detenu's representation "within three weeks from the date of detention" under S. 10 of National Security Act — Held, not mandatory but conditional upon making of the representation and date of its receipt by the appropriate Government — Belated

representation of detenu resulting in one day's delay in placing it before the Board despite expeditious action of the Government — Advisory Board having the representation four days before the date of hearing — In absence of any prejudice caused to the detenu and any negligence on the part of the Government and in view of impossibility to forward the representation within time, held, detention not vitiatted.

An order of detention was passed under S. 3(2) of the National Security Act against the respondent on August 14, 1984 and he was taken into custody on the following day. On August 22, 1984 the State Government referred the matter to the Advisory Board comprising three Judges of High Court and placed before it the grounds of detention as also the materials referred to therein. The respondent made a representation on August 28, 1984, which was received by the Superintendent of the Central Jail where the detenu had been lodged and the same was received by the State Government on August 30, 1984. After looking into the contents of the representation of the State Government caused it to be placed before the Advisory Board on September 6, 1984. The Board having already fixed the consideration of the respondent's detention at the meeting on September 10, 1984, it got the representation four days before the date of hearing. The Board recommended detention of the respondent. The High Court quashed the detention order.

While making of the reference to the Advisory Board under S. 10 of the National Security Act and forwarding of the grounds of detention to it are mandatory, the requirement of placing before it the representation is conditional upon it having been made and receipt thereof by the appropriate Government. It is, however, obligatory for the appropriate Government to forward the representation, when received, to the Board without delay.

In the present case there had been a day's delay in placing the representation of the respondent before the Board, though reference to the Board furnishing grounds of detention was made within a week of commencement of the detention in compliance with S. 10 of the Act. As by the time of making the reference and furnishing grounds no representation from the respondent had been received, it was not possible to place the same before the Board along with the grounds. The doctrine of impossibility of performance (lex non cogit ad impossibilid) indicates that however mandatory the provision may be, where it is impossible of compliance that would be a sufficient excuse for non-compliance, particularly when it is a question of the time factor.

The first meeting of the Advisory Board was fixed within four weeks from the date of detention and the consideration of the matter by the Board was not required to be adjourned on account of any delay in receiving the copy of the representation of the detenu. The legislative scheme in fixing the limit of three weeks in S. 10 and the further limit of seven weeks in S. 11 allows at least four weeks' time to the Board to deal with the matter.

In the facts of the present case, it cannot be said that there has been any negligence or remissness on the part of the State Government in dealing with the representation of the detenu or in the matter of causing the same to be placed before the Advisory Board. No prejudice has been caused to the
detenu on account of the delay of a day beyond the statutory period in placing the representation before the Advisory Board inasmuch as the Board had caused the matter to be heard on September 10, 1984, and before the appointed date the representation was before the Board. 374

(d) Proceedings before the Board

Procedural fairness must be observed by Advisory Board. There is no particular procedure prescribed for the Advisory Board since there is no lis to be adjudicated. Section 11 of the Act provides only the broad guidelines for observance. The Advisory Board, however, may adopt any procedure depending upon varying circumstances. But any procedure that it adopts must satisfy the procedural fairness. 375

Procedure — Board should send all the relevant materials to the Government along with its report to enable the Government to apply its mind and decide whether to confirm the detention or revoke the same — National Security Act, 1980, S. 11.

Though the procedure established by law i.e. S. 11 of the National Security Act, does not require the entire record to be sent by the Advisory Board to the State Government, yet it is certainly proper that the entire record or at least all relevant materials should be made available to the State Government when it proceeds to apply its mind to decide whether the detention should be continued or revoked on the basis of the report of the Board under S. 12(1). The Board should, therefore, forward the record containing the papers placed before it at the of the matter along with its report so that the matter can be attended by the State Government with due despatch and on taking a full view of the matter.

In the present case the grounds of detention as well as materials referred to in the grounds were available with the State Government. Only the documents which the detenu claimed to have produced before the Board were not available to the Government. But on a perusal of those documents it appeared to the Court that they did not contain any material which could persuade the Government to act in a different way. Though it is for the Government and not for the Court to act as the confirming authority and non-compliance with the procedure laid down by law makes the order of detention liable to be quashed, but as non-placing of the record of the Board before the appropriate Government is not a failure of compliance with the prescribed procedure, the Court could look at the record to find out if it could be said to be a defect having material bearing on the question and a matter of prejudice so far as the detenu is concerned. 376


Must forward record of its proceedings along with its report to the State Government — If the Board fails to forward the record, confirmation of detention order only on the basis of Board's report would amount to non-application of mind and violation of Art 21, which would render the detention order illegal — Prevention of Black marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (7 of 1980), Ss. 11(1) and 12 The State Government while confirming the detention order under S. 12 of the Act has not only to peruse the report of the Advisory Board, but also to apply its mind to the material on record. If the record itself was not before the State Government, it follows that the order passed by the State Government under S. 12 of the Act was without due application of mind and the procedure adopted was not in consonance with the procedure established by law. This is a serious infirmity in the case which makes the continued detention of the detenu illegal.377

Failure to forward detenu's letter retracting his confessional statement to the Board — Held, will not vitiate the detention order where the detenu, a highly qualified and highly placed person, was himself present before the Board — Detenu would have informed the Board about the retraction.378


Proceedings before the Board cannot be made public — National Security Act, 1980, Ss, 9, 10, 11.379

It is not possible to accept the plea that proceedings of the Advisory Board should be made public. The right to a public trial is not one of the guaranteed rights under our Constitution as it is under the 6th Amendment of the American Constitution which secures to persons charged with crimes a public, as well as a speedy trial. Considering the nature of the inquiry which the Advisory Board has to undertake, the interests of justice will not be served better by giving access to the public to proceedings of the Advisory Board. Carrying on correspondence with the detenus through Government — Held, justified where the Board consisting of High Court Judges having no administrative office of its own — No mala fide intention made out.380

Writ petition under Art. 32 challenging the detention filed during pendency of detenu's representation before Advisory Board is maintainable — Representation — Constitution of India, Art. 32. 381


(ii) Hearing


It was decided to hold the sitting of the Advisory Board at Indore on November 12, 1988 which was a week before the mandatory last date for submitting the report. On November 8, 1988 the detenu at Agartala prayed for postponement of the Board sitting. The State Government informed the Board on the basis of teleprinter message dated November 8, 1988 received from Agartala that the detenu was unable to undertake the journey from Agartala to Indore. Thereafter, the arrangements made to carry the detenu and his witnesses to Indore by plane were also cancelled by the State Government of Punjab and the detenu was told through the Inspector-General of Prisons, Tripura by communication dated November 11, 1988 that the next date of hearing as fixed by the Board will be intimated. It was contended that opportunity was not afforded to the detenu to appear and produce his witnesses before the Advisory Board.

There was a communication gap. Though the Advisory Board is not a judicial body and is charged with the responsibility of advising the executive government, but when it advises in favour of the detenu, namely, that there was no sufficient cause for detention, it would be binding upon the government under S. 12(2) of the Act to release the detenu forthwith. The detenu in this case did not have the opportunity to show that there was no sufficient cause for his detention. Expressing inability to appear once could not have been treated as the detenu's not desiring to be heard under S. 11(2) of the Act. In fact he desired to be heard and to produce his witnesses. The result was that despite the State Government's communication he was deprived of this opportunity.

As a result of the amendments of the National Security Act applicable to, the State of Punjab and the U.T. of Chandigarh, on one hand there is addition to the grounds of detention and on the other, there is extension of the period during which a person could be detained without obtaining the opinion of the Advisory Board. There is, however, no amendment as to the safeguards provided under Art. 22 and Ss. 9, 10 and 11 of the Act. Indeed, there could be no such amendment. Lex uno ore omnes alloquitur. Law addresses all with one mouth or voice. Quotiens dubia interpretatio libertatis est secundum libertatem respondendum erit — Whenever there is a doubt between liberty and bondage, the decision must be in favour of liberty. State

(iii) Representation by friend/lawyer before Board

Detenu’s request for being represented by lawyer must be made before the Advisory Board and not before Government — On receipt of such request the Board must take a decision in the matter considering the merits of each case — Constitution of India, Arts. 22(1) and 21 — COFEPOSA Act, 1974, S. 8(e)

While S. 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 lawyer. Often adequate legal assistance may be essential for the protection of right to procedural fairness, which is a part of the fundamental right guaranteed by Art. 21 of the Constitution, as also right to be heard given to the detenu under S. 8(e), COFEPOSA Act. Therefore, where a detenu makes a request for legal assistance, his request would have to be considered on its own merit in each individual case. In the present case, the Government merely informed the detenu that he had no statutory right to be represented by a lawyer before the Advisory Board. Since it was for the Advisory Board and not for the Government to afford legal assistance to the detenu the latter, when he was produced before the Advisory Board, could have, if he was so minded, made a request to the Advisory Board for permission to be represented by a lawyer. He preferred not to do so. In the special circumstances of the present case it cannot be held that the detenu was wrongfully denied the assistance of counsel so as to lead to the conclusion that procedural fairness was denied to him.382

Legal assistance in proceedings before Advisory Board — Though detenu has no right to such assistance, held, he is entitled to make a request in that regard and the Board is bound to consider the same and take a reasonable decision — Permitting the detaining authority to be represented by counsel while denying legal assistance to the detenu despite his requests, held, violative of Arts. 14 and 21 — Constitution of India, Arts. 14 and 21 — Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 (7 of 1980), S. 11 — COFEPOSA Act, 1974, S. 8(e)

Arbitrariness is the very antithesis of Art. 14. The principle of reasonableness is an essential element of equality and the procedure contemplated by Art. 21 must answer the test of reasonableness in order to be in conformity with Art. 14. The history of personal liberty is largely the history of procedural safeguards for observance of procedural safeguards, particularly in cases of deprivation of life and liberty is, therefore, of prime importance to the body politic. It is increasingly felt that in the context of "deprivation of life and liberty" under Art. 21, the "procedure established by law" carries with it the inherent right to legal assistance. The right to be heard before the Advisory Board would be in many cases, of little avail if it did not comprehend the right to be heard by counsel.

