

(1992) 02 AHC CK 0033

In the Allahabad High Court

Case No : Civil Miscellaneous Habeas Corpus Petition No. 1646 of 1991

Birendra Kumar Rai

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 21-02-1992

Acts Referred:

Arms Act, 1959 — Section 25, 26, 4
Constitution of India, 1950 — Article 19, 21, 210, 22, 22(4)
Criminal Procedure Code, 1973 (CrPC) — Section 327, 46, 46(2), 70, 75
General Clauses Act, 1897 — Section 21
Government of India (Transaction of Business) Rules, 1961 — Rule 3
Motor Vehicles Act, 1988 — Section 207
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 10, 10(1), 11, 11(1), 12
Official Languages Act, 1963 — Section 3(1), 3(3)

Citation : (1992) 1 AWC 473 : (1992) CriLJ 3866 : (1993) 1 RCR(Criminal) 561

Hon'ble Judges : Surya Prasad, J;G.D. Dubey, J;A.P. Misra, J

Bench : Full Bench

Advocate : P.P. Srivastava, for the Appellant;

Final Decision : Dismissed

Judgement

A.P. Misra, J.—The petitioner has challenged his detention u/s 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (hereinafter referred to as 1988 Act). The matter was earlier heard by a Bench of two-Judges when one of the Hon'ble Judge while interpreting Sections 3 and 5 of the Act held the impugned detention order illegal while the other Hon'ble Judge upheld the detention order. The petitioner's contention was that since the impugned order was passed by the Joint Secretary of the Central Government and not by the Central Government and u/s 5(a) the place of detention could only be specified by the "appropriate Government" viz. the Central Government and not by its officer thus order by the Joint Secretary is illegal and void. The matter was referred to the third Hon'ble Judge who felt it appropriate that the matter be heard by a Full Bench and the Hon'ble the Chief

Justice thereafter constituted this Full Bench. Since the whole case was referred and not the joint, the petition is being heard on all the points raised by the petitioner and not confined to the point of difference.

2. The petitioner was arrested by Zamania Police on 21st November, 1990, in connection with Case Crime No. 402 of 1990 u/s 25 of the Arms Act and Section 207 of the Motor Vehicles Act. While he was detained in District Jail, Ghazipur, he was served on 10th December, 1990, with the detention order dated 4th December, 1990, issued by the respondent No. 2, Joint Secretary to the Government of India, Ministry of Finance, u/s 3(1) of the Act. The petitioner made a representation both to the State and the Central Government through the Jail Superintendent, District Jail, Ghazipur on 22nd December, 1990. The petitioner stated though the State Government rejected the same but the same has not yet been disposed of by the Central Government.

3. The case of the respondent is that secret informations were received from time to time by the officers of Varanasi and Delhi units of Narcotic Control Bureau Official (hereinafter referred to as NCB) regarding Sri Shanti Swaroop and Sri. A. K. Chaudhary (P. P. Singh). The Officers were made vigilant at Terminal-2 of the IGI Airport, New Delhi on the night of 12/13th August, 1990. When the aforesaid persons reported for boarding flight No. K.L. 836 to Amsterdam and when they just crossed the immigration Check, their baggage was examined. It was found that P. P. Singh was travelling in the false name of A. K. Chaudhary and was found to possess 975 gms. of heroin concealed in the false bottom of his shoulder bag. Nothing was recovered from the baggage of Shanti Swaroop. A Panchayatnama was prepared on the spot and recovered heroin was seized under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 1985 Act). Consequent upon this, statements were recorded u/s 67 of the 1985 Act. They were placed under arrest on 13th August, 1990, at 6.00 p.m. for having committed offences under Sections 21, 23 and 28 of the 1985 Act. They were produced before the Duty Magistrate on 14th August, 1990, who remanded them to judicial custody till 28th August, 1990. On the basis of disclosure from the statements of the aforesaid two person's follow up operations and search was conducted both at petitioner's house at Varanasi and his flat at Bombay, which resulted into recovery of 855.250 gms. of foreign marked gold from the Varanasi house. According to the statement of Sri P. P. Singh he is doing business of assisting in passport making and on the date of his arrest he was to go to London via Amsterdam when he was intercepted by the NCB officers. On the search of the aforesaid shoulder bag recovery of two black polythene were made and on opening they were found to contain white powder, which were heroin and the same was said to have been given by the person accompanying him (Shanti Swarup). He knew Sri Shanti Swaroop for the last more than five years and has been visiting his (Shanti Swarup's) Veer Studio almost daily. It is he who got the passport prepared in the false name of Ashwani Kumar Choudhry. The case of the respondents further is that on 25th July, 1990, Sri P. P. Singh along with Shanti Swarup met the petitioner at mini house flat

where discussion was made how the heroin was to be carried and since it was not ready at that time no conclusion could be arrived at. Thereafter, on 26th July P. P. Singh came to Delhi and confirmed his and Shanti Swarup's ticket for 13th August, 1990, on the aforesaid KLM flight and on the 7th August he along with Shanti Swarup met the petitioner at his Varanasi house where the petitioner handed over the heroin to P. P. Singh in two polythene packets. On 11th August, 1990, they started from Varanasi by Kashi Vishwanath Express and reached Delhi thereafter and stayed at Bright Hotel, Room No. 15, where the heroin was repacked and placed at the bottom of the hand bag. The said two persons reached the aforesaid New Delhi IGI Airport at about 11 p.m. One of the chits recovered from Sri P. P. Singh bore some telephone number of one Mr. Sharma which was given to P. P. Singh by Shanti Swarup. This was Bombay contact number and on reaching London he was to phone the said Mr. Sharma, who, in turn, would have given the description of the person to whom the drug was to be delivered. Another chit recovered also bore number of one Hem Chand of America, who had met P. P. Singh on the last occasion at the aforesaid Bright Hotel. Earlier, in 1988 both went to France and carried 130 gms. of heroin, out of which 30 gms. were given to Reland Montoux, whose full address was known to Shanti Swarup, and the rest 100 gms. were given to J. P. Collins. Payments were made by the aforesaid two persons. Next in 1989 both P. P. Singh and Shanti Swarup went to Venice via Frankfurt where wife of the said Sharma was given 30 gms. of heroin and the said two persons carried 200 gms. of heroin each in their shoes. On that occasion Sri Shanti Swarup phoned the petitioner in Bombay and the petitioner in turn sent second party in the hotel where they stayed and paid them 16000 pounds. On both the occasions, Sri Shanti Swarup procured heroin from the petitioner and Sri P. P. Singh was also paid money for doing the said job. On the earlier occasion, Sri P. P. Singh travelled on his actual passport, which since thereafter was lost. On further interrogation he narrated he had another passport issued in the name of Ram Shanker Singh, but till then he had not travelled on that passport. Similarly, in his statement Sri Shanti Swarup stated that he was a photographer and was running Veer Studio. The heroin, which was seized at the airport on 12th/13th August, 1990, was procured by him from his friend Virendra Rai (petitioner). Earlier, they were to travel outside on the 14th July for the said work, but since heroin was not made available by the petitioner it was deferred. On 4th August he met the petitioner and thereafter on 6th August he informed the petitioner that their tickets were confirmed and on petitioner's invitation both received the said heroin at petitioner's residence at Varanasi in the morning of 7th August. Earlier, and on 10th July petitioner gave Rs. 70,000/- to Sri Shanti Swarup for the expenses. On the 7th August the petitioner further gave one telephone number of Bombay of Mr. Sharma (Dilip Kumar Sharma). They were to contact Mr. Sharma from London and Mr. Sharma would tell them the code of the party who would receive the heroin and the party was to travel from Paris to London. They were to be paid 40,000 dollars for the said heroin.

