
(1990) 10 BOM CK 0027

In the Bombay High Court

Case No : Criminal Writ Petition No. 537 of 1990

Abdul Nasir Khan

APPELLANT

Vs

L. Hmingliana and others

RESPONDENT

Date of Decision : 09-10-1990

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 5A, 8, 9
Constitution of India, 1950 — Article 19, 21, 22, 226
National Security Act, 1980 — Section 5A

Citation : (1991) 93 BOMLR 298 : (1991) CriLJ 507

Hon'ble Judges : S.P. Kurdukar, J; M.F. Saldanha, J

Bench : Division Bench

Advocate : Ram Jethmalani, M.A.H. Solkar and Smt. R.P. Desai, Public
Prosecutor, for the Appellant; M.K. Patwardhan and A.S. Khan, for the Respondent

Judgement

Kurdukar, J.—This petition for a writ of habeas corpus under Article 226 of the Constitution of India is filed by the detenu (petitioner) challenging the legality and correctness of the detention order dated April 24, 1990 issued by the first respondent in exercise of powers u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the Act"). The order of detention is at Exh. A. Grounds of detention were formulated pari passu the order of detention and the same are annexed to this petition at Exh. B. The order of detention, grounds of detention and the material thereof were served upon the detenu and no challenge has been raised before us in that behalf.

2. At the outset it may be stated that other two companion criminal petitions bearing Criminal Writ Petition No. 530 of 1990 Amir Shad Khan v. L. Hmingliana and others and Criminal Writ Petition No. 531 of 1990 Aziz Ahmedkhan alias Aziz Mohamed Khan s/o Amir Ahmed Khan v. L. Hmingliana and others were disposed of by the Division Bench of this Court on 31st August, 1990. Both these petitions were dismissed and the detention orders were confirmed. To these judgments

one of us (Kurdukar, J.) was a party. The only distinguishing feature in the present petition and other two companion petitions is that in the present petition the detaining authority has relied upon an additional incident dated 6th February, 1990 in which the present detenu along with one Jagadish Vishin Gursahani was involved. It may also be stated that the detention order issued against Jagadish Vishin Gursahani was also challenged in this Court in Criminal Writ Petition No. 408 of 1990 and this Court Vide its order dated July 24, 1990 allowed the petition and set aside the detention order. To this judgment one of us (Kurdukar, J.) was a party. Reference to these judgments will be made at appropriate places.

3. It is needless to set out the grounds of detention in detail because Mr. Jethmalani, learned counsel appearing in support of this petition raised three contentions to which a reference will be made shortly. We may, therefore, briefly summarise the grounds of detention.

4. The detaining authority on being subjectively satisfied that the detenu is involved in the prejudicial activities under the Act, it is necessary to detain him u/s 3(1) of the Act with a view to preventing him from smuggling goods and engaging in transporting smuggled goods. From the material on record it appears that the present detenu is a king-pin of the gang which has been actively involved in nefarious and prejudicial activities under the Act.

5. It has been stated in the grounds of detention that on the basis of intelligence, officers of DRI and the Collectorate of Central Excise and Customs, Pune, kept a watch from the morning of 25-3-1990 at Katraj Ghat Naka and at Kashedi Ghat for two suspect vehicles i.e. (i) Mahindra Jeep No. MH 15A-3011 and (ii) Premier 118 NE Car No. MH 15A-12. On 24-3-1990 at about 10.30 p.m. a huge quantity of smuggled gold totally weighing 163.39 kgs. (1400 bars of gold each weighing about 10 Tolas) and valued at Rs. 4,98,15,650/- was landed nearabout Ratnagiri shore. This gold was to be transported through vehicles which were kept ready. These vehicles were to pass either through Katraj Ghat or Kashedi Ghat and accordingly the officers of the DRI were posted at both these Ghats. Transporting operations were undertaken by one Amir Shad Khan and Aziz Ahmed Khan alias Aziz Mohamed Khan with the help of other associates. The carriers successfully evaded the DRI officers at Katraj Ghat but noticing that the Mahindra Jeep in which the smuggled gold was being carried was spotted at Katraj cheek post near Pune and being intercepted by DRI officers, the jeep was taken in a bylane and the gold was shifted in a fiat car. This car was accordingly sent to Lonawala and Amir Khan and Aziz Mohamed Khan contacted the detenu at Bombay and told him about the incident. Amir Khan requested the detenu on phone from Pune to send another car at Lonawala. Accordingly the detenu sent a fiat car to Lonawala in which the contraband was shifted. Amir Khan and Aziz Mohamed Khan went in this Premier 118 NE car towards Bombay and it is this car which was intercepted near Panvel by the DRI officers. The car was then brought to DRI office at Bombay. On rummaging the same in the presence of panch witnesses the above quantity of gold was recovered from the specially made cavities of the

said Premier 118 NE car. This is broadly the gist of the incident dated March 25, 1990 in which the officers of DRI seized 1400 bars with foreign markings in which the present detenu is involved.

6. It is needless to state that it was a very well planned and prearranged conspiracy hatched by the smuggling gang of which the present detenu is the master mind. It may be stated that the detenu is known as "Bhai" in this smuggling circle. The detenu is also known as "Mohan" and this name has been referred to in the incident which took place on 6-2-1990 at the Sahar airport to which reference will be made shortly. We may however without burdening the judgment reproduce from the grounds of detention the statement of the detenu only recorded on 27th and 28th March 1990. The statement of the detenu is as under :-

7. In your statements recorded on 27th and 28th March 1990 you, inter alia, disclosed that you stay with your wife Seema in Room No. 8-B 2nd floor, Star Mansion, Byculla, Bombay which is in your mother's name. Your brother Mehmood runs "Video Land" Library which is in your wife's name. Your eldest uncle Syed Ahmed alias Miyan was involved in a case of seizure of 500 foreign marked gold bars in May 1986 by DRI, Bombay. Miyan was in Cofeposa detention in 1989 and you used to go and meet him. There, you became friendly with one Amir. Shad Khan who was also in detention. You came in contact with one Haji Sahab whose real name you do not know. In February, 1990 the said Haji Sahab phoned and told you that he was interested in landing contraband near Goa and that Amir knows some persons who could arrange landing there. You discussed this with Amir who used to come to the Video shop run by your brother. Then you and Amir went to Goa but could not meet on way Arun Naik at his place, but kept message for him to wait for you on your return. Accordingly on return from Goa, you both met Arun Naik at Kawthan village, Sawantwadi and discussed regarding landing of contraband gold in the vicinity. Then both of you came to Ratnagiri and stayed in Hotel Vihar and saw various suitable landing places at Jaitapur and Arun Naik returned to his village while you and Amir Khan came back to Bombay. Again you received phone from Haji Sahab and you explained the position to Haji Sahab but did not give any commitment. On 21-3-1990, you were informed by Haji Sahab on phone, to remain prepared to go for landing but you expressed your inability due to kidney stone trouble. You decided to send Amir for the job and sent him on 23-3-1990 evening to Ratnagiri on instructions from Haji Sahab. You gave Amir a jeep and Rs. 15,000/- and Amir took Aziz. Amir was instructed to stop in a restaurant situated about 10 kms. before Ratnagiri and wait for Arun Naik's men. On Sunday the 25th March 1990 Haji Sahab informed you that Amir would be contacting you and that you should go if Amir calls you. Around noon on 25-3-1990 Amir requested you to come to Khandala taxi stand with a car but you did not go and instead you sent Premier 118 NE Car along with one Babu to Khandala. You waited for Amir at Bombay. Around 8-30 - 9-00 p.m. Haji Sahab informed you that Amir and Aziz had been caught by DRI but they had not been able to recover the gold and asked you to