The Advisory Board is expected to act in a manner which is just and fair to both the parties. It is the arbitrariness of the procedure adopted by the Advisory Board that vitiates the impugned order of detention. While there is no right under S. 11(4) of the Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980 or S. 8(e) of the COFEPOSA Act to legal assistance to a detenu in the proceedings before the Advisory Board, he is entitled to make such a request to the Board and the Board is bound to consider such a request when so made.

In the present case, the detenu made such a request, but in the absence of the record of the Advisory Board, it is not possible to infer whether the request was considered. Even if it was denied, as the petitioner himself alleges there was no rational basis for a differential treatment. Under S. 11(4) the detenu had no right to legal assistance in the proceedings before the Advisory Board, but it did not preclude the Board to allow such assistance to the detenu, when it allowed the State to be represented by an array of lawyers. 383

Legal representation before Advisory Board — No right in detenu to claim — Board has discretion to such representation in particular circumstances — COFEPOSA Act, 1974 (52 of 1974), S. 8(e) — Constitution of India, Art. 21 Section 8(e) of the COFEPOSA Act only lays down that the detenu cannot claim representation by a lawyer as of right. It has given the Board a discretion to permit or not to permit representation of the detenu by counsel according to the necessity in a particular case. Certain cases may be complicated and assistance of lawyers may be necessary on behalf of the parties to explain the facts and law involved in the case.

However, the contention that the Advisory Board's rejection of the detenu's request for representation by a lawyer on the ground that in the past no legal representation had been allowed on behalf of any detenu was based on misconception of law is not acceptable because in this case: (1) the Board was not a party before the Court and (2) and Court's decision on the point would be merely academic as after the rejection of the request the Board reviewed the case of the detenu and gave its opinion whereupon the Government confirmed the detention. 384

Board directing presence of Customs Officers with files before it while disallowing detenu's request for being represented by someone — Held, Art. 14 not violated — Constitution of India, Art 14 — COFEPOSA Act, 1974, S. 8(c). 385

[Ed.: In Phillippa Anne Duke v. State of T.N., (1982) 2 SCC 389, the Court held that merely allowing some Customs Officers to be present in the corridor so as to enable them to produce the relevant files whenever required for perusal

by the Board while disallowing the detenu's demand for representation would not amount to inequality of treatment before the Board."

Detenu has a right to be represented by a friend who is not a legal practitioner — Denial of such right would amount to non-compliance with the procedure by the Board which would vitiate entire proceedings before it and render continued detention of the detenu illegal — Constitution of India, Art, 21 — COFEPOSA Act, 1974, S. 3. 386


Detenu's right to be represented by a friend — Arises when detaining authority is allowed to be represented by high-ranking government officers — In such circumstances, denial of representation by a friend to detenu "would vitiate his detention — Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980, Ss. 11 and 12 — Constitution of India, Art. 22(4) and (5).

The opinion of the Advisory Board under S. 11(2) as to sufficient cause is required to be reached with equal opportunity to the State as well as the person concerned, no matter what the procedure. It is important for laws and authorities not only to be just but also appear to be just. The action that gives the appearance of unequal treatment or unreasonableness — whether or not there is any substance in it — should be avoided by the Advisory Board. Therefore, it is the duty of the Advisory Board to see that the case of detenu is not adversely affected by the procedure it adopts. It must be ensured that the detenu is not handicapped by the unequal representation or refusal of access to a friend to represent his case.

In the instant case, since the Advisory Board has heard the high-ranking officers of the Police Department and others on behalf of the government and detaining authority, it ought to have permitted the detenu to have the assistance of a friend who could have made an equally effective representation on his behalf. Since that has been denied to the detenu, the High Court, was justified in quashing the detention order. 387

Legal representation — Denial of right of counsel to detenu not unconstitutional — He can, however, take help of a friend - Government not allowed to put up lawyers or officers to put forward its case before Advisory Boards unless it gives the same right to the detenu — National Security Act, 1980, Ss. 9, 10, 11.

Regarding procedure before the Advisory Board the Constitution itself by Art. 22(3)(fr) denies to a detenu under preventive detention the right to consult a legal practitioner or to be defended by him. Since the Constitution as originally constituted so provided it cannot be said to be unfair, unjust or

unreasonable since the standard of reasonableness and fairness for Arts. 19 and 21 is provided by the Constitution itself. The rights available to an accused can be different from those available to a detenu.

Also under Art. 22(5) the written representation of the detenu does not have to be expatiated upon by a legal practitioner.

While the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board, the detaining authority or the Government also cannot take the aid of a legal practitioner or a legal adviser before the Advisory Board. This bar would apply also to officers of the Government in the concerned departments even though they are not legal practitioners or legal advisers. Else Art. 14 requires that if the detaining authority or the Government takes the aid of a legal practitioner or an adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner.

The embargo on the appearance of legal practitioners, however, does not extend to preventing the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner. A detenu, taken straight from his cell to the Board's room, may lack the ease and composure to present his point of view. The friend would assist him to give coherence to his stray and wandering ideas. Incarceration makes a man and his thoughts dishevelled. So whenever demanded the Advisory Board must grant this facility.

Legal representation — Detenu's right to - Detention order passed by Administrator of a Union Territory under COFEPOSA Act — Held, detenu has no right to appear through a lawyer before the Administrator or before the Advisory Board — A friend or agent of the detenu may, however, represent the detenu provided he is not a legal practitioner — COFEPOSA Act, 1974 (52 of 1974), S. 8(e) — Constitution of India, Art. 22(5).

A detention matter which is pending before the Administrator is a 'matter connected with the reference to the Advisory Board' within the meaning of S. 8(e) of the COFEPOSA Act and therefore, the detenu has no right to appear before the detaining authority or before the Advisory Board by a legal practitioner.

In view of Art. 22(3) any law providing for preventive detention would not be unconstitutional even if it contravenes Art. 22(1) and (2). Thus a person detained under a law providing for preventive detention cannot claim as a matter of constitutional right to consult and be defended by a lawyer of his choice.

Assuming that the right to make a representation and the corresponding obligation cast on the detaining authority to consider the representation expeditiously is not a matter connected with the reference to the Advisory Board and that both are independent stages, it cannot be said that the refusal of the Administrator to hear the Advocate of the detenu while

considering the representation would be denial of common law right of the to be represented by an agent. It is implicit in Art. 22(5) that the representation has to be a written representation communicated through the Jail Authorities or through any other mode which the detenu thinks fit of adopting but the detaining authority is under no obligation to grant any oral hearing at the time of considering the representation. Now, if the representation has to be a written representation, there is no question of hearing anyone much less a lawyer.

A ‘friend’ who, in truth and substance, is a friend of the detenu may appear for the detenu but if such a ‘friend’ also happens to be a legal practitioner, he can not as of right, appear before the Advisory Board on behalf of the detenu. The same reasoning will apply to appearance by an 'agent'. In passing it must be stated that a man has a right to appoint an agent which may be called a common law right, but there is no obligation on the other side to deal with the agent. The other side has an equal right to refuse to deal with an agent. But a 'friend' or an 'agent' of the detenu who is essentially a comrade in the profession of the detenu for which he is detained, such a 'friend' or 'agent' will also be barred from appearance on of the detenu.

In the present case in response to the telegram of the detenu's lawyer to the Administrator asking for time and place for appearing before him on behalf of the detenu, the Administrator only advised the lawyer that the detenu could make representation to him through Jail Authorities. Such gratuitous advice can hardly mislead a lawyer. 389

Legal representation before the Board — Where Advisory Board, consisting of High Court Judges, after hearing the detenus considered it not necessary to provide legal representation to the detenus, held, Supreme Court's interference is not called for — Representation by a 'friend' can be allowed by the Board only when so demanded by the detenus — Proceedings before the Board, held, not vitiated on ground of absence of a friendly representation where no such demand made — Merely allowing some Customs Officers to be present in the corridor so as to enable them to produce the relevant files whenever required by the Board, while disallowing detenus' demand for representation, held, would not amount to inequality of treatment before the Board — Constitution of India, Arts, 14 and 22(7) — COFEPOSA Act, 1974 (52 of 1974), S. 8(e). 390

Natural justice — Detenu's allegation that opportunity of being represented by a friend who was not a lawyer denied by the Board — Statement of secretary of the Board in his affidavit that officers of the Department were not present at the time of hearing and that no request was made by detenu for being represented, being of a responsible officer, acceptable — Detention order not vitiated on ground of violation of natural justice. 391


Representation by friend — Though Board permitted detenu to be represented by a friend, detenu failed to take friends help — No representation made before the Board that adequate time had not been given to get the services of a friend — In the circumstances held, cannot take the advantage of his own lapses and raise a contention that detention order was illegal because he was not represented by a friend before the Board's meeting — National Security Act, 1980, S. 1L.\textsuperscript{392}

Representation by lawyer or friend —

Services of two persons available for understanding the statement of the detenu and deciphering his representation in Gujarati which was forwarded to the Board by State Government — On facts held, ground of not allowing the detenu to be represented properly before Advisory Board cannot be sustained — COFEPOSA Act, 1974, S. 8.\textsuperscript{393}

Representation by nest friend —

Whether absence of next friend would vitiate proceeding before the Board — Test to determine is one of prejudice in making effective representation of case at the hearing before the Board — Detenu failing to available his friend on the date of hearing when Board enquired about such a — Board finding the detenu to be worldly wise, sufficiently educated, not suffering from any deficiency and in a fit condition to represent his case, declining to adjourn and proceeding without any representation of detenu by a friend — Held, detenu not prejudiced in making effective representation of his case before the Board in absence of a friend. Asha Keshavrao Bhosale v. Union of India, (1985) 4 SCC 361, 369:1985 SCC (Cri) 561: AIR 1986 SC 283.