4. On search of the house of the petitioner at Varanasi the petitioner's father Mr. Kamta Rai in his statement on 13th/14th August, 1990, admitted the recovery of 7 gold biscuits from the residence, but further stated that the said gold biscuits were purchased from money received on selling heroin. He further stated that the petitioner fell into bad company and started preparing heroin from opium and the petitioner further placed his brothers in the same trade and it is out of this money the petitioner further purchased one flat at Andheri (Bombay). To the same effect were also the statement of the petitioner's brother. Summons were issued to the petitioner both at his Bombay and Varanasi address on 28th August, 1990, but were received back undelivered on account of his non-availability and later it was brought to the notice, of the respondent authority that the petitioner had been arrested by the police of police station Zamania, district Ghazipur on 21st November, 1990, under Sections 4/25/26, Arms Act and Section 207 of Motor Vehicles Act in Case Crime No. 402 of 1990. Further, a complaint being punishable under Sections 21, 28 and 29 of 1985 Act was filed both against the aforesaid P. P. Singh and Shanti Swarup on 8th November, 1990, in the Court of AC.M.M. New Delhi. In the ground of detention it has been specifically stated that even though prosecution proceedings under the aforesaid 1985 Act are likely to be initiated against the petitioner the detaining authority is satisfied that there is compelling necessity in view of the likelihood of the petitioner's indulging in illicit traffic of Narcotics Drugs, in view of the trend of his activities in the past to detain him under the 1988 Act. It is on account of this satisfaction recorded by the detaining authority on the aforesaid and other facts placed before him that the impugned detention order was passed.

5. The case of the petitioner is that there was no material before the detaining authority from which it could have arrived at the satisfaction u/s 3 of the Act that the petitioner has engaged himself in the illegal traffic of the Narcotics Drugs before passing of the detention order. A case against the petitioner was also pending before the special Judge, Varanasi under the 1985 Act and thus there was no real danger of petitioner being released on bail in view of the amendment in Section 37 of 1985 Act by Act No. 2 of 1989 from 29th May, 1989. Further, the grounds served on the petitioner being in English language which the petitioner did not understand and thus furnishing the same in English the petitioner was not afforded proper opportunity for making representation and is in contravention of Article 22(5) of the Constitution of India. Further, it was not possible for the detaining authority to consider all the documents referred at Serial Nos. 1 to 91 within a very short span of time they being enormous in volumes it amounts to non-application of mind of the detaining authority. The place of the detention of the petitioner being passed by the Joint Secretary to the Central Government it would not be an order of the appropriate Government u/s 5(a) of the Act as the said order could only be passed by the appropriate Government and not by an officer to the Central Government. Thus, the said order is beyond the power vested u/s 5(a) of the Act. Further, the witnesses of seizure having retracted from their earlier statements given and denied through

affidavit dated 25th August, 1990, denying any gold being seized during the raid conducted by NCB officials in the house at Birdopur, Varanasi and that having not been adverted by the detaining authority the satisfaction arrived at is improper and illegal. The points raised by the petitioner we shall be adverting to while dealing with them separately in the concrete form in which they have been urged.

6. In the counter-affidavit filed by Dr. Nisha Sahai Achuthan, Joint Secretary, Ministry of Finance, the detaining authority has stated that the impugned order was passed by her on the basis of all the material placed before her. Further, paragraphs 15 and 19 of the grounds of detention specifically refers that the petitioner was trying to get out on bail and paragraph 21 spells out the compelling necessity of petitioner's detention. The Hindi version of the detention order, grounds of detention and all the documents in English language which have been relied upon have been provided to the detenu. It was denied that the seizure witnesses made any retraction before the A.C.M.M. concerned. The statements of members of petitioner's family clearly reveals that the petitioner has been engaged in the clandestine business of heroin and selling the heroin and even the recovered foreign gold weighing 855.250 gms. was out of the sale proceeds of the heroin sold by the petitioner. The statement of P. P. Singh and A. K. Chaudhary further reveals that the possession of heroin was obtained by them from the petitioner and the petitioner abetted the deport of heroin in the past also. In reply to the petitioner's contention that he was under detention from 2-8-1988 to 3-11-1988 it has been stated that the petitioner was actually apprehended by the N.C.B. Varanasi officials in the evening of 2nd August, 1988, when he was to emplane for Bombay at Babatpur (Varanasi) Airport. Thus, there could be no doubt that the petitioner was present at Varanasi in the beginning of August, 1988 and had given the heroin to Shanti Swarup as disclosed by him. Shanti Swarup further admitted that he left for abroad along with heroin in August, 1988. Further, in respect of heroin which he carried in November, 1988 it was stated that he had received 90 dollars and 16000 British pounds and on reaching India the petitioner gave him Rs. 80,000/- and rest of the money was kept by the petitioner. Regarding retraction of the statements made by the seizure witnesses it was stated that they signed the recovery memo and gave the statements before the Intelligence Officer at Varanasi on the same day without any protest corroborating the statements made by the seizure witnesses it was stated that they signed the recovery memo and gave the statements before the Intelligence Officer at Varanasi on the same day without any protest corroborating the recovery of foreign gold biscuits. When they made the statements they were under no pressure. If it was so they would have retracted from their earlier statements the very next day. It seems the two affidavits, which were filed, were filed on 25th August, 1990, which were prepared on the same day under the pressure of the accused, but the retraction was never made before the Magistrate concerned.