get back the vehicle from the DRI officers and scolded you for not going. You instructed Atiq a driver-cum-mechanic to get the car and gave him the duplicate keys and you went to Esplanade Court to see whether Amir and Aziz were being produced. When you returned, you met Atiq and learnt that the car had already been brought by him. You changed the number plate of the car and checked and found that there was no gold in it. You gave the car to Aziz Patel instructing him to get it done up and to have it painted maroon or black. During the course of your interrogation you called Aziz Patel and told him to trace the car and return it to the officers. During the course of your statement, you identified Amir Shad Khan and Aziz Khan as the persons referred by you in your statements and both of them signed on your statement. You also identified the photograph of Arun Naik and signed thereon and further disclosed that you went to Goa and Sawantwadi with Amir for the first time in the 3rd week of February, 1990. After talking to Haji Sahab you had sent Amir with one Sadiq to see the places of landings, as he was conversant with navigation. Sadiq returned to Dubai. Sadiq visited the places of landing, so that he could bring the vessel with contraband safely. Thereafter you and Amir went to Ratnagiri and finalised the landing places after meeting two persons one of whom was named Shaligram, in the restaurant before Ratnagiri. You and Amir returned to Bombay. You further stated that you have 4-5 vehicles purchased by you but you do not know in whose name they are registered. You got cavities made in Premier 118 NE Car No. MH 15A-12 through one Babu from a garage, on garage road near Lido Cinema. You finalised the walkie-talkie code "Chache" and "Guchi" for establishing contact, when Haji Sahab phoned you on 22-3-1990 and informed you that the landing would take place on the night of 24-3-1990. You also stated that out of 1400 bars of foreign marked gold seized by the officers, 150 belonged to Zubair, 150 belonged to Feroze and 100 belonged to you and had been personally arranged by you. The remaining 1000 bars had been arranged by Haji Sahab. In your statement dated 28-3-1990 you further disclosed that on 25-3-1990 Amir Khan had informed you on phone from Pune that the Mahindra Jeep No. MH 15-A 3011 was in some problem and that the gold from it had been shifted in the other Fiat car which had also gone to bring the smuggled gold. The colour of the fiat car which had also gone was white and it has a floor gear and that its number starts with MH 15 A-12 but you do not recollect the actual number. The number plates bearing Car No. MH 15 A-12 seized with gold on 25-3-1990 were given by you to Atiq on 26-3-1990, for destroying them. The new number plates bearing Nos. MH 01 324 which were fixed on the said car were prepared by one person who sits at the Patel pump situated behind Star Mansion, Byculla, on the main road. As regards the foreign goods seized from the premises at Ranjan Bungalow and from Flat No. 8, Star Mansion, Clare Road, Byculla, Bombay, you stated that you will produce the necessary documents as soon as you are able to get from the parties concerned. You stated that you have no licence for the foreign revolver and the bullets seized from Ranjan bungalow and no documents thereof. You do not know where the Mahindra Jeep No. MH 15-A 3011 and the Fiat car with floor gear had been kept by the drivers and stated that you would see that they are

produced before the officers as soon as possible. As regards your visits to Ratnagiri on the second occasion you further clarified that when you stayed in hotel, 10 Kms earlier from Ratnagiri, two persons namely Shaligram and another had come to see you but Arun Naik did not come. After discussion about the work of landing of gold Shaligram had stated that the work would be done and all arrangements could be made when you phoned him about the work of landing of contraband gold and he gave his contact telephone No. 2038. No amount was fixed for landing at that time. However, when Amir Khan and Aziz were sent on 23-3-1990 for the landing of gold near Vijaydurg you had sent Rs. one lakh with Amir to pay to Shaligram after the landing was done. You identified the photocopy of photograph of Shaligram obtained from the Pune Collectorate of Central Excise and Customs, by the DRI officer, as the same person who had helped you in the landing of the 14 jackets of gold seized on 25th/26th March 1990 from Premier 118 NE Car No. MH 15 A-12 and signed thereon."

8. The detaining authority in the grounds of detention then relied upon the incident dated 6th February 1990 in which the present detenu and one Jagdish V. Gursahani are involved. On the basis of intelligence, the DRI officers on 6-2-1990 kept discreet surveillance on Air India Aircraft flight No. AI 830 when it arrived in the early hours at Bombay from Muscat via Delhi. They rummaged some suspect places in the aircraft and kept discreet watch on the movements of one Jagdish V. Gursahani near the aircraft. Later on when the aircraft was taken to the Hangar at MITC building, Sahar, the officers kept a watch in the vicinity. At about 8.15 hours they saw Jagdish going out of the building. When called by the officers he ran inside the building and entered a toilet and bolted the door from inside. The officers nabbed him when he came out of the toilet and found two wet heavy cloth packets lying on the floor of the toilet. They recovered the said packages in the presence of panchas and also searched the locker and car No. MAF 3136 of Jagdish. From his person they recovered and seized Rs. 12,000/- and some documents. On detailed inventory of the packages the officers recovered and seized 120 gold bars of foreign markings totally weighing 1200 tolas and valued at Rs. 46,80,000/-. All these gold bars were having foreign markings. Jagdish V. Gursahani is a Senior Aircraft Technician in Air India and was on third shift duty on 5-2-1990 and his checking out time was 6-20 hours on 6-2-1990. The investigating officer then recorded the statement of Anil V. Ingle on 6-2-1990 in this connection. The statement of Jagdish V. Gursahani was also recorded on 6-2-1990 and we may reproduce his statement :-