Taking assistance of a friend in proceedings before, where detaining authority assisted by high officials — When should be allowed — Friend in the context of Detenu seeking assistance of a retired official was justified — On refusal detention vitiated — COFEPOSA Act, 1974, S. 8(e).

The detenu, a clearing and forwarding agent aged around 26 or 27 years was detained under S. 3(1)(i) of the COFEPOSA Act. On the date of hearing of the representation of the detenu by the Advisory Board, while the detaining authority was being assisted by a Deputy Collector and a Superintendent of Customs and Central Excise the specific request of the detenu to permit a retired Assistant Collector of Central Excise to assist him as a friend was rejected by the Board on the ground that on being asked the said retired Assistant Collector had admitted that he was not a friend of the detenu, though he was inclined to assist the detenu because of his professional experience. The detenu contended that he had sought assistance of the friend the retired Asstt Collector because the case before the Board involved certain facts which required acquaintance with the legal provisions and the procedure and practice adopted by the customs authorities with which he was not well versed. The present appeal by special leave was preferred by the father of the detenu against the dismissal of writ petition by


the High Court challenging the order of detention against his son. Allowing the appeal.

Held:

In the facts of the case if the retired Assistant Collector had been permitted to the detenu his case would have been better placed before the Advisory Board. Moreover, as the detaining authority had the assistance of the Deputy Collector of Central Excise and a Superintendent of Central Excise, who play the role of legal advisers, the Board had no justification to refuse assistance of the retired Assistant Collector to the detenu. In view of the position of law and the facts of the case, the refusal by the Advisory Board to permit the detenu to be assisted by the retired Assistant Collector as a friend was bad and continued detention of the became vitiates.

The term ‘friend’ used in the judgments of the Court was more in the sense of an 'ally' or a 'supporter' than meaning a person known well to another and regarded with liking, affection and loyalty. A person not being a friend in the normal sense could be picked up for rendering assistance within the frame of the law as settled by the Supreme Court. The Advisory Board has, of course, to be careful in permitting assistance of a friend in order to ensure due observance of the policy of law that a detenu is not entitled to representation through a lawyer. What cannot be permitted directly should not be allowed to be done in an indirect way.

It is, however, not for the Court to examine and assess what prejudice had been caused to the detenu on account of assistance by a friend. Matters relating to preventive detention are strict proceedings and warrant full compliance with the requirements of law.

(iv) Evidence

Evidence — Detenu entitled to present his own evidence oral, or documentary, to rebut the allegations made against him — National Security Act, 1980, Ss, 9, 10 & 11.

There can be no objection in granting to the detenu the right to lead evidence in rebuttal before the Advisory Board. Neither the Constitution nor the National Security Act contains any provision denying to the detenu the right to his in rebuttal of the allegations made against him. The detenu therefore offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him.

But, if the detenu desires to examine any witnesses, he shall have to keep them present at the appointed time and no obligation can be cast on the Advisory Board to summon them. The Advisory Board, like any other tribunal, is free to regulate its own procedure within the constraints of the Constitution and statute. It would be open to it, in the exercise of that power, to limit the time within which the detenu must complete his evidence.

Whether Board considered documentary evidence produced by the detenu — Affirmative inference drawn from the facts that the Board comprised High


Court Judges and that the detenu himself was a practising advocate — Board is required to furnish its conclusion only and not the reasons, pleas, evidence produced by the parties etc. in its report — It is therefore not proper to conclude from the report that the Board did not consider documentary evidence.

There was no justification to hold that the documentary evidence produced by the detenu had not been considered by the Board. The Board is not required to write out a judgment wherein one would expect mention of the respective pleas, materials produced by the parties, specification of contentions advanced and reasons for the conclusion as may have been drawn. What is required is the unbiased and impartial conclusion on the materials available with reference to the grounds of detention as to whether the detention order when made and the continued detention of the person concerned are justified.

The Advisory Board in the instant case was constituted by three Judges of the High Court, one of them being the Chairman. That would justify the assumption that the members of the Board by their professional ability and acumen were capable to assess the matter in a proper way and form an objective opinion on the basis of materials produced. The detailed conclusion with reasons given by the Board has also been disclosed. That shows that the detenu made before the Board very lengthy arguments and cited a number of authorities in support of his submissions. The detenu in the instant case is a practising advocate and it can be assumed that such a practising advocate must have very properly placed his points before the Board. 396

(v) Examination and cross-examination of witnesses

Cross-examination — Detenu does not have right to cross-examine the persons on whose statements the detention is based or the detaining authority itself — National Security Act, 1980, Ss. 9, 10, 11.

Regarding a right to the detenu of cross-examination, the primary question that arises is whether it is an integral and inseparable part of the principles of natural justice.

A detenu cannot claim the right of cross-examination in the proceeding 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 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.

Also in cases of preventive detention, witnesses would be most reluctant to testify and often it may harm public interest to disclose their identity. It is therefore, difficult, in the very nature of things, to give to the detenu the full panoply of rights which an accused is entitled to have in order to disprove the charges against him. Just as there can be an effective hearing

without legal representation even so, there can be an effective hearing without the right of cross-examination. The nature of the inquiry involved in the proceeding in relation to which these rights are claimed determines whether these rights must be given as components of natural justice.

Hence, in the proceedings before the Advisory Board, the detenu has no right to cross-examine either the persons on the basis of whose statement the order of detention is made or the detaining authority. 397 Detenu has no right to cross-examine in proceedings before the Board. 398 Detenu has right to examine defence witnesses in rebuttal of allegations against him if the witnesses are present and willing — In absence of any statutory prohibition in this regard, this right must be read into the statute — Any contrary procedural regulation of the Board would be invalid — Board erred in denying this right to the detenu, and instead allowing him only to produce affidavits of the witnesses — COFEPOSA Act, 1974, S. 8(b) and (c)

The detenu has a right to lead evidence in rebuttal of the allegation against him before the Advisory Board. This right being a right in the nature of a constitutional safeguard embodied in Art. 22(5) as construed by Supreme Court in A.K. Roy case has necessarily to be deemed to be incorporated in the statute dealing with detention without trial viz. S. 8(b) and (c) of the COFEPOSA Act S. 8 of the COFEPOSA Act is a sequel to Art. 22(7)(e). There is nothing in S. 8 prohibiting oral evidence of the witnesses tendered by a detenu being taken. The concept of inquiry by the Advisory Board takes within its ambit this aspect of 'hearing' also. If this right is denied to a detenu the necessary consequence must follow.

All that is necessary is that the detenu should keep the witnesses ready for examination at the appointed time since there is no obligation on the Advisory Board to summon them. The Board is entitled to regulate its own procedure within the constraints of the Constitution and the statute and this procedure is referable to the time limit within which the Advisory Board must complete its inquiry. The Board had not regulated any procedure that oral evidence will not be permitted when it inquires into orders of detention. Even if there was any such procedure it would be of no legal consequence after the law in this behalf had been laid down in A.K. Roy case.

Unless there is any legal bar for oral evidence of the detenu being adduced before the Advisory Board it should be left to the detenu to choose between affidavit evidence and oral evidence subject of course to the rigorous limitation placed upon this right by the Court in A.K. Roy case relating to constraints of time.

It is wrong to say that the witnesses on behalf of the detenu produced in rebuttal of the allegation against him cannot be cross-examined. Cross-examination of such witnesses has to be by the detaining authority and that right cannot be denied to them. 399

Natural justice — Examination of detenu’s witnesses and assistance of detenu’s friend — Specific prayer regarding, must be made by detenu in proceedings before the Board and not merely in his representation to the Board — In absence of such a prayer, held, the Board cannot be said to have acted illegally and in violation of principles of natural justice in taking a decision without examining the witnesses and without assistance of detenu’s friend. 400

Advisory Board cannot consider continuation of detention beyond the date of its report.

The obligation on the Advisory Board under S. 11(2), National Security Act, to find sufficient cause for the detention cannot be extended to the consideration of the question as to whether it is necessary to continue the detention of the person beyond the date on which it submits its report or beyond the period of three months after the date of detention. Such question is for the detaining authority and not the Board.

The duty and function of the Advisory Board is to determine whether there was sufficient cause for detention of the person concerned on the date on which the order of detention was passed and whether or not there is sufficient cause for the detention of that person on the date of its report. 401

Opinion of Advisory Board for detention exceeding one year — COFEPOSA Act, 1974 — Ss. 8(b), (c) and (f), 9(1) and (2) and 10 — Board must specifically opine that there was sufficient cause for 'continued detention' of the detenu — Omission of words 'continued detention' in the opinion not mere clerical or typographical error — Mere opinion regarding necessity of 'detention', would vitiate detention under Ss. 8 and 9. 402

_Jusub Haji Ismail v. State of Gujarat, 1985 Guj LH 617, reversed_

Whether detention continued to be justified on the date of the report of the Board even if it was justified on the date of making the detention order — Board’s failure to consider the question, would not vitiate proceedings before it in view of short passage of time (one month) between the two dates and in absence of any intervening circumstances requiring compartmentwise consideration of the detention on those dates — In the circumstances held, the Board’s report that there was sufficient cause for detention necessarily implied that the detention was found to be justified on both the dates.403

Report of the Board

Advisory Board’s failure to submit its report to the Government within eight weeks from the date of detention, held, would render further detention of the detenus illegal — J&K Public Safety Act, 1978, S. 16(1) — Constitution of India, Art. 22(4) to (7).