7. In the supplementary counter-affidavit it has been stated that the order dated 7th September, 1988, passed by Sri S. B. Chavan, Ministry of Finance,

Government of India, passed under Rule 3 of the Government of India (Transaction of Business) Rules, 1961, directs the powers of the Central Government under the Act to be exercised by the officers in the Ministry of Finance (Department of Revenue), Government of India, as specified therein. The said order has been annexed as Annexure I to that affidavit. According to that, the power u/s 5 of the 1988 Act is to be exercised by the Additional Secretary or the Joint Secretary of the Government of India, Ministry of Finance (Department of Revenue) for the Central Government and accordingly the respondent No. 2 has been empowered u/s 5(2) of the Act to pass orders.

8. The first ground of challenge to the detention order is that the order of detention specifying the place of detention, viz., in District Jail, Agra of the detenu by the officers of the Central Government is beyond his jurisdiction as place of detention can only be ordered u/s 5 of the 1988 Act by the appropriate Government. The argument is Section 3 only empowers both the appropriate Government and the officers of the appropriate Government to pass order of detention, but it does not include specifying the place of detention for which one has to travel to Section 5. Section 5 gives jurisdiction only to the appropriate Government for specifying the place of detention thus any order specifying the place not being passed by the appropriate Government but only by its officer would be illegal.

9. The appropriate Government is defined in Section 2(a) of 1988 Act, which is reproduced below:--

appropriate Government, means, as respects a detention order made by the Central Government or by an officer of the Central Government, or a person detained under such order, the Central Government, and as respects a detention order made by a State Government or by an officer of a State Government, or a person detained under such order, the State Government.

It is not in dispute that the detention order u/s 3 has been passed by the officer of the Central Government. In order to appreciate this controversy it is relevant to refer to Sections 3, 4 and 5 of 1988 Act, which are quoted below :--

3. Power to make orders detaining certain persons-- (1) The Central Government or a State Government, or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner) that, with a view to preventing him from engaging in illicit traffic in narcotic drugs and psychotropic substances, it is necessary so to do, make an order directing that such person be detained.

(2) When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten

days, forward to the Central Government a report in respect of the order.

(3) For the purposes of Clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days from the date of detention.

4. Execution of detention orders.-- A detention order may be executed at any place in India in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure, 1973 (2 of 1974).

5. Power to regulate place and conditions of detention.-- Every person in respect of whom a detention order has been made shall be liable--

(a) to be detained in such place and under such conditions including conditions as to maintenance, interviews or communication with others, discipline and punishment for breaches of discipline, as the appropriate Government may, by general or special order, specify; and

(b) to be removed from one place of detention to another place of detention, whether within the same State or in another State by order of the appropriate Government:

Provided that no order shall be made by a State Government under Clause (b) for the removal of a person from one State to another State except with the consent of the Government of that other State.

For the purpose of showing that the order has been passed by the officer of the Central Government and not by the Central Government a reference was made to the language used in the detention order where the detaining authority has used the words "I direct that Sri Virendra Kumar Rai... be kept in custody in Central Jail, Agra." The emphasis was on the word "I" showing it was passed by the officer of the Central Government and not by the Central Government. According to respondent's case the place of detention is included within the power of detention u/s 3 and for specifying place of detention the detaining authority need not go to Section 5 for requesting another authority having powers on behalf of the appropriate Government to pass a second order specifying place of detention. In the alternative, in any case, in the present case the detaining authority as specifically empowered by the Central Government to exercise power on behalf of the Central Government, thus, if an order has been passed by him it would not be illegal. By means of a supplementary counter-affidavit filed by Sri Chandra Shekhar Singh on behalf of the respondents through its Annexure SCA-1 it is brought on record that in pursuance of the provisions of Rule 3 of the Government of India (Transaction of Business) Rules, 1961, Minister of Finance, Government of India, empowered the Additional Secretary or Joint Secretary in the Ministry of Finance (Department of Revenue), Government

u/s 5, Sections 8(1), 9(f), 12 and 13 of the 1988 Act. To repel this later part of respondents' case a feeble argument was raised by the petitioner that when order shows it has been passed by an officer of the Central Government by subsequent affidavit it cannot be explained to have been passed by the Central Government.

10. Reliance was placed in the following two cases, one Commissioner of Police, Bombay Vs. Gordhandas Bhanji, . In this case it was held (at page 18):--

...We are clear that public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by a public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed. and must be construed objectively with reference to the language used in the order itself.

In Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, it was held :--

When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.

This proposition of law has no application to the facts of the present case. The affidavit subsequent to the detention order is only to show the authority of the officer to pass an order on behalf of the Central Government and it could not be constituted as fresh reasons to substantiate to the grounds of detention order.

11. Respondents placed reliance in Ram Parvesh Singh v. District Magistrate, Deoria 1985 ALJ 570

It is true that u/s 3(3) only the power to pass an order of detention u/s 3(2) is delegated by the State Government to the District Magistrate. This power necessarily includes the incidental power of specifying the place of the detention as the place of detention is not mentioned by the U.P. National Security Prisoners Condition of Detention Order, 1980. It is noteworthy that the State Government was empowered to specify the place of detention u/s 5(a) and that no detention order shall be invalid merely by the reason that the place of detention of the person detained is outside the limits of the officer making the order. The District Magistrate is thus empowered to direct the detention of a person within his district and also outside his district in some other place within the State for reasons such as safety, security and administrative convenience.

Under the National Security Act, Sections 3 and 5 are almost similar to Sections 3 and 5 of the 1988 Act so far it relates to the question in the present case. In this decision, it was held, this power includes incidental power of specifying the

place of detention. This inference was drawn as no place was mentioned in the U. P. National Security Prisoners Condition of Detention Order, 1980.