"In his statement dated 6-2-1990 Jagdish V. Gursahani confirmed that he is a Senior Aircraft Technician in All India and that he was on 3rd shift on the night of 5th/6th February 1990 from 21-30 hrs. on 5-2-1990 to 6-30 hrs. on 6-2-1990. He was to attend to the maintenance part of job in respect of Flight No. AI 830 which had arrived at Bombay at about 3.30 hrs. from Muscat via Delhi. On seeing the officers near the plane and some of them boarding it, he got nervous and waited for the officers to go away. On the night of 5-2-1990 he had been instructed by his friend Mohan that foreign marked gold biscuits would be coming

in AI 830 concealed in the upper deck toilet. His friend had asked him to take out the gold without anybody's knowledge and inform him on Phone No. 890757 for further instructions after taking out the gold outside the Airport. He had come in contact with Mohan about two years ago and Mohan had suggested that he wanted to smuggle gold into India by concealing it in the commode of the toilet in the upper deck of Jumbo Aircraft and had offered him Rs. 100/- per 10 tolas of gold smuggled and delivered to him. He agreed to do the job when he was on night shift he used to remove the concealed gold, keep it in his pocket and take out in his Car No. MAF 3136 given to him by Mohan. He used to contact Mohan on phone and take his instructions for delivering the same. He had delivered the gold so smuggled to Mohan in the past at Dadar Circle. On the last occasion during Jan., 1990 or so he had removed two packets containing the same quantity of gold and delivered to Mohan at Dadar. He took the opportunity and managed to get into the aircraft when it was taken to the hangar and took out the two packets totally containing 120 gold bars of 10 tolas each and was about to leave the hangar with the said gold in his pant pocket. He was to go outside and contact Mohan. Meanwhile Officers came after him and he got nervous and rushed into the toilet of the hangar and bolted the door from inside. He removed the two packets containing gold and put them in the toilet and opened the door and the officer apprehended him and took him in the toilet where he had put the cloth packets containing gold. Since the two packets were wet when he had removed from the commode, his pant pockets also became wet when he had put the packets in the pockets. He also confirmed that Mohan had phoned at about 9.15 p.m. in Room No. 205 of Hotel Airport Kohinoor when Anil Ingle, Ashok Mehta and Mahendra were present and had told him about the arrival of the gold in Flight No. AI 830 on 5th/6th February 1990. Jagadish produced his Identity, Card No. 06508 of Civil Aviation Security Card No. 16932 of Air India and stated that he is being paid by Mohan for the job of removing gold from the toilet as and when he demanded. On being shown the document marked "C" produced by Anil Ingle Jagadish stated that he had calculated the value of gold as dictated to him by Mohan and on the left side of the document he had calculated the amount paid to him by Mohan during the period February 1987 to 2th Sept. 1989. He further stated that the total amount paid to him was Rs. 23,51,500/- and after deducting the said amount from the amount of Rs. 1,47,61,193/- the balance of Rs. 1,24,09,693/- is shown on the right hand side of the document for the period. The monthly and daily per head calculations of the amount of Rs. 1.24 Crores was arrived at on the right side and the entire amount has been worked out at Rs. 4 lakhs per month for six, which shows that besides him, Mohan was having other partners in the smuggling of gold. As regards document marked "A" and "B" produced by Anil Ingle, Jagdish stated that he was unable to recollect as to what figures he had dictated to Anil."

In paragraph 47 of the grounds of detention the detaining authority has recited as under :-

"On 13-2-1990 the Premises of Room No. 8 Star Mansion, 2nd floor, Mirza Galib

Road Byculla Bombay-8 where telephone Number 890757 was suspected to be installed was searched but nothing incriminating was found. Gulam Gaus Khan who was present in the premises stated that no person named Mohan resides there and that telephone No. 890757 is installed in the shop "Video Land" of his Son Mehmood Khan. The said premises were also searched in the presence of Mohd. Azizuddin Manager of Video land but nothing incriminating was found. In their statements recorded on 13-2-1990 both Gulam Gaus Khan and Mohamed Akhtar Azizuddin denied knowing any person by name Mohan."

In connection with this incident the Investigating Officers on 28-3-1990 recorded the statement of Jagdish V. Gursahani and it reads as under :-

"52. In connection with the case of seizure of 120 bars of foreign marked gold on 6-2-1990 in which Jagdish V. Gursahani is involved, your statement was recorded on 28-3-1990. You stated that when your residence in Flat No. 8, 2nd floor, Star Mansion, Mirza Galib Road, Byculla, Bombay and the shop "Video Land" were searched, you were not at home but learnt later on that the search was with reference to phone No. 890757. You further stated that you had met Jagdish Gursahani about 2 1/2 years ago near Rupam Talkies at Sion at the instance of Riyaz Bhai of Dubai to start a line of smuggling gold by concealing it in Air India aircrafts. After about 6 months time, Riyazbhai informed you to collect gold on certain days of week from Jagdish Gursahani. Accordingly you started receiving gold sent by Riyaz from Jagdish, sometimes once a week and some times 2-3 times in a week. You used to collect the gold from Jagdish at Dadar after receiving a message and dispose the same on the instructions of Riyaz, to parties code named like Raju, Babu, Kalu etc. who used to contact you. For this mode of smuggling you disclosed that you were called Mohan by Jagdish so that your identity was not disclosed. You further stated that you might have smuggled about 50 jackets of gold i.e. about 5,000/- bars of 10 tolas each and you used to pay Jagdish about Rs. 10,000/- per consignment of smuggled gold delivered to you at the instructions of Riyazbhai. You had given the old Flat car No. MAF 3136 to Jagdish for his use at the instance of Riyazbhai. Sometimes, when Jagdish was not available you used to keep message with his friends whom you have not met. On 5-2-1990, you had phoned Jagdish in Room No. 205, of Hotel Airport Kohinoor and had informed him of the job to be done before he proceeded on the 3rd shift on that day. On the next day i.e. on 6-2-1990 when you did not receive phone from Jagdish you requested his friend to check up for him. You identified the photograph of Jagdish Gursahani from the photocopy of his identity Card No. 06508 of Civil Aviation Authority and No. 16932 of Air India and signed thereon in token of having identified Jagdish."

The detaining authority in para 51 has concluded as under :-

"51. In view of his involvement in the case of seizure of 120 bars of smuggled gold on 6-2-1990. Jagdish Vishin Gursahani was detained on 22-2-1990 under Detention Order No. SPL. 3(A)/PSA, 0190/59 dated 21-2-1990 under COFEPOSA Act, 1974 with a view to preventing him from smuggling goods, abetting the

smuggling of goods and engaging in transporting keeping smuggled goods on the grounds supplied to him therewith by the Secretary (Preventive Detention) to the Government of Maharashtra, Home Department and Detaining Authority. Declaration No. 56/90 dated 16-3-1990 issued u/S. 9(1) of COFEPOSA Act, 1974 by the Special Secretary, Government of India was served on him."

The detaining authority on the basis of the material placed before it has concluded as under :-

"From what is stated hereinabove, it is very clear that you have been indulging in prejudicial activities since quite some time and have successfully smuggled into the country a large quantity of foreign gold through your associates and had abetted the smuggling of gold and engaged in the transportation and disposal thereof. It is also clear that you are likely to carry on such illegal activities unless you are detained."

9. The sponsoring authority then placed the documents as per list Annexure "C" before the detaining authority for its consideration. It is needless to state that the list includes statements of various persons involved in this incident, as also their retractions and other documents. It may also be stated that in the present incident the two officers of the Central Excise and Customs viz. Shaligram and Mathew of Poona Division having their postings at Ratnagiri also actively extended their helping hand in smuggling contraband gold near Ratnagiri shore.

10. On the basis of material produced before the detaining authority as per the list Annexure "C" the detaining authority was subjectively satisfied that the detenu is involved in the prejudicial activities under the Act and with a view to preventing him from smuggling goods and engaging in transporting smuggled goods he should be detained under S. 3(1) of the Act. On the basis of this subjective satisfaction the detaining authority on 24th April 1990 issued impugned order of detention at Exh. A to the petition. It is this order which is the subject matter of challenge in this writ petition.