Clauses (4) and (7) of Art. 22 envisage time-bound stages for the processing of a case as it reaches its determination. The obligation placed on


268

the Advisory Board under S. 16(1) of the J & K Public Safety Act to submit its report within the prescribed period must be construed strictly inasmuch as the personal liberty of a person is involved and having regard to the emphasis which the Constitution has placed, and which emphasis is reflected in the Act, on the necessity of expeditiously determining whether the detention of the person concerned should be continued. Any proceedings taken by the Advisory Board after the expiry of the prescribed period of eight weeks from the date of detention can be of no consequence in supporting the further detention of the detenu and the Court cannot grant any adjournment where the Board is programmed to sit after expiry of the prescribed period. 404

Advisory Board is required under S. 11 to dispose of within 7 weeks the matter placed before it by Government within three weeks from the date of detention under S. 10 of National Security Act, 1980.

Section 10 casts a duty on the appropriate Government to forward to the Advisory Board within three weeks from the date of detention, the relevant papers pertaining to the detention. Therefore, the words 'place before' in that section does not mean anything more than forward to or submit before the Advisory Board the relevant papers relating to the detention of the detenu. The Advisory Board is a wholly independent body which can regulate its schedule of holding meetings and conducting its business in accordance with the procedure laid down under S. 11 of the Act which has specified a time limit of seven weeks from the date of detention for the submission of the Board's report to the appropriate Government. In the present case, the Advisory Board disposed of the petitioner's case well within the period of seven weeks specified in S. 11(1). Consideration of the case beyond three weeks would not therefore, vitiate the detention on the alleged ground of violation of S. 10. 405

10. REVOCATION OR CONFIRMATION

(a) Revocation

The meaning of the verb 'revoke' and its noun seem to signify that revocation is a process of recall of what had been done. 406

Revocation of detention order — Duty to exercise power of revocation arises only when new and relevant facts and circumstances come to light. 407

The power of revocation of detention order conferred on the appropriate Government under S. 11 of the COFEPOSA Act is independent of the power of confirming or setting aside an order of detention under S. 8(f). It is an overriding power and is intended to be a check or safeguard against arbitrary or improper exercise of power of detention by the detaining authority or the State Government, in addition to the protection under Art. 22(5) available to the detenu by way of making a representation against the

detention order to the detaining authority, which has to be referred by the appropriate Government to the Advisory Board constituted under S. 8(a).

The power of revocation of detention order under S. 11(1)(b) may either be exercised on information received by the Central government from its own sources including that supplied by the State Government under S. 3(2), or, from the detenu in the form of a petition or representation. It is for the Central Government to decide whether or not, it should revoke the order of detention in a particular case. The use of the words "at any time" in S. 11, gives the power of revocation an overriding effect on the power of detention under S. 3. Ordinarily, the Central Government would in such a case like to await the Report of the Advisory Board under S. 8(c), before taking any action under S. 11(1)(b) but the circumstances may differ, and there may be a case where the Central Government finds that the order of detention passed under S. 3 is mala fide or constitutes an abuse of power on the part of the State Government or an officer of the State Government specially empowered in that behalf, it may "at any time", revoke the order of detention. 408

Revocation of detention order must be made by the Govt. concerned specified in S. 11(1) of COFEPOSA Act - Quashing of order of detention by High Court under Art. 226 does not amount to revocation - COFEPOSA Act, 1974, S. 11(1).

The words without prejudice to the provisions of S. 21 of the General Clauses Act, 1897, used in S. 11(1) of the Act give expression to the legislative intention that without affecting that right which the authority making the order enjoys under S. 21 of the General Clauses Act, an order of detention is also available to be revoked or modified by authorities named in clauses (a) and (b) of S. 11(1) of the Act.

The power conferred under clauses (a) and (b) of S. 11(1) is an extension of the power recognised under S. 21 of the General Clauses Act and while under the General Clauses Act the power is exercisable by the authority making the order, the named authorities under clauses (a) and (b) of S. 11(1) are also entitled to exercise the power of revocation. When the High Court exercises jurisdiction under Art. 226 it does not make an order of revocation. 'Revocation' is a process of recall of what had been done. By issuing a high prerogative writ like habeas corpus or certiorari it quashes the order impugned before it and by declaring the order to be void and striking down the same it nullifies the order. The ultimate effect of cancellation of an order by revocation and quashing of the same in exercise of the high prerogative jurisdiction vested in the High Court may be the same but the manner in which the situation is obtained is patently different and while one process is covered by S. 11(1) the other is not known to the statute and is exercised by an authority beyond the purview of S. 11(1). In a situation where the order of detention has been quashed by the High Court, S. 11(2) is not applicable and the detaining authority is not entitled to make another order under S. 3 on the same grounds.

Once the orders of detention are held to be invalid, the declarations made subsequently under S. 9 could not be made and would have no consequence. 409

Government counsel stating that Central Government had in fact considered the report sent by the State Government and saw no reason to revoke the order in exercise of its powers under S, 14, N.S. Act — There is no reason to doubt the correctness of this statement — Hence challenge on ground of non-application of mind not sustainable — National Security Act, 1980, Ss, 3(2) and 4. 410


Section 11 does not confer any power of revocation on an officer of the Central or State Government nor does it empower the Central or State Government to delegate the power of revocation to any of its officers. Even though S. 11 specifies that the powers of revocation conferred on the Central Government/State Government are without prejudice to the provisions of S. 21 of the General Clauses Act, this reservation will not entitle a specially empowered officer to revoke an order of detention passed by him because the order of the specially empowered officer acquires 'deemed approval' of the State or Central Government, as the may be, automatically and by reason of deemed approval the powers of revocation, even in terms of S. 21 of the General Clauses Act, will fall only within the domain of the State Government and/or Central Government. 411

Decision on continuation of detention three months need not be made till opinion of Advisory Board is received authorising it — Appropriate Government is only bound to make the reference to the Advisory Board within five weeks and not later — Hence making of reference within the statutory period without first determining the period for which detenu was to be detained not improper—Constitution of India, Art 22(4) and (7) — COFEPOSA Act, 1974, S. 8(b) and (f)

Whenever any order of detention is made, whether the detention is to continue for a period than three months or a period of three months or less or the detaining authority has not yet applied its mind and determined how long the detention shall be continued, the appropriate Government is bound within five weeks from the of detention to make a reference to the Advisory Board and if it fails to do so, the continuance of the detention after the expiration of the period of five weeks would be rendered invalid. However, it is not at all necessary for the detaining authority to apply its mind and consider at the time of passing the order of detention or before making a reference to the Advisory Board, as to what shall be the period of detention

and whether the detention is to be continued beyond a period of three months or not. The only inhibition on the detaining authority is that it cannot lawfully continue the detention for a period longer than three months unless the Advisory Board has, before the expiration of the period of three months, that is in its opinion sufficient cause for such detention. 412

Government not obliged to record reasons for confirming the maximum period of detention — Act, 1974, Ss. 8(f), 10 and 11.

Per Dutt J.

Section 10 of the COFEPOSA Act does not provide that in imposing the maximum period of detention, any reason has to be given. In confirming the order of detention, it may be reasonably presumed that the government has applied its mind to all the relevant facts and, thereafter, if it imposes the maximum period of detention, it cannot be said that the government has not applied its mind as to the period of detention. In any event, under S. 11 of the Act, a detention order may, at any time, be revoked or modified by the government. In the circumstances, it cannot be said that the detenu was in the least prejudiced or that there has been non-application of mind by the government to the question of period of detention of the detenu, Per Shetty, J. (concurring).

If the Advisory Board reports that there is in its opinion sufficient cause for the detention of the person, the concerned authority may confirm and continue the detention of the person for such period as it thinks fit. The expression "as it thinks fit" in S. 8(f) of the Act indicates that the concerned authority after considering the report of the Advisory Board may fix any period for detention. The authority is not required to give any special reason either for fixing a shorter period or for fixing the maximum period prescribed under S. 10. The opinion of the Advisory Board and the grounds of detention are the only basis for confirming and continuing the detention, for any period, even up to the maximum period prescribed. Section 11 provides for revocation of detention order. The detention order may at any time be revoked or modified. When the power to revoke the order of detention could be exercised at any time, it is not necessary for the authority to articulate special reasons for continuing the for any period much less for the period prescribed under the Act. 413

(b) Confirmation

Protection of Art. 22(4) by requiring confirmation of detention within three months by an Advisory Board, held, cannot be evaded by making successive detention orders before expiry of three months of the earlier order — S. 15 of Gujarat Prevention of Anti-Social Activities Act, 1985 must therefore be read down.