12. Reverting to the in interpretation of the aforesaid two sections under the 1988 Act we find the language is very plain and clear. Section 3 spells power to detain a person. Section 4 speaks about its execution and Section 5 provides power to regulate place and conditions of detention of a detenu. If petitioners interpretation is accepted then whenever the order of detention is passed u/s 3 by an officer of the State Government or the Central Government there has to be a subsequent order by the appropriate Government u/s 5 to sustain such a detention order. In other words, there has to be two orders, one u/s 3 and the other u/s 5 in a given case to sustain one's detention. But setting of these sections reveal a detention order passed u/s 3 has to be executed by virtue of Section 4 in the manner provided for the execution of warrant of arrest under Code of Criminal Procedure, 1973. Thereafter, Section 5 provides that "every person in respect of whom a detention order has been made shall be liable to be detained in such place and under such conditions...." A mere reading of the aforesaid three sections and the placement of these sections makes it clear that first the detention order is to be made u/s 3, the same has to be executed thereafter u/s 4, and finally there has to be regulation pertaining to such detenu of place and the conditions, during the tenure he is under detention. Section 5 provides for this regulation of place and conditions of detention. The "place" referred here cannot be constituted to be an inherent part of detention order u/s 3. Whenever validity of a detention order u/s 3 is challenged of it not having been passed by the authority empowered or detenu not being detained at such place of detention as meant to be detained then it has to be tested only from the provisions existing prior to the execution of the detention order. After the detention order is executed u/s 4 subsequent provisions as Section 5, unless indication to the contrary is specified, so far as it relates to the place where a detenu is to be kept would only be regulatory in nature. Thus, regulating the place of detenu in our considered opinion u/s 5 is only for regulating the place of detention, conditions under which the detenu is to be kept including conditions pertaining to maintenance, interviews or communications pertaining to maintenance, interviews or communication with others, discipline and punishment for breach of discipline, which would all be after the execution of the detention order. It also provides for shifting the detenu from one place to another within the same State or outside. The provisions of Section 5 thus pertains to the contingencies after a detenu is kept under detention at a place u/s 3, which would be only regulatory in nature. We further get aid to this inference by the heading of the section itself, which also spells out power to regulate. It is further pertinent that the detention order is defined u/s 2(c) which is quoted below:--

"detention order" means an order made u/s 3.

Thus, a detention order which is challenged could only be an order passed u/s 3 for the purpose of declaring it to be invalid.

13. On the other hand, if the interpretation, which is sought to be given by the petitioner is accepted the detention order would not be complete without reference to Section 5. Thus, detention order could only be an order passed both under Sections 3 and 5, which would be contrary to the definition given in Clause (c) of Section 2, as aforesaid. It is true while interpreting Section 5 the order, which is to be passed under it, has to be by the appropriate Government by general or special order. This cannot be done either by the officers of the State Government or the Central Government. It is in this context we find, in exercise of powers u/s 5 of the 1988 Act the State Government has passed orders, which has been adopted by the Central Government, relating to the place and condition of detention of such detenu by enacting the Uttar Pradesh Prevention of Illicit Traffic in Narcotic Drugs and Psycho-tropic Substances (Conditions of Detention) Order, 1989, which has come into force from 10th November, 1989. This provides in which class such detenus have to be placed. For the place of detention inside the jail it is provided to be in ordinary class. Further, all the provisions of the National Security Prisoner (Conditions of Detention) Order, 1980, as amended from time to time has been made applicable to it. This power exercised by the appropriate Government u/s 5 merely regulates conditions of a detenu inside the jail including fixing the place where he is to be kept inside jail, and other conditions specified therein. By reading each clause of this Order, we find, it specifies the regulatory conditions of a detenu while in detention. In other words, Section 5 comes into play only, after execution of the detention order for regulating conditions under which such detenu is to be kept and in which class inside the jail. Inside jail various classes in which a detenu is to be kept are categorised. A detenu has to be kept in a fixed place in a particular class, inside jail and nowhere else. So the place of a detenu referred u/s 5 is the place where detenu is to be kept inside jail, including the place where he could be transferred subsequently. In cases of detenu under 1988 Act the appropriate Government has fixed under the aforesaid order their place inside jail to be ordinary class.

14. A detention order u/s 3 stands on its own leg without descending down to Section 5. No detention order under the preventive detention law could be complete without specifying the place where he has to be kept under detention either by specifying the jail or any other place which may be school, hospital including the place a detenu is at that time residing. A detention under preventive detention law is to detain a person as a preventive measure to check his activities which is detrimental to the society at large or for defence of India. In other words, only to prevent activities of such person which may in a given case be achieved even by confining him in his own house. He need not be Sent to jail. Thus, it is inescapable that the authority passing the detention order u/s 3 inherently possesses the power to specify the place of detention and for that he need not travel to Section 5. Thus, in our considered opinion it cannot be said that an order of detention passed u/s 3 specifying the place of detention at Agra was beyond the jurisdiction of the detaining authority viz. the officer of the Central Government empowered to pass such an order. It may be examined from

another vision. One of the canons of interpretation of a Statute is whenever words of Statutes are capable of bearing two or more constructions; the established rule of construction is to follow the rule laid down in Heydon's case in (1584) 76 ER 637, followed by the Supreme Court in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, . Four things have to be considered under Heydon's rule :--

- (a) What was the common law before making of the Act?
- (b) What was the mischief or defect for which the common law did not provide?
- (c) What remedy the Parliament has resolved and appointed to cure the disease.
- (d) The true reason of the remedy, and then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy and to add force and life to the cure and remedy according to the time intent of the makers of the Act, "pro bono publico".

In his context the decision of the Federal Court in the case of AIR 1949 153 (Federal Court), is also relevant which is quoted as under :--

It is useful to remember the well known historical facts that led to the enactment.

It is also settled rule that the intention of the Legislature must be founded by reading the Statute as a whole as held in *Poppatlal Shah Vs. The State of Madras*, .

15. Keeping in mind the Heydon's Rule, decision in *Auckland Jute Co. Ltd.* (supra) *Popat Lal Shah* (supra) we first refer to the Objects and Reasons of the 1988 Act :--

"In recent years, India has been facing a problem of transit traffic in illicit drugs... This trend has created an illicit demand for drugs within the country.... Although a number of legislative, administrative and other preventive measures, including the deterrent penal provisions in the Narcotic Drugs and Psychotropic Substances Act, 1985, have been taken by the Government, the transit traffic in illicit drugs had not been completely eliminated.