11. Mr. Jethmalani raised three contentions before us : (1) that the documents and in particular a document at page 404 of the compilation furnished to the detenu are illegible. These documents are referred to and relied upon by the detaining authority in the ground of detention. Since these documents were illegible, in law there is non communication of order of detention and grounds of detention and consequently it has infringed both the facets of Art. 22(5) of the Constitution of India;

(ii) If one of the grounds of detention fails on the ground of non communication of detention order then S. 5A cannot cure the defect and save the detention order on other grounds and consequently entire order is rendered illegal on the premises of non observance of procedural, safeguards prescribed by law under Arts. 21 and 22 of the Constitution of India;

(iii) The documents accompanied with the declaration u/S. 9(1) were not served

upon the detenu and, therefore, the declaration is invalid and consequently continued detention of the detenu be declared illegal.

12. Coming to the first contention as regards illegibility of documents Mr. Jethmalani urged that the very same document at page 404 of the compilation was the subject matter of consideration in Criminal Writ Petition No. 408 of 1990 Haresh Vishin Gursabani v. The State of Maharashtra and others and this Court held that the said document was illegible and, therefore, there was no communication of grounds of detention and consequently the detention order came to be set aside (Detention order was based on an incident dated 6-2-1990). The same document is also relied upon by the detaining authority in the present detention order. Mr. Jethmalani therefore urged that the judgment in Gursahani's case must apply to the present case and consequently the impugned order of detention must be struck down for the same reasons. Mr. Jethmalani also branded few more documents at pages 405 to 408 of the compilation as illegible.

13. In order to appreciate this contention we will have to consider as to whether the document at page 404 furnished to the detenu is illegible, whether this document was relied upon and/or referred to by the detaining authority while formulating the grounds of detention and issuing the detention order and whether this document is vital and constitutes a basic fact.

14. Before we deal with these aspects we may usefully refer to certain decisions of this Court as well as of the Supreme Court on this topic. The Supreme Court in Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others, , while construing the word "grounds" appearing in Art. 22(5) of the Constitution of India has ruled that the article has two facets (1) communication of the grounds on which the order of detention has been made, and (2) opportunity of making a representation against the order of detention. 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. It is further ruled that it would not be sufficient to communicate to the detenu a bare recital of grounds of detention but copies of the documents, statements and other materials relied upon in the grounds of detention must also be furnished to the detenu within the prescribed time subject of course to clause (6) of Art. 22 in order to constitute compliance with Clause (5) of Art. 22 and S. 3, sub-sec. (3) of the COFEPOSA Act, (See paragraphs 7 and 8).

The Supreme Court further ruled that all basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to the making of the order of detention must be communicated to the detenu, so that the detenu may have an opportunity of making an effective representation against the order of detention. It is, therefore, not only the right of the Court, but also its duty as well, to examine what are the basic facts and materials which

actually and in fact weighed with the detaining authority in reaching the requisite satisfaction. (See paragraph 8).

The ratio of this judgment therefore is that the Court must find out as to what are the basic facts and materials which actually and in fact weighed with the detaining authority in reaching the subjective satisfaction. It is also obligatory upon the detaining authority to furnish to the detenu the copies of the documents, statements and other materials relied upon in the grounds of detention.

15. In *Mst. L.M.S. Ummu Saleema Vs. Shri B.B. Gujaral and Anr*, the Supreme Court while dealing with this aspect has observed at page 892 CRLJ 1981 :

"..... It is, therefore, clear that every failure to furnish copy of a document to which reference is made in the grounds of detection is not an infringement of Art. 22(5), fatal to the order of detention. It is only failure to furnish copies of such documents as were relied upon by the detaining authority, making it difficult for the detenu to make an effective representation, that amounts to a violation of the Fundamental Rights guaranteed by Art. 22(5). In our view it is unnecessary to furnish copies of documents to which casual or passing reference may be made in the course of narration of facts and which are not relied upon by the detaining authority in making the order of detention." (See para 5).

16. This Court in *Chandra Shekhar Ojha Vs. A.K. Karnik and others*, emphasized that the documents relied upon while passing the detention order must be furnished to the detenu. It goes without saying that if such documents are relied upon, referred to and/or constitute basic facts must be furnished to the detenu and such copies must be legible so as to afford him an opportunity of making effective representations.

17. Bearing in mind these well settled principles as regards supply of legible copies of the documents to the detenu we may revert to the factual aspect in the present case. The documents about which a complaint was made before us are at pages 404 to 408. These are the documents from P.D. Hinduja Hospital and Medical Research Centre, Bombay. These documents relate to the patient Mr. Jagdish V. Gursahani. The document at page 404 is dated 13th October 1989 whereas the documents at pages 405 and 406 are dated 12th October 1989. The document at page 407 is dated 17th October 1989 and the document at page 408 is dated 19th October 1989. One thing that must be noted in connection with these documents is that all these documents are much prior to both the incidents in question. As indicated earlier the first incident in which the detenu and Mr. Gursahani were involved is dated 6th Feb. 1990, whereas the Ratnagiri incident is dated 25th March 1990. It is true that the document at page 404 is partly illegible but certainly it communicates the name of the patient namely Jagdish Gursahani. The document at page 405 is described as Chemistry (1) report in connection with Jagdish Gursahani. The document page 406, in our opinion, is legible. Only some of the printed words in the columns are slightly

faint. The documents at pages 407 and 408 cannot be termed as illegible documents at all.

18. Mr. Jethmalani took us through the grounds of detention and after going through the same we find that nowhere in the grounds of detention the detaining authority has even remotely referred to and/or relied up on or based his conclusions on any of these alleged illegible documents. In paragraph II, at page 50, however the detaining authority has stated as under :-

"I communicate to you as required under S. 3(3) of the COFEPOSA Act, 1974, read with Art. 22(5) of the Constitution of India, the grounds on which detention order has been made by me. The copies of panchanamas, statements and documents placed before me as mentioned in the accompanying list are enclosed."

It is true that the documents as per Annexure "C" (the list of documents) were placed before the detaining authority and the list includes these alleged illegible documents. As indicated earlier these alleged illegible documents were not at all referred to, relied upon nor constitute basic facts while formulating the grounds of detention. Even there is no casual reference to these documents in the grounds of detention. A close scrutiny of the grounds of detention unmistakably indicates that the detaining authority has made no reference whatsoever nor even a passing or casual reference to these alleged illegible documents. If this be so, in our opinion, grievance of the detenu is without any merits and cannot vitiate the detention order on the ground of non communication of the grounds of detention. Resultantly argument of Mr. Jethmalani as regards infringement of both facets of article 22(5) of the Constitution does not survive.