Even though S. 15(2) permits issuance of a subsequent detention order against the same person on the expiry or revocation of an earlier detention and that such detention on the same facts cannot exceed 12 months of the issuance of the first order, the same to be constitutionally valid in conformity with Art. 22(4) must be read down. It, therefore, becomes imperative to read down S. 15 of the Gujarat Prevention of Anti-Social Activities Act, 1985 which provides for the making of successive orders of detention so as to bring it in conformity with Art. 22(4) of the Constitution. If there is to be a collision between Art. 22(4) of the Constitution and S. 15 of the Act, S. 15 has to yield. But by reading down the provision, the collision may be avoided and S. 15 may be sustained. So read if the report of the Advisory Board is not made within three months of the date of detention, the detention becomes illegal notwithstanding that it is within three months from the date of the second order of detention. 414

Confirmation of detention by Central Government — Non-application of mind — Failure of Advisory Board, to forward to the Central Government complete records of the proceedings) due to non-mention of the Board’s refusal to allow the detenu to examine defence witnesses who were present and willing — Whether confirmation of detention by the Central Government amounted to non-application of mind — Question not considered — COFEPOSA Act, 1974, S. 8(f).

The complaint by the detenu's counsel that the Advisory Board failed to send the entire records of proceedings before it to the Central Government inasmuch as it did not contain all the necessary information regarding the availability of the witnesses, the readiness of the detenu to examine them, rejection of the request to examine them and directing instead filing of the affidavits, cannot be said to be wholly unjustified. However, it is not necessary to go into the contention regarding non-application of mind of the Central Government on the ground of absence of full information before it due to failure of the Advisory Board to mention in the record forwarded by it to the Government about presence of the defence witnesses and the Board's refusal to record their evidence. 415

Competent authority to pass — Detention order passed by Secretary but confirmation order passed by the Minister of State for Home Affairs — That Minister being duly authorised by the Chief Minister to pass requisite confirmation orders, held, order passed by him valid — COFEPOSA Act, 1974, S. 8(f). 416

Failure to mention period of detention in confirmation order passed by Government, held, would not vitiate that order — Such failure implies that the detention is for the maximum period specified in the Act — Detention

---

beyond the maximum period will be illegal — COFEPOSA Act, 1974, Ss. 8(f), 9 and 10. 417

Application of mind by confirming authority — Whether deposition of defence witness not considered by confirming authority — Advisory Board in its report referring to evidence of the defence witness — Confirming authority, having considered the report of Advisory Committee, held, cannot be said to have not applied his mind to the evidence of the defence witness — Advisory Board not obliged to refer in detail evidence of the defence witness in its report and hence non-mention of relevant portion of evidence of such witness in the report would not indicate confirming authority's failure to consider the same. 418

Confirmation or revocation by Government — National Security Act, 1980, S 12 — If Advisory Board's report is against the detention, State Government is duty-bound to release the detenu — But if the Board recommends the detention, Government has option either to confirm or to revoke the detention. 419

Detention order passed on September 11 confirmed by State Government on October 21 — Confirmation having been made beyond the period of 15 days prescribed by S. 3(4) of National Security Act, 1980, held, continued detention of the petitioner illegal. 420

11. ORDER OF DETENTION

Order passed immediately after revocation of the earlier order on the basis of report of Advisory Board — State Government failing to defend its action despite two adjournments given by the Court — Held, further detention of the petitioner would be unconstitutional in the circumstances — Constitution of India, Arts. 21 and 22. 421

Basic materials constituting subjective satisfaction in the earlier order of detention, which was quashed by High Court, considered along with other materials by detaining authority in drawing subjective satisfaction for passing the fresh order of detention and not merely for showing the antecedents of the detenu — Held, fresh order of detention liable to be quashed — Gujarat Prevention of Anti-Social Activities Act, 1935, S, 3(2). 422


Consideration of grounds set out in previous orders of detention which had been quashed by court — Held, fatal to the fresh order of detention — Gujarat Prevention of Anti-Social Activities Act, 1985, S. 15.

Under S. 15 of the Gujarat PASAA the modification and revocation of detention order by the State Government shall not bar making of another detention order on fresh facts when the period of detention has come to an end either by revocation or by expiry of the period of detention. However, an order of detention cannot be made after considering the previous grounds of detention when the same had been quashed by the court, and if such previous grounds of detention are taken into consideration while forming the subjective satisfaction by the detaining authority in making a detention order the order of detention will be vitiating. It is of no consequence if the further fresh facts disclosed in the grounds of the impugned detention order have been considered.

In the present case in the grounds of detention specific reference had been made to the earlier two orders of detention against the petitioner-detenu. In the schedule of documents annexed to the grounds of detention not only the copies of the order of detention but also of the grounds of detention in the earlier detention cases had been given to the petitioner. Thus the detaining authority while considering the fresh facts disclosed in the grounds had taken into consideration the previous grounds of detention as well as the orders made therein even though the same were nullified by the High Court as well as by the Advisory Board, for the purpose of showing that the detenu in spite of those earlier orders of detention was continuing in his bootlegging activities.


Fresh facts — Grounds taken in earlier detention, which was quashed by High Court by issuing writ of habeas corpus, considered as one of the material documents, along with other materials, in drawing subjective satisfaction in the subsequent order — Held, fresh order of detention vitiating thereby — Gujarat Prevention of Anti-Social Activities Act, 1985, Ss. 3(2) and 15 — Constitution of India, Art. 226.

Even if the order of detention comes to an end either by revocation or by expiry of the period of detention there must be fresh facts for passing a subsequent order. A fortiori when a detention order is quashed by the court issuing a high prerogative writ like habeas corpus or certiorari the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the court strikes down an earlier order by issuing rule it nullifies the entire order. In the present case the detaining authority took into consideration, along with the other grounds of detention, also the grounds taken in the earlier detention.

which had been nullified by the High Court by issuing a prerogative writ of habeas corpus. Hence the fresh order of detention is liable to be set aside.\textsuperscript{424}

Fresh order of detention on the same grounds cannot be made under S. 11(2) read with S. 3 of COFEPOSA Act where previous order quashed by High Court under Art. 226 — Such afresh order being invalid, subsequent declaration under S. 9 inconsequential — COFEPOSA Act, 1974, Ss. 11(2), 9 and 3.\textsuperscript{425}

Referring to incident which constituted subject-matter of an earlier order of detention would vitiate the order.\textsuperscript{426}

(a) Affidavit

Affidavit must be filed by the detaining authority who actually passed the Girder — Mere holder of office of that authority cannot arrogate to substitute subjective satisfaction of that authority and therefore not competent to file affidavit justifying the detention — National Security Act, 1980 (65 of 1980), S. 3.\textsuperscript{427}

Though normally detaining authority should personally affirm on oath the stand by him, but this is not an inflexible rule and depends upon circumstances of each — Where Home Minister who was detaining authority was not available having ceased to be a minister before filing of affidavit, and the then Deputy Secretary, Home who was fully conversant with the case had filed his affidavit and original file was also produced before Court to dispel any doubt as to subjective satisfaction of detaining authority, held, failure of detaining authority to file affidavit personally not of much importance — Detention order — Application of mind — COFEPOSA Act, 1974, S. 3.\textsuperscript{428}

Counter-affidavit — Should disclose all such facts and documents as are relevant for the purposes of the writ petition and necessary for its disposal — Constitution of India, Art, 32.\textsuperscript{429}

Counter-affidavit in response to writ petition filed by detenu — Should be filed by detaining authority especially in sensitive cases of detention - But failure to do so would not ordinarily vitiate the detention in absence of allegations of mala fides — Constitution of India, Arts. 226 and 32 — Habeas corpus, writ of.

In matters of a routine nature, if indeed are any matters of a routine nature in the field of detention, a counter-affidavit may be sworn by a person

who derives his knowledge from the record of the case. However, in sensitive matters of the present nature, the detaining authority ought to file his own affidavit in answer to the writ petition and place the relevant facts before the court which the court is legitimately entitled to know. However, failure to furnish the counter-affidavit of the detaining authority may not be of much consequence, especially if there was no allegation of mala fides against the detaining authority. In the present case there were no allegations of mala fides against the D.M., the detaining authority. There are degrees of impropriety and the line which divides grave impropriety from illegality is too thin to draw and even more so to judge. Conceivably, there can be cases in which such impropriety arising out of the failure of the detaining authority in filing his own affidavit may vitiate the order of detention. 430

Counter-affidavit — Must be filed by detaining authority himself — Affidavit of a clerk in the judicial section on behalf of the defaming authority not acceptable— Detaining authority failing to file the counter-affidavit despite Supreme Court's specific direction in that regard — In absence of any explanation or return before the Court to rebut the allegations made by the detenu in the writ petition, detention order must be set aside. 431

Counter-affidavit— Should be of the detaining authority — Counter-affidavit filed by Police S.O. indicates that subjective satisfaction of the detaining authority was influenced by police personnel.

The detaining authority had not forward to file an affidavit stating whether he had taken into consideration the fact that the appellant was already in judicial custody and on considering his past activities he was subjectively satisfied that if set free or released from jail custody on bail, there was likelihood of the appellant indulging in criminal activities endangering public order. On the other hand, the Station Officer of the Police Station, filed a counter stating that the District Magistrate passed the impugned detention order when the appellant was already in jail on the apprehension that the appellant was likely to be on bail in the near future and if the appellant is bailed out, the public order problem will become worse.