16. It was keeping that in mind the 1988 Act was enacted. Though earlier the Conservation of Foreign Exchange and Preventive of Smuggling Activities Act, 1974 provide preventive detention in relation to smuggling of drugs and psychotropic substances, but since that provisions could not be invoked to deal with persons engaged in illicit traffic in narcotic drugs and psychotropic substances within the country, the aforesaid 1988 Act was enacted. This indicates that in spite of number of legislative, administrative and other preventive detention law including the deterrent penal provisions of 1985 Act the transit traffic in illicit drugs could not be eliminated. This shows the law which existed earlier which could not eliminate all such mischiefs or defects, in order to eliminate it the present 1988 Act was enacted. This provision is specifically important in view of the fact that illicit traffic in narcotic drugs and psychotropic

substances poses a serious threat to the health and Welfare of the people and the activities of persons engaged in such traffic which have deleterious effect on the national economy. This enactment was made with regard to the persons by whom and the manner in which such activities are organised and carried on, and also having regard to the fact that in certain areas which are highly vulnerable to the illicit traffic in narcotic drugs etc. and such activities of a considerable magnitude are clandestinely organised and carried on this provision has been enacted.

17. It will not be out of place to mention here that United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and psychotropic Substances was held in Vierina in 1988. The said conference expressed its deep concern by the magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose a serious threat to the health and welfare of human beings and adversely affecting the economic, cultural and political foundations of society. The said Convention further recognised the importance of strengthening and enhancing effective legal means for international co-operation in criminal matters for suppressing the international criminal activities of illicit traffic. Paragraphs 6 and 7 of Article 3 of the said Convention made the following provisions :

6. The parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement in respect of those offences and with due regard to the need to deter the commission of such offences.

7. The Parties shall ensure that their Courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph I of this article and the circumstances enumerated in paragraph 5 of this article when considering the eventuality of early release or parole of persons convicted of such offences.

18. The aforesaid reference of the U.N. Convention is not for the purpose of interpretation of a Statute but only taking stock of the existing situations, including historical background regarding the spread of illicit traffic in narcotic drugs and psychotropic substances in spite of various laws having been made in the past by the various countries in the world. Further, while interpreting a statute it is a settled rule that the intention of the legislature have to be gathered by reading the statute as a whole. Apart from enacting the 1988 Act to remedy the existing mischiefs the legislature further made provisions to insulate all the loopholes to check the possible escape of all such mischief mongers by enacting Sections 6 and 7. In the absence of Section 6. a detenu could be released even where any one of the grounds was found to be vague, non-existent, not relevant, not connected or not proximately connected with such person. Similarly, Section 7 provides that no detention order shall be held to be invalid merely because the

person to be detained is outside the limits of the territorial jurisdiction of the Government or officer making the order of detention in which the place of detention of such person is outside the said limit.

19. These provisions express the concern of the legislature so that such person does not escape detention only on the grounds of technical violations of anything short of Constitutional violation, violation of principle of natural justice, or undue delay in disposal of detenu's representation, inaction of the authorities concerned. Thus, keeping in mind the scheme of the Act, object sought to be achieved by it, the law which was before 1988 Act, the mischief which could not be covered under the said law, the remedy the present law in trying to make, the inescapable conclusions, in our considered opinion, in the alternative, is that even if it could be said that for fixing the place of detention of a detenu while passing detention order u/s 3 an order has to be passed u/s 5 by the appropriate Government, then such a provision to the extent it affects detention order would only be directory and not mandatory. The object of detention as we have said before is only to prevent such person from his prejudicial activity affecting society and thus the place where he is to be detained could only be ancillary which may be changed from time to time. The challenge to detention order is founded primarily on the curtailment of his liberty enshrined in Article 19 and violation of Article 21 of the Constitution of India. Once detention order could be upheld not violative of Articles 19 and 21, then it would not fall only because he has not been kept at such a place so long his detention is legal, of course, the Court has to examine whether custody of a detenu is legal or not at a particular time at place where he is lodged. So long a detenu could be said to be in legal custody may be on account of order other than challenged or in legal custody by virtue of any order though the detenu still not placed at the place of destination where he has to be lodged, he cannot be set at liberty only on account of latter's irregularity. Thus any violation of the place specified and condition laid down under order passed u/s 5 may give rise to a detenu right for a direction to the authority concerned to comply the same but that cannot invalidate the detention order itself.

20. An ancillary and in addition to the aforesaid argument it was further urged that the power of detention does not include power of transfer of a detenu from one place to another and since the detenu was in the jail at Ghazipur the order of detention fixing the place at Agra amounts to exercise of power transferring the detenu from District Jail, Ghazipur to the Central Jail, Agra. Further since the respondent has not kept the detenu at Central Jail, Agra makes his detention illegal. For this the petitioner relied on two Division Bench decisions of this Court in Civil Misc. Writ Petition No. 1556 of 1982 (Ram Chandra Jain v. State of U. P. decided on 29th April, 1982) and Civil Misc. Writ Petition No. 21184 of 1988 (Naresh Kumar v. Superintendent, Central Jail, Naini and Ors, decided on 8th February, 1989). In the case of Ram Chandra Jain (supra) the Bench did not disclose any reason for holding the detention order to be illegal except that the appropriate Government has to specify the place of detention u/s 5 and that