19. We may however make it clear that in a given case a detenu may demonstrate that one or more of such documents produced before the detaining authority although not relied upon is or are vital documents having a bearing one way or the other on the subjective satisfaction of the detaining authority. In the present case no such argument was developed and rightly so. It was then urged by Mr. Jethmalani that it was the duty of the detaining authority to sift irrelevant material from relevant material and rely upon only relevant material while formulating the grounds of detention and issuing the detention order. He then urged that now it is transpired from the return of the detaining authority that illegible document at page 404 was not relied upon by him while formulating the grounds and issuing the detention order but such irrelevant material in an illegible form was furnished to the detenu. This only shows non application of mind by the detaining authority and consequently subjective satisfaction is vitiated. We are unable to accept this submission. In our opinion detaining authority did sift relevant material from the voluminous material produced before him and consequently relied upon and referred to only relevant material while issuing the detention order. There is therefore no merit in this contention.

Tuesday, October 9, 1990.

20. Mr. Jethmalani relying upon the unreported judgment in Criminal Writ Petition No. 408 of 1990 *Harish Gursahani v. The State of Maharashtra* decided on July 24, 1990, urged that the reasons for which the detention order of Gursahani was set aside the same reasons must apply to the facts of the present case inasmuch as this Court in Gursahani's case held that the document at page 404 was wholly illegible and non furnishing of legible document to the detenu has violated the fundamental right guaranteed under Art. 22(5) of the Constitution. It is true that the same document at page 404 is the subject matter of severe criticism being illegible in the present case. It is also true that this Court in Gursahani's case held that non furnishing of a legible copy of the said document amounts to non communication of detention order as well as the grounds of detention. Ordinarily this Court would not discriminate but for the following reasons we are unable to accept Mr. Jethmalani's contention.

21. Mrs. Desai, learned Public Prosecutor appearing for the detaining authority urged that the present case materially differs on the pleadings. In Gursahani's case, the learned Public Prosecutor urged, there was a specific contention raised on behalf of the detenu that the detaining authority has relied upon and referred to the said illegible document while reaching the subjective satisfaction and to this averment the detaining authority in its affidavit did not deny that it did not rely upon and/or refer to the said document while reaching the subjective satisfaction. The only issue joined by the detaining authority in Gursahani's writ petition was that the document was legible. The writ petition was disposed of only on the issue of legibility of the document. The learned Public Prosecutor in that case, fairly admitted that the said document is illegible. In view of these pleadings the Court concluded that the detenus right to make effective representations under Art. 22(5) was infringed by reason of non furnishing the legible copy of the document at page 404. Mrs. Desai then urged that in the present case the detaining authority has in terms joined an issue that the said document at page 404 was not relied upon nor referred to in the grounds of detention. Even there is no casual reference to the alleged illegible document while formulating the grounds of detention and reaching a subjective satisfaction. Mrs. Desai relying upon the return of the detaining authority dated 10th September 1990 drew our attention to paragraph 21 and it reads as under :-

"21. With reference to para 6(P) of the petition, I deny that the document supplied to the petitioner are illegible. In any event the document at page 404 is not a relied upon document. Assuming that some portion of the same is illegible, it does not vitiate the order of detention. I deny that there is any non-communication of grounds of detention. I deny that there is any violation of both the facets of Article 22(5) of the Constitution of India."

22. From the above recitals from the return para 21, it is clear that the detaining authority has expressly denied to have relied upon and/or referred to the document at page 404 alleged to be illegible. This explanation cannot be rejected on the principle of ex post facto explanation because on perusal of the grounds

of detention it is clear to us that the detaining authority has not at all relied upon the document at page 404 while formulating the grounds of detention as well as reaching the subjective satisfaction. We have already discussed threadbare an issue which is settled by the Supreme Court as regards the challenge on the ground of non furnishing of a document which is neither relied upon nor referred to nor there is even a casual reference to such a document. In this view of the matter we are of the opinion that the document at page 404 assuming that the same is partly illegible did not infringe Art. 22(5) of the Constitution. It must also be stated that the documents at pages 404 to 408 relate to the medical reports of Mr. Jagdish Gursahani who was admitted to Hinduja Hospital much prior to the incident dated 6-2-1990 and were not relied upon by the detaining authority in the grounds of detention. It must also be stated that these documents were filed by Gursahani in the criminal court while applying for bali on medical grounds. The sponsoring authority it appears had obtained the copies of these documents and placed them before the detaining authority for its consideration. After going through these documents though document at page 404 is partly illegible we are of the opinion that these documents have no bearing whatsoever upon the subjective satisfaction of the detaining authority inasmuch as these documents do not constitute basic facts nor they were even casually referred to in the grounds of detention. In this view of the matter the first submission of Mr. Jethmalani must fall.

23. The second limb of argument in this behalf of Mr. Jethmalani is that the order of detention is invalid on the ground of non observance of the procedure prescribed by law under Art. 21 and 22(5) of the Constitution read with S. 3(3) of the COFEPOSA Act. Mr. Jethmalani urged that if one of the two grounds fails because of non compliance of the procedure prescribed by law thereby violating the fundamental right under Art. 22(5) of the Constitution entire detention order must be held illegal and such order cannot be saved with the aid of S. 5A of the COFEPOSA Act. This submission is founded on the same ground of illegibility of the document at page 404. In order to appreciate this contention it would be necessary to set out S. 5A of the Act. S. 5A of the Act reads as under :-

"5A. Grounds of detention severable -

Where a person has been detained in pursuance of an order of detention under sub-sec. (1) of S. 3 which has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly -

(a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are -

(i) vague, (ii) non-existent, (iii) not relevant, (iv) not connected or not proximately connected with such person, or (v) invalid for any other reason whatsoever and it is not therefore possible to hold that the Government or Officer making such order would have been satisfied as provided in sub-sec. (1)

of S. 3 with reference to the remaining ground or grounds and made the order of detention.

(b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said sub-sec. (1) after being satisfied as provided in that sub-section with reference to the remaining ground or grounds."

24. Mrs. Desai, learned Public Prosecutor, was good enough to hand over the statement of objects and reasons for enacting S. 5A. The relevant portion is as under :-

"Smuggling, foreign exchange racketeering and related activities have a deleterious effect on the national economy and thereby a serious adverse effect on the security of the State. The COFEPOSA Act, 1974 was enacted to immobilise by detention the persons engaged in these operations and to disrupt the machinery established for furthering smuggling and foreign exchange manipulations, with all their ramifications. The effective administration and realisation of the purposes of the Act have been rendered difficult by reason of the clandestine manner in which the persons engaged in these operations carry on their activities and the consequent difficulty in securing sufficient evidence to comply with the rigid standards insisted upon by Courts. Some persons against whom orders of detention were made under the Act had to be released because the orders of detention were held to be void as some of the grounds of detention were considered by Courts to be vague, irrelevant or otherwise invalid. In a few cases difficulties were experienced in the administration of the Act by reason of the detenus obtaining release on bail or otherwise."

25. We have therefore to consider the contention of Mr. Jethmalani in the light of the statement of objects and reasons in enacting S. 5A of the Act and various decisions of this Court as well as of the Supreme Court.