Held:

This clearly goes to show that the Sub-Inspector had arrogated to himself the knowledge about the subjective satisfaction of the District Magistrate on whom the power is conferred by the Act. The District Magistrate, the detaining authority in this case, had not to file his affidavit. The affidavit-in-opposition filed by the Station Officer of Police implies that he had access to the file of the District Magistrate or he influenced the decision of the District Magistrate for making the detention order. 432


Counter-affidavit – Not detaining authority himself — That will not in all circumstances be fatal to the sustenance of the order of detention — Though could not state whether the documents were relied upon by detaining authority or not but in the facts stated in the counter-affidavit, held, this part of the statement of the deponent should be taken to be his submission — A deponent who has no personal knowledge about any fact may, on the basis of some other facts make his submissions to the court.\textsuperscript{433}

Detention order passed by Joint Secretary — But counter-affidavit filed by Under Secretary who was dealing with the papers relating to the particular order of detention and had placed those papers before the Minister concerned — In the circumstances, held, the counter-affidavit can be considered in absence of any allegation of mala fide or malice or extraneous consideration personally against the detaining authority in making the impugned order of detention.\textsuperscript{434}

Filing of counter-affidavit by detaining authority himself essential where personal allegations of mala fide or bias made by detenu against the detaining authority.\textsuperscript{435}


Rule Nisi — Counter-affidavit — Who should file — Detention order passed by Administrative Secretary and Commissioner, Home Department ‘while counter filed by a Dy. Superintendent of Police claiming himself to be person appointed as officer-in-charge of the case but who was not connected with the of the detention order and subsequent processing of the case — In the circumstances, explanation given in the counter for delay in disposal of detenu's representation not acceptable.

In response to the rule nisi a counter-affidavit should normally be filed by the detaining authority himself though it cannot be suggested as a rigid or inflexible rule applicable in all cases of detention under all circumstances. However, when allegation of mala fide or abuse of powers or personal bias is attributed to the detaining authority, the said authority should himself swear to the counter-affidavit. In the absence of any such allegation in the petition a counter-affidavit may be sworn by a responsible officer who personally dealt with or processed the case or by an officer duly authorised under the Rules of Business of the government concerned.

In the present case the reply affidavit and the additional affidavit before the High Court as well as the Supreme Court were filed by the Deputy


Superintendent of Police stating that he was 'appointed as officer in charge in this case'. It was shocking and surprising that a police officer who had no connection whatsoever with the detention order and who had not at any relevant time personally dealt with the case has come forward to swear about the entire proceedings from the beginning right up to the rejection of the representation including the holding of the meeting of the Advisory Board on behalf of the appropriate authority. This practice of allowing a police officer who has not dealt with the case at any point of time at any level and who in the very nature of the case could not have any personal knowledge of the proceedings, to swear the counter and reply affidavits on behalf of the appropriate authorities should be highly deprecated and condemned and the counter and reply affidavits sworn by such officer merit nothing but rejection.436

Counter-affidavit — Pleas not taken up in counter-affidavit cannot be raised for the first time before court in writ petition — Constitution of India, Arts. 32 and 226.437

Counter-affidavit — When detention order challenged on ground of non-application of mind, return to the rule of the court should be filed either by the detaining authority or a person directly connected with the making of the order — Affidavit filed in a casual manner by some other official on the basis of record of the case not acceptable — Detention Order.438

Detaining authority not filing affidavit justifying detention order — Affidavit in opposition filed by Sub-Inspector of Police on behalf of District Magistrate, the detaining authority, indicating his knowledge about subjective satisfaction of the detaining authority — Held, amounts to abdication of power and hence such affidavit not acceptable — National Security Act, 1980 (65 of 1980), S. 3.

A Sub-Inspector of Police cannot arrogate to himself the knowledge about the subjective satisfaction of the District Magistrate on whom the power is conferred by the Act. In absence of any averment of the Sub-Inspector clarifying as to how he came to know about the subjective satisfaction of the District Magistrate, whether he had access to the file or he was making the affidavit on the basis of the record maintained by the District Magistrate, the inference is irresistible that at the behest of Sub-Inspector of Police who was the investigating officer in some criminal case in which each of the detenu was implicated, the District Magistrate completely abdicating his responsibilities, made the detention order. In the circumstances it is not possible to take notice of the affidavit in opposition. Merugu Satyanarayana v. State of A.P., (1982) 3 SCC 301: 1983 SCC (Cri) 18: AIR 1982 SC 1543: 1982 Cri LJ 2357.

Persons competent to file counter-affidavit on behalf of the State

In return to a rule nisi issued by Supreme Court or the High Court in a habeas corpus petition, the proper person to file the same is the District Magistrate who had passed the impugned order of detention and he must explain his subjective satisfaction and the grounds therefor; and if for some good reason the District Magistrate is not available, the affidavit must be sworn by some responsible officer like the Secretary or the Deputy Secretary to the government In the Home Department who personally dealt with or processed the case in the Secretariat or submitted it to the Minister or other officer duly authorised under the Rules of Business framed by the Government under Art. 166 of the Constitution to pass orders on behalf of the government in such matters.\(^{439}\)

Counter-affidavit made in writ petition under Art. 32 before Supreme Court by Desk Clerk of Home Department — Defect fatal — But affidavits of the concerned Police Commissioners filed in detenu's identical writ petition under Art. 226 upholding issuance of the detention order and explaining grounds and reasons for the same must be considered — So considered, held, Government's view expressed in the counter-affidavits could be taken into account — Constitution of India, Arts. 32 and 226.\(^{440}\)

(b) Pleadings

Impugning High Court's decision before Supreme Court on the ground of being based on a wrong statement of facts — In absence of affidavit of the counsel who appeared before the High Court, held, such a plea not maintainable — Constitution of India, Art 136.\(^{441}\)

Plea — Detenu claiming to have been rendered unable to give proper instructions to counsel before Advisory Board - No grievance made by detenu in that regard before the Board — Advocate representing the detenu before the Board, arguing the detenu's case along with the cases of other detenus — Held, the detenu cannot challenge his detention before the Court on ground of his advocate's failure to effectively represent his case in absence of proper instructions from him — Advisory Board.\(^{442}\)

Plea for release — Whether detenu should be released since other like detenus and the detenus had already undergone a substantial period (more than two-third) of the detention, to be decided by the detaining authority and Court cannot give any direction in that regard.\(^{443}\)


Even though the High Court was in error in quashing the order of detention made against the detenu, he will not be re-arrested and placed in custody for the rest of the period of detention having regard to the facts that the detenu was a young boy of 19/20 years and that he had already been in custody for 5 months and 3 weeks and that no adverse information against the detenu had come to the notice of the authorities after he was set at liberty by the High Court.\textsuperscript{444}


Filing of return by State — State counsel requesting adjournment even though service effected in New Delhi eight days before— Held, such for filing a return and where the detenu's petition shows a prima facie good case, detenu entitled to be released provisionally on filing bail bonds — Constitution of India, Arts. 32 and 22(5).\textsuperscript{445}

Order wrongly quashed by High Court about 16 months back — While disapproving the view taken by the High Court, its judgment and order not interfered with by Supreme Court because of long lapse of time — Practice and Procedure.\textsuperscript{446}


The detenu's statement recorded under S. 161 CrPC accepting allegations against himself may not be a legally recorded confession which can be used as substantive evidence against the accused in the criminal case, but it cannot be completely brushed aside on that ground for the of his preventive detention.\textsuperscript{447}

13. FACILITIES AND AMENITIES TO

Detenu to be afforded all reasonable facilities and amenities including with family members.

It must be impressed on the Government that the detenus must be afforded all reasonable facilities for an existence consistent with human dignity. There is no reason why they should not be permitted to wear their own clothes, eat their own food, have interviews with the members of their families at least once a week and, last but not the least, have reading and writing material according to their reasonable requirements.


The courts are open to the detenu to determine whether the restraints imposed upon the detenu in any particular case are excessive and unrelated to the object of detention. If so, they shall have to be struck down.448

Failure to inform detenu's members about passing of the order and place of detention — Held, not fatal to the detention where detenu was already an undertrial prisoner and his relatives knew the fact as one of them had visited him in jail within two days of passing the order of detention — Constitution of India, Art. 21 — COFEPOSA Act, 1974, S. 3(1).

The object and purpose of the imperative requirement (as enjoined by the Supreme Court in A.K. Roy case) of informing the members of the detenu's household in writing of the passing of the order of detention and taking in custody of the detenu as also the place of detention immediately after the detenu is taken in custody pursuant to the order, is that the family members of the detenu should not be kept in darkness by withholding the information about the passing of the order of detention and the place of detention thereby preventing them from having any access and from rendering any help or assistance to the detenu and similarly the detenu should not be deprived of the privilege of meeting his relations and getting any help or assistance. In the present case the family members had sufficient knowledge about the detention of the detenu by virtue of the mittimus issued as well as about the place of detention.449

Facilities to detenu in jail — Government having no objection to grant the desired facilities to the detenu — Matter disposed of.450

DETENTION OF FOREIGNER

Detention of a foreign national — Not justified having regard to the object of preventive detention as also international law and human rights concept — International Law — COFEPOSA Act, 1974, S. 3.

Preventive detention of a foreign national who is not resident of the country involves an element of international law and human rights and the appropriate authorities ought not to be seen to have been oblivious of its international obligations in this regard, The Universal Declaration of Human Rights include the right to life, liberty and security of a person, freedom from arbitrary arrest and detention; the right to fair trial by an independent and impartial tribunal; and the right to presume to be an innocent man until proved guilty. When an act of preventive detention involves a foreign national, though from the national point of view the municipal law alone counts in its application and interpretation, it is generally a recognised principle in national legal system that in the event of doubt the national rule is to be interpreted in accordance with the State's international obligations.