having been specified to be in the Central Jail, Bareilly and the petitioner having been kept in the District Jail, Gorakhpur, the detention was held illegal. The Court while testing any challenge of detention has to see whether detention at any place is with or without authority of law. If his detention or custody is legal at a particular place, then only by not placing or transferring him at a specified place or jail would not make the detention order illegal. So if detention of the petitioner at the District Jail, Ghazipur is valid on account of any in connection with some other crime or case then he not being put or transferred from there to the Central Jail, Agra where detention order u/s 3 specified his continued detention at Ghazipur would not make the detention order u/s 3 illegal. We have held hereinbefore specifying the place of detention by the appropriate Government u/s 5 is only regulatory in nature. The place of detention has to be specified by an order u/s 3 itself. However, it is bounden duty of the respondent authority the moment the obstacles of removing a detenu from a place are removed the detenu should be placed in the jail or place specified in the order at the earliest. In the second case of Naresh Kumar (supra) the detention order was passed for keeping the detenu in the Central Jail, Fatehgarh and the said order was served on 26-6-1988 on the detenu in jail who was there since 2nd May, 1986 in consequence of an offence under the Customs Act in the Central Jail, Naini. Thereafter, on 8th July, 1988 he was released on bail by the Court for the offence under the Customs Act. In the meantime, while at the Central Jail, Naini the detenu made a representation on 9th July, 1988 for being transferred to some other jail in Delhi or Gurgaon, which is nearer to his State Haryana. The orders were passed on 28th July, 1988 by the State Government to transfer the detenu to Central Jail, Meerut. However, the petitioner was only transferred on 13th January, 1989 from Naini to Meerut. It was held in this case that admittedly the petitioner continued to be under detention at the Central Jail, Naini till 13th January, 1989 without any authority of law. After grant of bail on 8-7-1988 and even State Government order dated 28-7-88 the continued detention at Naini till 13-1-1989 was without, any authorisation to keep him there.

21. The facts in that case do not apply to the facts in the present case. It is not in dispute that the petitioner was detained at the District Jail in Ghazipur in pursuance to an offence under the Motor Vehicles Act and Arms Act and his detention in the District Jail, Ghazipur was in accordance with a legal authority. At no point of time it could be said that the detention of the detenu at the District Jail, Ghazipur was without any authority of law. Hence, the principle applicable to the case of the aforesaid Naresh Kumar's case (supra) would not be applicable in the present case. Further, we have already held hereinbefore for holding a detention order illegal court has to see whether a detenu is in legal custody or not. If in legal custody, only on account of his being placed at a different place would not invalidate a detention order if that order is otherwise valid.

22. In the present case we find from the record that petitioner sought his stay from transfer to Central Jail, Agra on ground of ill health, further Magistrate at Ghazipur did not pass any orders in Crime No. 402 of 1990 u/s 25 of the Arms

Act read with Section 207 of the Motor Vehicles Act in which he was detained there for his transfer to Agra. The fact of not transferring from the District Jail, Ghazipur to Central Jail, Agra was not on account of any inaction or illegality committed by the respondent authority, but on account of the reason which was beyond their control. Thus, we hold merely because the petitioner was not transferred at the place where he has to go in terms of the detention order for the aforesaid reasons would not constitute a ground for holding the detention order to be illegal. We have been informed that the petitioner has already been transferred to Central Jail, Agra and is under detention there after all the impediments were removed. We further hold that the detenu being sent to Central Jail, Agra in pursuance to detention Order u/s 3 is not an order of transfer.

23. Next, it is contended, service of detention order in Jail that too not by a police officer amounts to its non-execution hence continued detention of the petitioner is illegal. Further, execution could only be by arresting a person and that having not done as he was already in jail there is no execution in the eye of law.

24. It is not in dispute that the detention order was served on the petitioner by the Intelligence Officer of the Narcotic Control Bureau, Varanasi and the ground of detention along with the list of enclosure were also served on the detenu through the Jailor, District Jail, Ghazipur. Firstly, it is not necessary to a man who is already under detention, to do any overt act for arresting him as may be in the case of a person not under any legal detention. According to the Strouds Judicial Dictionary, Vth Edition, "arrest" means :

When one is taken and restrained from his liberty... An arrest is constituted when any form of words are used which, in the circumstances, are calculated to and do bring to the notice of a person that he is under compulsion to which he thereafter submits... A person can be arrested if there is actual seizure or if there is touching with a view to detention... "and even includes" the mere pronouncement of words of arrest can be an arrest if the person submits to the process and goes with the arresting officer.

Section 46, Cr. P.C. provides how arrest is to be made. Under it, an arrest is made either by a Police Officer or other person by actually touching or confining the body of the person to be arrested, unless there be a submission to the custody by word or action. Thus, arrest need not be by hand-cuffing a person, but could be complete even by the spoken words, if a person submits to the custody. Section 46(2) provides in case a person resists arrests or attempts to evade arrest then force may be used including all other means necessary to effect the arrest. The arrest, therefore, is a legal confinement and therefore the moment he submits to the authority of the person who has come to arrest him after his spoken words amounts to his arrest. Thus, for arresting in such a situation no further act is necessary. It is only when he tries to evade the arrest any overt act is necessary. Regarding service of detention order, the contention was, arrest could only be made by a police officer and since in the present case it

has only been made by an Intelligence Officer of the Narcotic Bureau, it does not constitute legal arrest. Section 75, Cr. P.C. refers the "Police Officer or other person executing the warrant of arrest" has only to notify the substance of the warrant to the person to be arrested and if required to show him the warrant. Thus, the execution of warrant even under Cr. P.C. need not be only by the police Officer but by "other person" as referred to therein. Even Section 46, Cr. P.C. as aforesaid which provides how arrest is to be made also refers to the arrest to be made by the Police Officer or other person. Further, Section 41(2) of 1985 Act gives procedure of arresting a man where it provides :

Any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control... may authorise any officer subordinate to arrest such a person....

Thus, arrest under it also could be by a person other than police officer. In view of this, the contention that the impugned order has not been executed, as no arrest has been made and further as no service of the order was made on him by the police officer as required under Cr. P.C. is not sustainable.

25. It was further dilated that serving the detention order in jail does not amount to execution of the order in accordance with the Code of Criminal Procedure and mere reading the order to the detenu in jail is not execution. After passing the detention order u/s 3 it has to be executed in accordance with the manner provided for execution of the warrant of arrest under the Code of Criminal Procedure, 1973 in view of Section 4 of 1988 Act.

26. The procedure for warrant of arrest under Cr. P.C. is provided from Section 70 onwards. For execution of detention order like the warrant of arrest concludes at the stage of Section 75. Section 76 directs the person arrested to be brought before the Magistrate within 24 hours of his arrest. But this provision is not applicable in the matter of preventive detention law in view of the provision of Article 22(5) of the Constitution of India. u/s 77 a warrant of arrest may be executed at any place in India. This definition is wide enough to include a place within jail. In *Kehar Singh and Others Vs. State (Delhi Administration)*,

Cri LJ 1), the Supreme Court interpreted notification issued by the High Court u/s 9(6), Cr. P.C. read with Section 327. By the said notification the High Court directed the trial to be held in Tihar Jail. Section 9(6) of the Code of Criminal Procedure empowers the High Court to fix place or places for sitting of Court of Session. It was held:

Therefore, the said Notification of the High Court could be taken to have notified that Tihar Jail is also one of the places of sitting of the Sessions Court in the Sessions division ordinarily. That means apart from two places Tis Hazari and the New Delhi, the High Court by Notification also notified Tihar Jail as one of the

place where ordinarily a Sessions Court could hold its sittings...