26. At the outset it must be stated that Mr. Jethmalani fairly stated that if one of the grounds of detention order suffers from any of the defects under sub-cl. (i) to (v) of sub-sec. (a) of S. 5A, such detention order need be termed as void order but it would be an invalid order and such invalidity cannot be restricted to the ground of detention which suffers from either of such defects contained in clauses (i) to (v) of S. 5A(a) of the Act. No contrary argument was advanced that rule of ejusdem generis would apply as regards interpretation of Clause (v) and rightly so in view of the law laid down by the Division Bench of this Court in Smt. Bina Mohamed Shakeel Wahid Ahmed Vs. State of Maharashtra and others, holding that Clause (v) is comprehensive to cure any other defect not covered by clauses (i) to (iv) of S. 5A(a) of the Act. The Division Bench of this Court while interpreting S. 5A(a)(v) has held as under at page 767 1983 Cri LJ :

"9. It is a well known canon of construction that ejusdem generis rule is one to be applied with caution and not pushed too far. Normally every words in a statute ought to be construed in its primary and natural sense unless secondary or more

limited sense is required by the subject of context. Ultimately the principle of law generally known as ejusdem generis rule is really a principle of assumed intention of the statute. In the present case if Clause (v) of S. 5A(a) is read in the context of other sub-clauses it is quite obvious that by the said residue clause the legislature wanted to cover all other reasons which would invalidate a ground of detention. The words "invalidate for any other reason whatsoever", would in our opinion exclude the rule of ejusdem generis since the said clause is all comprehensive and could not be construed in a limited sense."

The Division Bench went on to observe further :-

"..... The context of the clause clearly suggests that by the said residue clause it is intended to cover all other reasons which are not specifically referred to in sub-cl. (i) to (iv) but which can render a ground invalid. To provide for an effective remedy to cure the mischief the last and residue clause is made all comprehensive so as to cover all other reasons which could render a ground of detention invalid. The word "whatsoever" as a rule excludes any limitation or qualification and therefore in our view Clause (v) will have to be understood in utmost generality and in its comprehensive sense and cannot be read as ejusdem generis. If the interpretation suggested by Shri Jethmalani is accepted, then the very object and purpose behind the enactment of S. 5A will be defeated"

27. It was urged by Mr. Jethmalani that assuming Clause (v) of S. 5A(a) is wide enough to cover all other reasons which are not specifically referred to in sub-clauses (i) to (iv), still the question which invalidates the detention order survives. According to Mr. Jethmalani if one of the two grounds is bad in the grounds of detention it amounts to non communication of the detention order. (This argument is based upon illegibility of the document at page 404). This resultantly amounts to breach of procedure prescribed by law under Arts. 21 and 22(5) of the Constitution. If there is non communication of one of the two grounds of detention then the whole order is rendered invalid. It is the fundamental right of every citizen and such a right must be protected when there is patent breach of procedure prescribed by law. While giving illustration Mr. Jethmalani urged that S. 5A applies where there is some defect in the ground but there is no breach of procedure prescribed by law. It is the ground which must be invalid. Breach of procedural safeguards cannot be cured with the aid of S. 5A of the Act. A good ground improperly communicated attracts breach under Art. 22(5) of the Constitution and in that event S. 5A cannot cure the defect. In support of this submission Mr. Jethmalani drew our attention to two Division Bench judgments of this Court (i) Chandra Shekhar Ojha Vs. A.K. Karnik and others, ; and (ii) Shekhar Shantaram Pawaskar Vs. V.K. Saraf and others, . In Chandra Shekhar Ojha's case the Division Bench of this Court held that non supply of legible copies of relevant documents which were relied upon and formed basis of the detention order to the detenu (some of the copies were either blank or wholly illegible) amounted to non supply of copies of relevant

documents rendering detention order void ab initio and such order cannot be saved by taking recourse to S. 5A of the Act. The learned Public Prosecutor in that case raised an identical contention that by reason of non supply of legible copies of the documents, which are referred to and relied upon would render the detention order qua that ground invalid but the detention order on other grounds could be sustained. While negating this argument of the learned Public Prosecutor the Division Bench held as follows :-

"..... From this decision it is clear that non supply of relevant documents will render the detention itself void ab initio. Therefore, once it is held that the supply of wholly blank or illegible documents amounts to non-supply of copies of the relevant documents which are relied upon for passing the detention order, then we have no other alternative but to hold that the detention of the detenu is void ab initio. If the detention is void ab initio, then the question of sustaining such a void order u/s 5A of the COFEPOSA Act cannot arise. S. 5A of the COFEPOSA Act will come into operation after the communication of grounds and following the constitutional safeguards. In our opinion, S. 5A of the COFEPOSA Act will have no application if the grounds themselves are not communicated. Otherwise the constitutional safeguards guaranteed under Art. 22(5) will have no meaning. From the various decisions of the Supreme Court, it is clear that non-supply of the grounds of detention or relevant documents must have an effect of invalidating the detention itself. In that case the detention cannot be said to be according to the procedure prescribed by law. If the detention itself is not according to the procedure prescribed by law, then the question of supporting the void order of detention by taking recourse to S. 5A of the COFEPOSA Act will not arise. An order which is void ab initio cannot be validated or supported by taking recourse to S. 5A of the COFEPOSA Act"

This reported judgment is clearly distinguishable because the Division Bench on facts held that the detaining authority has relied upon and referred to these documents of which the illegible copies were furnished to the detenu. In the case before us the documents at page 404 as indicated earlier is neither referred to nor relied upon by the detaining authority in the grounds of detention nor there is even a casual reference to that document. The said document did not constitute the basic facts and in these circumstances the law laid down in Chandra Shekhar Ojha's case (supra) has no application. The said decision is therefore clearly distinguishable on facts.

28. Mr. Jethmalani then drew our attention to another reported judgment of this court in Shekhar Shantaram Pawaskar v. V. V. K. Saraf (supra). To this judgment one of us (Kurdukar, J.) was a party. This case arose out of detention order passed under S. 3(2) of the National Security Act. The Division Bench following the law laid down in Chandra Shekhar Ojha's (supra) held that the entire order is void and S. 5A of the Act cannot cure the defect.

29. As indicated earlier Mr. Jethmalani did not contend before us that the detention order if fails on one of the two grounds such order is void order but

urged that none the less it is an invalid order because of non observance of procedure prescribed by law under Art. 21 and 22(5) of the Constitution read with S. 3(3) of the COFEPOSA Act.

30. Mrs. Desai learned Public Prosecutor appearing for the detaining authority however vehemently urged that in view of the latter decision of the Supreme Court in *Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others*, , the decisions of this Court in *Chandra Shekhar Ojha and Shekhar Shantaram Pawaskar (supra)* are no more a good law. *Prakash Chandra Mehta's* case (*supra*) arose out of the detention order under the COFEPOSA Act. While construing the provisions of S. 5A of the Act the Supreme Court in paragraphs 70 to 73 has observed as under at page SC 699 AIR 1986 :-

"70. S. 5A stipulates that when the detention order has been made on two or more grounds, such order of detention on each deemed to have been made separately on each of such grounds and accordingly that if one irrelevant or one inadmissible ground had been taken into consideration that would not make the detention order bad.