There is need for harmonisation whenever possible bearing in mind the spirit of the Covenants. Crimen trahit personam. The crime carries the person. The commission of a crime gives the court of the place where it is committed jurisdiction over the person of the offender. Legal relations associated with the effecting of legal aid on criminal matters is governed in the international field either by the norms of multilateral international conventions relating to control of crime of an international character or by special treaties concerning legal cooperation. Smuggling may not be regarded as such a crime. The system of extradition of criminals represents an act of legal assistance by one State (the requestee) to another State (the requestor) with the aim of carrying out a criminal prosecution, finding and arresting a suspected criminal in order to bring him to court or for executing the sentence. In concluding such the States themselves on principles of humanitarianism in their, efforts to contribute to the more effective achievement of the objectives of the correction and re-education of violators of the law. Where such conventions exist, the citizens of a State who were convicted to deprivation of freedom in another signatory State are in accordance with mutual agreement of the States, transferred to the country of which they are citizens to serve their sentences. The transfer of the convicted person may take place only after the verdict has entered into legal force and may be carried out on the initiative of either of the interested States. The punishment decided upon with regard to a convicted person is served on the basis of the verdict of the State in which he was convicted. On the strength of that verdict the competent court of the State of which the person is a citizen adopts a decision concerning its implementation and determines, in accordance with the law of its own State, the same period of deprivation of freedom as was assigned under the verdict. While ameliorative practices may be available in case of the foreign national being criminally prosecuted, tried and punished, no such proceedings are perhaps possible when he is preventively detained. There may be where while a citizen and resident of the country deserves preventive detention apart from criminal prosecution, in case of a foreign national not resident of the country he may not be justifiably subjected to preventive detention in the event of which no international legal assistance is possible unlike in case of criminal prosecution and punishment.\footnote{451}

Foreign nationals directly involved in smuggling not entitled to be differently treated and cannot seek deportation.\footnote{452}

**CHALLENGE TO DETENTION AFTER RELEASE**

Detention challenged after release — Action taken under Ss. 6 and 7 of SAFEMA on the basis of order of detention under COFEPOSA — Failure of detenu to challenge.

Particular statutes

The detention order during his detention due to prevalence of Emergency, held, would not operate as estoppel against his right to move the court after his release for having his detention order quashed in order to challenge the action taken under Ss. 6 and 7 of the SAFEMA — Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976. Ss. 6 and 7 — Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, Ss. 3(1) and 5.

PARTICULAR STATUTES

[Note: The cross-references below are not exhaustive and the reader is advised to study the synopsis at pages 2654-55 and follow the approach for full advantage.]

(a) A. P. Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986

S. 2(3) — Affirmal of State govt-eminent — Failure to obtain State Government's approval within statutory period — Held, detention order would cease to be in force after that period — A. P. Prevention of Dangerous Activities of Bootleggers, Dacoits, Offenders, Goondas, Immoral Traffic Offenders, and Land Grabbers Act, 1986, S. 2(3).

The detention order had not been approved by the State Government within 12 days of its being made as required by S. 3(3) of the AJP, Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act. The result is that the order could not remain in force more than 12 days after making thereof and as such must be treated as to have ceased to be in force and non-existent thereafter.

Legal relations associated with the effecting of legal aid on criminal matters is governed in the international field either by the norms of multilateral international conventions relating to control of crime of an international character or by special treaties concerning legal cooperation. Smuggling may not be regarded as such a crime.

Ss. 2(e) and 3(1) — Smuggling - Raw material imported under Duty Exemption Entitlement Scheme by detenu in the name of two fictitious benami firms created for that purpose and instead of complying with the condition to manufacture its product with the raw material and export the product abroad within six months, the goods disposed of in local market — Held, activity amounted to smuggling or abetment of smuggling within the meaning of Ss. 2(e) and 3(1) of COFEPOSA Act read with Ss. 2(39) and 11(o) of Customs Act - Abeyance order passed against the firm before expiry of the six-month period cannot be said to be the reason for failure to manufacture

454. S.M.D. Kiran Pasha v. Govt, of A.P., 1 SCC 328, 343: 1990 SCC (Cri) 110.
the product when the firms were actually nonexistent and there was neither any factory nor any manufacturing device — Customs Act, 1962, Ss. 2(39) and 11(0).456

*Per Shetty, J.*

The order made under S. 3(1) is in the nature of an interim order. It is subject to the opinion of the Advisory Board under S. 80 of the COPEPOSA Act.457

In the enforcement of a law relating to preventive detention like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 there is apt to be some delay, between the prejudicial activities complained of under S. 3(1) of the Act and the making of an order of detention. When a person is detected in the act of smuggling or foreign exchange racketeering, the Directorate of Enforcement has to make a thorough investigation into all the facts with a view to determine the identity of the persons engaged in these operations which have a deleterious effect on the national economy. Quite often these activities are carried on by persons forming a syndicate or having a wide network and therefore this includes recording of statements of persons involved, examination of their books of accounts and other related documents. Effective administration and realisation of the purposes of the Act is often rendered difficult by reason of the clandestine manner in which the persons engaged in such operations carry on activities and the consequent difficulties in securing sufficient evidence to comply with the rigid standards, insisted upon by the courts. Sometimes such investigation has to be carried on for months together due to the magnitude of the operations. Apart from taking various other measures i.e. launching of prosecution of the persons involved for contravention of the various provisions of the Acts in question and initiation of the adjudication proceedings, the Directorate has also to consider whether there was necessity in the public interest to direct the detention of such person or persons under S. 3(1) of the Act with a view to preventing them from acting in any manner prejudicial to the conservation and augmentation of foreign or with a view to preventing them from engaging in smuggling of goods etc. The proposal has to be cleared at the highest quarter and is then placed before a Screening Committee. The Screening Committee may meet once or twice a month. If the Screening Committee approves of the proposal, it would place the same before the detaining authority. Being conscious that the requirements of Art. 22(5) would not be satisfied unless the 'basic facts and materials' which weighed with him in reaching his subjective satisfaction, are communicated to the detenu and the likelihood that the court would examine the grounds specified in the order of detention to see whether they were relevant to the circumstances under which the impugned order was passed, the detaining authority would necessarily insist upon sufficiency of the grounds which


would justify the taking of the drastic measure of preventively detaining the person.

Hence, a distinction must be drawn between the delay in making of an order of detention under a law relating to preventive detention like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the delay in complying with the procedural safeguards of Art 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. Quite obviously, in cases of mere delay in making of an order of detention under a law like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 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 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 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 'state' or illusory or that there is no real nexus between the grounds and the impugned order of detention.458


S. 9(1) – Declaration under – Satisfaction of declaring authority – Whether based on materials or vitiated by non-application of mind

Nothing contained in S. 9 shall 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. However, since non-furnishing of the copies of the bail application and the bail order has resulted in violation of Art. 22(5), no opinion need be expressed on this submission.459

The purpose and object of S. 10 is to prescribe not only for the maximum period but also the method by which the period is to be computed.460

The key to the interpretation of S. 10 of the Act is in the words 'may be detained'. The subsequent words 'from the date of detention' which follow the words 'maximum period of one year' merely define the starting point from which the maximum period of detention of one year is to be reckoned in a case not falling under S. 9. There is no justifiable reason why the word 'detain' should not receive its plain and natural meaning. According to the Shorter Oxford English Dictionary, Vol. 1, p. 531, the word 'detain' means "to keep in confinement or custody". Webster's Comprehensive Dictionary, International Edition at p. 349 gives the meaning as "to hold in custody". 461

The scheme of S. 12, unless release by the appropriate government is taken to be one of parole, keeps away parole from the subject of preventive detention. At any rate, it is the appropriate government and not the court which deals with a case of temporary release of the detenu. Since the Act authorises the appropriate government to make an order of temporary release, invariably the detenu seeking to have the benefit of temporary relief must go to the appropriate government first. It may be that in a given case the court may be required to consider the propriety of an adverse order by the government in exercise of the jurisdiction under S. 12 of the Act. On the principle that exercise of administrative jurisdiction is open to judicial review by the superior court, the High Court under Art. 226 or this Court under Art. 32 may be called upon in a suitable case to examine the legality and property of the governmental action. There is no scope for entertaining an application for parole by the court straightway. 462

Gujarat Prevention of Anti-Social Activities Act

S. 2(b) — Prejudicial activities — 'Bootlegger' — Person involved in illicit liquor traffic business of importing Indian-made foreign liquor into a prohibited area, held, falls within S. 2(b) read with S. 3(1). 463

S. 2(b) — 'Bootlegger' under

Reference to crimes under Bombay Prohibition Act, 1949 made in the grounds but detenu not figured in any one of them and no material of his involvement in those cases produced — Held, detenu cannot be said to be a bootlegger —. Gujarat Prevention of Anti-Social Activities Act, 1985, S. 2(b). 464

Ss. 2(b) and 3(4) — 'Bootlegger' —

Activities of bootlegger must be shown to adversely affect maintenance of public order under S. 3(4) — Held on facts, disturbance of public order not proved — Hence detention on ground of the detenu being a bootlegger not sustainable — Basis of detention — Public order

A conjoint reading of S. 2(b) and S. 3(4) with the explanation annexed thereto clearly spells out that in order to clamp an order of detention upon a 'bootlegger' under S. 3 of the Act, the detaining authority must not only be satisfied that the person is a bootlegger within the meaning of S. 2(b) but also that the activities of the said bootlegger affect adversely or are likely to affect adversely the maintenance of public order. In the present case the vague allegations in the grounds of detention that the detenu was the main member of the gang indulging in bootlegging activities and that the detenu was taking active part in such dangerous activities, are not sufficient for holding that the activities affected adversely or were likely to affect adversely the maintenance of public order in compliance with S. 3(4) of the Act, that the activities of the detenu had caused harm, danger or alarm or a feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or public health as per the explanation to S. 3(4). Therefore, the impugned order of detention cannot be sustained on the ground that the detenu was a 'bootlegger'.