Thus, even place inside jail was held to be a place within the meaning of Section 9(6), Cr. P.C. Similarly u/s 77, Cr. P.C. refers "at any place in India" would include serving of detention order inside jail. Thus, we conclude serving of the detention order inside jail while under detention amounts to the execution of the detention order u/s 4.

27. The next challenge is that the detenu is entitled to make a representation not only to the Central Government or the State Government but also to the Officer who passed the detention order in view of Section 9 read with Section 12 of 1988 Act. This point stands concluded by the decision of the Supreme Court in *Amir Shad Khan and another Vs. L. Hmingliana and others*, . This was a case of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The Supreme Court was interpreting Section 11 of that Act, which is similar to Section 12 of the present 1988 Act. It held the following:

It is obvious from a plain reading of the two clauses of Sub-section (1) of Section 11 that State Government, as well as the Central Government are empowered to revoke the detention order.... Therefore, where an officer of the State Government or the Central Government has passed any detention order and on receipt of a representation he is convinced that the detention order needs to be revoked he can do so by virtue of Section 21 of the General Clauses Act since Section 11 of the Act does not entitle him to do so. If the State Government passes an order of detention and later desires to revoke it, whether upon receipt of a representation from the detenu or otherwise, it would be entitled to do so u/s 21 of the General Clauses Act but if the Central Government desires to revoke any order passed by the State Government or its officer it can do so only under Clause (b) of Section 11(1) of the Act and not u/s 21 of the General Clauses Act. This clarifies why the power u/s 11 is conferred without prejudice to the provisions of Section 21 of the General Clauses Act. Thus on a conjoint reading of Section 21 of the General Clauses Act and Section 11 of the Act it becomes clear that the power of revocation can be exercised by three authorities, namely, the officer of the State Government or the Central Government, the State Government as well as the Central Government. The power of revocation conferred by Section 8(f) on the appropriate Government is clearly independent of this power. It is thus clear that Section 8(f) of the Act satisfies the requirement of Article 22(4) whereas Section 11 of the Act satisfies the requirement of the latter part of Article 22(5) of the Constitution. The statutory provision, therefore, when read in the context of the relevant clauses of Article 22, make it clear that they are intended to satisfy the constitutional requirements and provide for enforcement of the right conferred on the detenu to represent against his detention order. Viewed in this perspective it cannot be said that the power conferred by Section 11 of the Act has no relation whatsoever with the constitutional obligation cast by Article 22(5).... The power of revocation conferred by Section 11 of the Act has a nexus with the right of

representation conferred on the detenu by Article 22(5) and, therefore, the State Government when requested to forward a copy of the representation to the Central Government is under an obligation to do so.

Thus, there could be no dispute that a detenu has also a right to make representation to the Central Government and also to the detaining authority "Officer of the Central Government". Of course, he has a right to make a representation to the Advisory Board in view of Section 9 of the 1988 Act.

28. We find while serving the grounds of detention in paragraph 26 it is specifically provided :

If you wish to make a representation against your detention to the detaining authority and/or the Central Government you may do so and address it to the undersigned or the Central Government-Secretary to the Government of India, Ministry of Finance.. If you desire to make any representation to the Advisory Board, you may address it to the Chairman, Central Advisory (Prevention of Illicit Traffic in Narcotics Drugs and. Psychotropic Substances Act, 1988), Delhi and forward the same through the Superintendent of Prison where you are detained.

In view of this it cannot be urged that the petitioner has not been given opportunity to make a representation to the aforesaid three authorities. In pursuance of the same the petitioner made a representation on the 22nd December, 1990 to the New Delhi, through the Government of India, Ministry of Finance, New Delhi (Annexure-2 to the writ petition). The said representation was finally rejected by the Central Government on 18th January, 1991. Since the petitioner addressed his representation to the Central Government and it was decided it cannot be said that any illegality results on account of that. There petitioner was duly informed as aforesaid that if he wished to make a representation against the detention order he may do so to the detaining authority/or the Central Government or also to the Advisory Board and that having been communicated to the petitioner the respondent authority complied with all the requirements of law as they had the obligation to perform.

29. Next, relying on paragraph 26 of the detention order, for making representation to the Advisory Board, which directed the petitioner to address the same to the Chairman, Central Advisory Board (The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988) Delhi High Court, it was urged, reference of "Chairman" and "Delhi High Court" shows unawareness of the detaining authority by applying the proposed amended Article 22(4) of the Constitution of India, amended through Forty-Fourth Amendment, which though passed in 1978, has not yet been enforced. The argument is based firstly because the proviso of the proposed Article 22(4) provides that the Advisory Board shall consist of Chairman which is not in unamended Article 22(4) and, secondly, Explanation to it defines "appropriate High Court" meaning: --

in the case of the detention of a person in pursuance of an order of detention

made by the Government of India or an officer or...

the High Court for the Union Territory of Delhi.

We do not find any substance in this argument. Mere use of the word "Chairman" or describing High Court for the Union Territory of Delhi in the proposed amended Article 22(4) cannot mean or be equated to have been used in paragraph 26 of the grounds of detention or account of the said amendment. Even the existing Article 22(4) which provides for Advisory Board does not exclude in case Advisory Board is constituted under it to have its Chairman, nor constitution of the Advisory Board at Delhi under the unamended Article could be said to be invalid. On the contrary, Section 9(a) of 1988 Act itself provides that the Central Government or the State Government shall, whenever necessary, constitute one or more Advisory Boards each of which shall consist of a Chairman and two other persons possessing the qualifications specified in Article 22(4)(a) of the Constitution. The validity of this provision is not under challenge before us. Hence reference of Chairman and the Advisory Board having its address at Delhi as specified in paragraph 26 of the detention order as aforesaid cannot be said to have been incorporated in view of the amendment in Article 22(4) which has not yet been given effect to.