71. Art. 22(5) of the Constitution has two elements : (i) communication of the grounds on which the order of detention has been made; (ii) opportunity of making a representation against the order of detention. 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.

72. 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. See the observations of this Court in the case of *Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others*, .

73. As has been said by Bengamin Cardozo, "A constitution states or ought to state not rules for the passing hour, but principles for an expanding future". The concept of "grounds", therefore, 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 *Hansmukh Vs. State of Gujarat and Others*, , this 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 sub-sec. (3) of S. 3 of COFEPOSA, therefore, has to receive an inter pretation which will keep it meaningfully in tune with contemporary notions. While the express "grounds" for that matters 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 basis facts."

31. In paragraph 81 the Supreme Court after setting out the statement of objects and reasons of 1975 Amending Act (S. 5A) observed as follows :-

"..... 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 in so far as practicable which are not inconsistent with the security and well-being of the society. Grant of power imposes limitation on the use of the power. There are various procedural safeguards and we must construe those in proper light and from pragmatic common sense point of view. We must remember that 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 may claim in certain circumstances higher priority."

32. This Judgment of the Supreme Court is after the decision of this Court in Chandra Shekhar Ojha's case (supra). Obviously the division Bench had no advantage of the observations of the Supreme Court referred to hereinabove in Prakash Chandra Mehta's case (supra).

33. As far as the other judgment of the Division Bench in Shekhar Shantaram Pawaskar's case (supra) (which is later in point of time to Prakash Chandra Mehta's case) is concerned, the said Judgment is based upon the law laid down by this Court in Chandra Shekhar Ojha's case (supra). It may be stated that the judgment of the Supreme Court in Prakash Chandra Mehta's case (supra) was not pointed out to the Division Bench which heard the habeas corpus petition of Shekhar Shantaram Pawaskar (supra).

34. Mrs. Desai then drew our attention to another latest judgment of the Supreme Court in N. Meera Rani Vs. Government of Tamil Nadu and Another, . In this case identical question u/S. 5A of the National Security Act, directly fell for consideration before the Supreme Court. S. 5A of the National Security Act 1980 is similar to S. 5A of the COFEPOSA Act. While dealing with the argument raised before the Supreme Court on S. 5A of the National Security Act in para 7 the Supreme Court has observed as under :-

"S. 5A of the Act clearly provides that the detention order under S. 3 of the Act which has been made on two or more grounds, shall be deemed to have been made separately on each of such grounds and accordingly such order shall not be deemed to be invalid merely because one or some of the grounds is or are invalid for any reason whatsoever. It further says that the detaining authority shall be deemed to have made a detention order after being satisfied as provided in S. 3 with reference to the remaining grounds or ground. In other words, a ground of detention which is rendered 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. S. 5A was inserted in the Act with effect from 21-6-1984 to overcome the effects of the decisions which had held that where one or more of the grounds of detention is found to be invalid, the entire detention order must fall since it would not be possible to hold that the detaining authority making such order would have been satisfied as provided in S. 3 with reference to the remaining ground or grounds. It is, therefore, doubtful whether the construction of S. 5A suggested by learned counsel for the appellant-petitioner can be accepted. However, in the present case, it is not necessary for us to express any concluded opinion on this point since we have reached the conclusion that the detention order must be quashed on one of the other contentions to which we shall advert later."

35. It is true that the above quoted observations indicate that the Supreme Court has not expressed a concluded opinion or interpretation and scope of S. 5A of the National Security Act. We do not find that the judgment of the Supreme Court in Prakash Chandra Mehta's case (supra) was also brought to the notice of the Supreme Court.

36. After considering the law laid down by the Supreme Court in Prakash Chandra Mehta's case (supra) we are of the opinion that the law laid down by this Court as regards the interpretation and scope of S. 5A of the COFEPOSA Act as well as S. 5A of the National Security Act in Chandra Shekhar Ojha and Shekhar Shantaram Pawaskar's cases (supra) respectively does not appear to us any more as good law.

37. Identical question as regards interpretation and scope of S. 5A of the National Security Act fell for consideration before the Delhi High Court in Mohd. Shahid v. The Administrator Union Territory of Delhi, Vol. VIII 1984 (2) Crimes 420. Decision of this Court in Chandra Shekhar Ojha's case (supra) was also cited before the Delhi High Court. The Delhi High Court in a well considered judgment did not agree with the view of this Court propounded in Chandra Shekhar Ojha's case (supra) and in Paras 10, 11 and 14 has held as under at page 423, 1984 (2) Crimes :-

"10. In our view, in all material phraseology S. 5A of COFEPOSA and S. 5A of the National Security Act are identical. We say, with all respect, that their Lordships of the Bombay High Court seem to have missed the words "shall be deemed to have been made separately on each of such grounds." The effect of these words is that in law it will be taken that for each ground a separate detention order has been passed. If any ground is liable to be struck down for non-compliance with the mandatory provisions of Article 22(5) of the Constitution or S. 8 of the Act then at best the deemed order relatable to that ground would be void ab initio because a valid satisfaction cannot be regarded as having been arrived at when the ground itself is bad. The other deemed detention orders will stand by their own force.

11. The Bombay High Court, it seems, proceeded on the assumption that there was only one order and if one of the grounds is bad then the order itself fails. Reliance on the Supreme Court judgments by their Lordships of the Bombay High Court does not appear to us to be relevant as provisions similar to S. 5A were not there in the Supreme Court cases relied upon.

14. Learned counsel for the petitioner stated that non-supply of copies of documents vitiates continued detention as opposed to the validity of detention order itself. It was further submitted that grounds cannot be bifurcated and all grounds have to be read for each one of the deemed detention orders even if it is assumed that the deeming provisions is attracted. In other words, the contention was that the cumulative effect of all the grounds cannot be seen if there has to be a deemed separate detention order for each of the grounds and if all the grounds are seen for each of the deemed separate detention orders then if any ground is vague or there is non-compliance with the requirements of Article 22(5) of the Constitution, the entire order fails. The argument is rather involved but when we analyse it we find that there is not much force in it. The legal fiction postulated by S. 5A is that if the entire detention order is to fall on account of one of the grounds being bad, then it will be taken that for that bad ground there is a separate detention order which may be quashed but the detention order as such for the valid grounds remains. If that is the correct approach, then we find that the objections raised by the petitioner have no force."

This view is more consistent and compatible with the object of enacting S. 5A of the Act especially bearing in mind the prejudicial activities under the Act which have adversely affected the national economy.