S. 2(c) — 'Dangerous person' under — Habitual offender — Who is — Three crimes registered against the detenu out of which detenu acquitted in respect of two and the only case pending against him lacking in supporting evidence — Held, appellant not a habitual offender and hence not a dangerous person — Gujarat Prevention of Anti-Social Activities Act, 1985, S. 2(c) — Words and Phrases — 'Habitual'

The expression 'habitually' in S. 2(c) of the Gujarat PASA Act is very significant. A person is said to be a habitual criminal who by force of habit or inward disposition is accustomed to commit crimes. It implies commission of such crimes repeatedly or persistently and prima facie there should be a continuity in the commission of those offences.

Though three cases had been registered against the detenu-petitioner, he had acquitted in respect of two. Though lengthy counter was filed averring in general that the detenu was indulging in prejudicial activities but from the solitary case pending investigation against him it cannot be inferred that the petitioner was a 'dangerous person' within the meaning of S. 2(c). The Sessions Judge in his order releasing the petitioner on bail in the pending case has noted that there was no medical evidence to prove that anyone was injured in the occurrence alleged in the FIR. If such is the only crime pending in which the detenu is alleged to have participated, it cannot be said that he comes within the meaning of 'dangerous person' and the conclusions drawn by the detaining authority are bereft of sufficient material as required under S. 2(c) of the Act. This betrays non-application of mind by the detaining authority. Consequently, the grounds on which the detention order is passed, are irrelevant and non-existing. Therefore, the detention order cannot be sustained.

S. 2(c) — Dangerous person — Detenu must be shown to be a habitual offender under Chapter XVI or XVII or XXII of IPC or under Chapter V of Arms Act — Registration of only one case under S. 307 IPC and S. 25 of Arms Act against the detenu falling within the definition — General and vague allegations of taking part in communal riots and conspiring to create terror being member of a gang made against the detenu in the grounds — Held on facts, ground of detenu being a dangerous person not made out

To bring a person within the definition of 'dangerous person' in S. 2(c) of the Act, it be shown that he is habitually committing or to commit or abetting the commission of offences punishable under Ch. XVI or XVII or XXII of IPC or under Ch. V of Arms Act. In the instant case, the registration of only one case was mentioned under S. 307 of IPC and S. 25 of the Arms Act which fell within the definition clause. This solitary incident would hardly be to conclude that the detenu was habitually committing or attempting to commit or abetting the commission of offences. The general and vague made in the grounds of detention that the detenu was taking active part in communal riots and entered into conspiracy to spread an atmosphere of being a member of a gang, in the of any specific instance or registration of any case thereof, cannot be construed as offences falling under any of the above three chapters of the IPC or Chapter V of the Arms Act enumerated under S. 2(c) so as to charac-the detenu as a 'dangerous person'. Thus the conclusions drawn by the detaining authority that the detenu is a dangerous person is bereft of sufficient material as required under S. 2(c). Therefore, the detenu cannot be termed as a 'dangerous person'.

S. 3(2). Expln. — Acts of removing permanent way material stocked along rail lines for maintenance of rail tracks and removing parts of carriages wagons and signal telecommunication materials utilised for repair of railway wagons and maintenance of signals fall under.

For maintaining supplies throughout the country the railways is per se essential, and, therefore, interference with railway lines would be endangering the maintenance of supplies.

S. 3(2) Explan. — Acts prejudicial to the maintenance of supplies and services to the community — S. 3(2) of National Security Act contemplates acts of general nature whereas S. 3(1) read with Explanation of PBMSEC Act contemplates acts of particular nature — Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (Act 7 of 1980).

S. 3(1) Explan. — The conduct of the detenu was prejudicial to the maintenance of supplies and services essential to the community in general as contemplated by S. 3(2) of the National Security Act and not in any particular

mode contemplated by Exnl. of S. 3(1) of Act 7 of 1980 and as such is not excluded by the Exnl. to S. 3(2) of the National Security Act.469

Ss. 3(3), 5, 8, 13 and 16 — Constitutionality of — S. 3(3) upheld — S. 5 only in exceptional circumstances can the detenu be put in a jail distant from his home — Family must be informed of arrest and place of detention of detenu and transfers if any — Ss. 8 13, read are constitutional — Protection to honest acts of officers under S. 16 justified — General Clauses Act, 1897, S. 3(22) (1).

(1) Regarding the constitutionality of S. 3(3), in view of the in-built safeguards, it cannot be said that excessive or unreasonable power is conferred upon the District Magistrate or the Commissioner of Police to pass orders under sub-section (2).

(1) Regarding the power to regulate place and conditions of detention under S. 5 it is neither fair nor just that a detenu should have to suffer detention in 'such place' as the Government may specify. The normal rule has to be that the detenu will be kept in detention in a place which is near his or her ordinary place of residence. To keep a person in a far off place is a punitive measure. That makes it impossible for his friends and relatives to meet him and for him to claim the advantage of facilities like having his own food etc. The requirements of administrative convenience, safety and security may justify in a given case the transfer of a to a place other than that where he ordinarily resides, but that can only be by way of an exception and not as a matter of general rule. Whatever smacks of punishment must be scrupulously avoided in matters of preventive detention.

Moreover, in order that the procedure attendant upon detentions should confirm to the mandate of Art, 21 in the matter of fairness, justness and reasonableness, it is imperative that immediately after a a person is taken in custody in pursuance of an order of detention, the members of his household, preferably the parent, the child or the spouse, must be informed in writing of the passing of the order of detention and of the fact that the detenu has been taken in custody. Intimation must also be given as to the place of detention, including the place where the detenu is transferred from time to time. It is necessary to treat the detenu consistently with human dignity and civilised norms of behaviour.

(3) No objection can be taken against the provisions of S. 8(1) since furnishing of grounds of detention 'as soon as may be' is the normal rule. Exceptional circumstances only permit delay within defined days.

(4) No objection can also be taken against S. 13 providing 12 months as the maximum period of detention. There is no obligation to pass detention order for 12 months and again, any order can be revoked or modified at an earlier point of time.

(5) Under S. 16 a mala fide order cannot be protected. Only those passed in good faith and in pursuance of the National Security Act are protected.

Also the challenge to S. 1.6 as being unreasonable is without any force. If the policy of a law is to protect honest acts, whether they are done with care or not, it cannot be said that the law is unreasonable. In fact, honest acts deserve the highest protection. Then again, the line which divides a dishonest act from a negligent act is often thin and, speaking generally, it is not easy for a defendant to justify his conduct as honest, if it is accompanied by a degree of negligence. The fact, therefore, that the definition contained in S. 3(22) of the General Clauses Act includes negligent acts in the category of acts done in good faith will not always make material difference to the proof of matters arising in proceedings under S. 16 of the Act. 470

S. 3(4) — "No such order shall remain in force for more than twelve days after the making thereof unless, in the meantime, it has been approved by the State Government" — Computation of period of twelve days — Held, day on which order made to be excluded, having regard to the significance of the "word 'after'" — Confirmation of detention — Words and Phrases — 'After'

In computing the period of twelve days referred to in sub-section (4) of S. 3 of the National Security Act, the day on which the cause of action arises i.e. the order of detention was passed should be excluded. Though the officer making the order of detention shall forthwith report the fact to the State Government, but the word 'forthwith' will not be taken into consideration for the purpose of computing the period of twelve days inasmuch as there is a clear indication that the said period shall be computed 'after' the order is made. The word 'after' in sub-section (4) is very significant and clearly excludes any contention that in computing the period of twelve days the day on which the order of detention is passed should be included. The expression "in the meantime" in sub-section (4) clearly indicates that the State Government can approve of the order of detention even on the day it is passed. The language of sub-section (4) is plain and simple and the question whether the order of detention can be approved on the day it is passed or not does not at all arise. In the present case the approval of the order of detention was made within twelve days after the making of the order of detention. 471

Prabhu Narain Singh v. Supdt, Central Jail, Varanasi, 1LR (1961) 1 All 427, overruled


A ground of detention which is invalid for any reason whatsoever, shall be treated as non-existent and the surviving grounds which remain after excluding the invalid grounds shall be deemed to be the foundation of the detention order. However, in the present case, it is not necessary to express any concluded opinion on this point. N. Meera Rani v. Govt, of T.N., (1989) 4 SCC 418: 1989 SCC (Cri) 732: AIR 1989 SC 2027: 1989 Cri LJ 2190: (1989) 3 Crimes 173.

S. 5-A — Invalidity of one or some of the grounds of detention would not render the entire order of detention bad.

If more than one ground are stated in the grounds of detention then the fact that one of the grounds is bad, would not alter order of detention after the amendment of the National Security Act in 1984, provided the other grounds were valid. But quite apart from the same, none of the grounds were vague. The grounds must be understood in the light of the background and the context of the facts.  

Prisoners Act, 1900

The 'places' envisaged for confinement of transportation prisoners under S. 32 of the Prisoners Act, 1900 can be the places in the jails. Moreover, as we shall point out later paragraph 719 of the Punjab Jail Manual clearly shows that by several Notifications or orders issued by the Punjab Government certain local jails within the Province have been constituted the "places" under S. 32 of the Act for confinement of transportation prisoners, It is thus clear that under S. 32 of Act 3 of 1900 a sentence of transportation either for a term or for life could be and a sentence of life imprisonment can be made executable in local jails by constituting such jails as the "places" within the meaning of S. 32 under orders of the State Governments.  

Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976

Ss. 2(2)(b), 6 and 7 — Condition precedent for taking action against any person under Ss. 6 and 7 is existence of a valid order of detention under COFEPOSA Act against him — Where detention order under COFEPOSA Act found to be invalid and illegal due to any legal or constitutional infirmity, such as non-supply of copies of documents and materials relied on in grounds of detention to the detenu, held, action under Ss. 6 and 7 would be baseless and unsustainable— Preventive Detention— Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, S. 3.  

---