37. In this view of the matter second submission of Mr. Jethmalani based on S. 5A of the Act must fail.

38. Coming to the second submission of Mr. Jethmalani as regards non service of additional documents forwarded with S. 9(1) declaration on the detenu, learned counsel during the course of arguments filed a compilation of certain documents which was taken on record and marked "X" for identification. It is common premise that on 23rd of May 1990 the Special Secretary to the Government of India in exercise of powers u/S. 9(1) of the COFEPOSA Act issued a declaration. Copy of the Declaration is at page 3 of the additional compilation. Relying upon this declaration order, Mr. Jethmalani urged that in the second paragraph there is reference to some additional documents having been enclosed to be served on the detenu but in fact these additional documents were not served upon the detenu. Since these additional documents were not served upon the detenu, his continued detention under declaration is illegal. The detenu has been denied an opportunity to make representations against the declaration thereby infringing his fundamental right under Art. 22(5) of the Constitution. This contention is found in paragraph 6(x) of the petition. Since the question of service of these additional documents was put in issue by the detenu to disprove the same the detaining authority relied upon affidavit dated 21-8-1990 of Shyam Laxmanrao

Channe, Jailor, Group II. Para 7 of the affidavit states thus :

"7. With reference to para X of the amendment I deny that the documents enclosed to the declaration was not served on the detenu. I say on 5-6-1990 I have served on the detenu the declaration along with the enclosed documents. The detenu has acknowledged that he has received the declaration along with additional documents relied upon for issue of declaration on a copy of the declaration served on him. There is therefore no substance in the contention that there is a violation of Art. 22(5) of the Constitution of India."

Despite this denial we called upon the learned Public Prosecutor to produce the jail record as regards the service of these additional documents on the detenu. The learned Public Prosecutor produced xerox copy of the relevant extract of the outward register dated 2-6-1990. Entry at serial No. 914 relates to the service of documents u/s 9(1) on the detenu. Column 5 reads as under :-

"9(1) papers 477 to 527 in respect of Detenu Abdul Nazir Khan alias Mohamed Gulam Gaus Khan."

Copy of this document was also furnished to Mr. Jethmalani. In view of this contemporaneous record read with the affidavit of the Jailor Shyam Laxmanrao Channe it is clear to us that the additional documents referred to in the declaration order were served upon the detenu. The detenu to say the least has raised an afterthought contention which lacks bona fides. In addition to this material there is also letter/memorandum dated 13th July, 1990 issued by the Under Secretary to the Government of India, to the detenu in reply to detenu's complaint in this behalf contained in this letter/representation dated 3rd July, 1990 (non-service of additional documents). In reply to this representation the declaring authority vide its letter dated 13th July, 1990 informed the detenu as under :-

"With reference to the representation dated 3-7-1990 for supply of documents, Sh. Abdul Nazir Khan, Cofeposa detenu, is hereby informed that the said representation has been carefully considered by the Central Government, but it regretted that the same has been rejected.

2. As regards supply of documents, the grounds of detention along with the material had already been served on him. The additional documents relied upon for issue of declaration have also been served along with the declaration No. 74/90 as per his acknowledgment dated 5-6-1990 on the copy of the declaration served on him."

On this letter also the detenu has acknowledged on 23-7-1990 as having been received.

39. In the light of the above documents and in view of the statement of the Jailor Shri Shyam Laxmanrao Channe on oath we are of the opinion that the contention raised by Mr. Jethmalani as regards non-service of the additional documents is without any merits and must be rejected.

40. It was then urged by Mr. Jethmalani that in order to verify the service of the additional documents the Union of India should be called upon to produce the second copy to ascertain the truth. This submission was based on a letter dated 29-5-1990 by the Union of India which contains a recital that two copies of the additional documents were sent by declaring authority; one for service on the detenu and the other to be returned to the declaring authority with acknowledgment of receipt. This contention is again an afterthought attempt without any merit. Since we are satisfied about the service of the additional documents on the detenu as indicated earlier, we do not see any merit in the request of Mr. Jethmalani to call for the second copy of the documents which is returned to the declaring authority.

41. Coming to the last submission as regards the noncompliance of the request of the detenu to forward the representation to the Central Government, Mr. Jethmalani urged that on 25-5-1990 the detenu had handed over copies of representations to the Jail Authority to be forwarded to the Detaining Authority for its consideration. On this date detenu was lodged in J.J. Hospital prison cell for investigation and treatment. In the very same representations the detenu requested the detaining authority that the copies thereof be forwarded to the State Government and the Central Government as they have got power to revoke the order of detention under the COFEPOSA Act. Since the detaining authority has failed and neglected to forward a copy of the representation to the Central Government the detenu has been denied an opportunity of making representation to the Central Government under Art. 22(5) of the Constitution and, therefore, the continued detention be held illegal. This contention is taken in paragraph 6(u) of the petition. The contention is two-fold but, however, there is no serious challenge to the second set of representations which were sent by the detenu sometime in June, 1990 and the same were considered and rejected expeditiously by the State Government and Central Government. In reply to this contention the detaining authority in its return in para 25 has stated as under :-

"25. With reference to amended para 2(u), I reiterate that in the grounds of detention I have clearly stated that the detenu has right to make representation to the State Government, to the Central Government and to the Advisory Board and that if he desired to make representation he should submit the same through the Superintendent of Jail where he is detained. The petitioner ought to have given copies of the representation dated 24/25-5-1990 to the jail authority so that they could have been forwarded to the Central Government and to the State Government. Though the detenu has prayed that copy of the representation be sent to the Central Government, he has not addressed the representation to the Central Government. I reiterate that the representation dated 24/25-5-1990 was forwarded by me to the State Government in the Home Department. I deny that because a copy of the representation was not sent by me to the Central Government. The detenu's right under Article 22(5) of the Constitution of India is infringed I deny that the petitioner's detention and/or continued detention is unconstitutional and/or void."

Identical contention was, raised in a companion writ petition No. 530 of 1990 Amir Shad Khan v. L. Hmingliana and others and the Division Bench vide its order dated 31st August, 1990 rejected the said contention and the reasons are contained in paragraphs 18 and 19. For the same reasons we reject the last contention raised by Mr. Jethmalani

42. During the course of arguments the jail record was produced and it has transpired that the detenu had handed over three copies of his representations addressed to the detaining authority only, to the Jail Prison Ward, J.J. Group of Hospitals, Bombay. Out of these three copies one copy was retained by the detenu, one copy was sent to the Bombay Central Prison (for its record) from where he was sent to the Prison Ward, J.J. Group of Hospitals for his treatment and third copy was forwarded to the detaining authority. What was received by the detaining authority was only one copy of representation in which a prayer was made that copies of the representation be forwarded to the Central Government. Since one copy of representation was received by the detaining authority which he forwarded to the State Government for its consideration, there was no copy available with him which he could have sent to the Central Government. We have already negated the claim of the detenu as regards the alleged obligation on the detaining authority to take out xerox copies and forward the same to the Central Government since such obligation cannot be spelt out from Art. 22(5) of the Constitution. In addition to this the detenu was specifically informed in the grounds of detention that if he wants to make any representation to the State Government, Central Government and the Advisory Board he must send the same separately through the jail authority. The detenu in the present case is an educated person. It is not the case of the detenu that he was financially not well off to take out the xerox copies and send the same to the respective authorities. Having regard to the facts and circumstances of the case we are of the opinion that there is no breach on the part of the detaining authority in not taking out xerox copies and forwarding the same to the Central Government. The last submission therefore has no merit and is accordingly rejected.

43. In the result the petition has no merit. We accordingly dismiss the petition. Rule is discharged. However, there will be no order as to costs.

44. Petition dismissed.