30. A feeble argument was also made that the detenu was ordered to be placed under detention at a far off place, which is against the principle as laid down in the case of *A.K. Roy and Others Vs. Union of India (UOI) and Others*, . Reliance placed by the petitioner was on the following observations (at page 740 of AIR):

...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 within the environs of his or her ordinary place of residence. If a person ordinarily resides in Delhi, to keep him in detention in a far off place like Madras or Calcutta is a punitive measure by itself which, in matters of preventive detention at any rate, is not to be encouraged. Besides, keeping a person in detention in a place other than the one where he habitually resides makes it impossible for his friends and relatives to meet him or for the detenu to claim the advantage of facilities like having his own food. The requirements of administrative convenience, safety and security may justify in a given case the transfer of a detenu 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. Even when a detenu is required to be kept in or transferred to a place which is other than his usual place of residence, he ought not to be sent to any far off place which, by the very reason of its distance, is likely to deprive him of the facilities to which he is entitled. Whatever smacks of punishment must be scrupulously avoided in matters of preventive detention.

Firstly, this authority is not to hold a detention order invalid on account of person being placed under detention at a far distant place but has depreciated such an action of the respondent authority. The principle laid down is that as a normal

rule a detenu has to be placed in the environment of the ordinary place of his residence. The said paragraph further justifies for administrative convenience, safety and security of transferring a detenu to a place other than where he ordinarily resides. Thus, on this ground even if it is accepted that the petitioner is being placed under detention at a far off place than the ordinary place of his residence would not invalidate the detention order. At the most, in a given case if the material exists on the record for which there is none in this case, if the Court is satisfied, to direct the detenu to be placed under detention at a place which is not far off place in terms of the desire expressed in the aforesaid case of A. K. Roy v. Union of India (supra). Apart from the fact that the petitioner has not raised any such objection in this case, we find that the petitioner's activities and the place of residence is not only at Varanasi but also at Bombay and his activities are also not only at these two places but Delhi also. Even otherwise, the order of detention specifying detention of the petitioner at Agra even if his place of residence is treated to be at Varanasi could not be said such as to qualify any direction in terms of the observations made above.

31. The next challenge is that the detention order, the grounds of detention and the documents supplied to the detenu were all in English or partly English and partly in Hindi and the detenu not knowing English thus non supply of the Hindi Version of the same amounts non supply of the same in the eye of law, thus he could not make an effective representation which is in violation of Article 22(4) of the Constitution of India. Further the official language of the Central Government being Hindi and the use of English is only in addition to Hindi the detention order being passed in English is violative of Official Language Act, 1963 and Article 343 of the Constitution of India.

32. The petitioner alleged in paragraph 8 of the petition that he does not know English and in the counter affidavit there is no denial of the same. The order dated 4th December, 1990 (Annexure CA 1 to the counter affidavit) reveals that at the bottom of this detention order it is written.

Copy Prapt Kiya aur Parhkar Samajh liya. Esme likhi Baten Mujhey Samjhaya Gaya.

Below this there is admitted endorsement of the petitioner. It is further corroborated by the nothings on the next page by Sri P. K. Singh, Intelligence Officer, Narcotics Control Bureau, Varanasi, on the 10th December, 1990, the same day that the detention order is served upon the petitioner in District Jail, Ghazipur in the presence of Jailor of the said District Jail and the contents of the same were read over and explained to the detenu. Similarly, Annexure 2 to the said counter affidavit is the grounds of detention at the bottom of which the following endorsement in Hindi is made:

Nirudh Adhar Sanlangnko page 1 se 1428 Evam Abhilekhon ki Suchi Prapt Kiya. Niruddhi ka Adhar Parhkar Samajh Liya Aur Yas Mujhey Samjhaya Gaya Suchi Me Diya Gaye Abhilekhon Ka Hindi Anuvad bhi Mujhe Diya Gaya Jise maine Parhkar

Samajh Liya.

At the bottom of this page both on the right side and the left side there is signature of the petitioner below which 10-12-1990 is also written. The aforesaid contents make it clear that the petitioner did receive the grounds of detention along with the translation in Hindi of all the documents referred in the list which is from pages 1 to 1428. As attempt was made on behalf of the learned counsel for the petitioner that endorsement and the date below Annexure CA-2 to the counter affidavit, as aforesaid, shows that forgery was committed as date "30" was made to read 10 to show that the petitioner received the Hindi translation on the same day on which ground of detention was served. It was said that since his representations dated 22nd December, 1990 stated that Hindi translation has not been given the translated copies were got prepared and were actually served on 30th December, 1990, for which an endorsement was made, but later it seems it was made to look as received on 10th December, 1990. This argument has been raised regarding forging only during the course of argument, prima facie by looking to the figure it is not possible for us to come to the conclusion that the figure "3" has been made to look as "1" to make the date "30" to look as "10". Adjudication on this aspect is not possible in proceedings under Article 226 of the Constitution of India. However, the suggestion made by the petitioner is not sustainable in view of the fact that subsequent to this endorsement, the petitioner was supplied with the supplementary translated copies in Hindi of the remaining documents, which were not supplied on the 10th December, 1990, the list of such documents is annexed as Annexure CA-4 to the counter affidavit and below that document there is endorsement of the petitioner dated 14th December, 1990. This signature of the petitioner is not disputed. The petitioner received this later document on the 14th which specifically refers the supply of the remaining Hindi translation of the English documents i.e. in addition to the documents supplied earlier on the 10th December. The heading in Roman script is quoted here-under:--

Dinank 10-12-90 ko Diya Gaya Angreji Sanglagnak ke Swatantra Hindi Anuvad Ke Atriakt Shesh Angreji Sanlagno ke Swatantra Hindi Anuvad ki Suchi.

This Contradicts the contention of the petitioner that no Hindi translation was supplied earlier. In case the Hindi translation of the grounds of detention and the documents were only supplied on the 30th December, 1990 there could not have been any endorsement by the petitioner on the 14th December, 1990, as aforesaid. Further, the recital of the documents received by the petitioner on the 14th December, 1990, specifically mentioned as aforesaid that these are the additional translation of English documents in addition to what has been supplied on 10th December, 1990. Apart from this, we compared the paper numbers and index of documents at Annexures CA-2 and CA-4. We find the pages from amongst the list, supplied earlier, does not find place at Annexure CA-4. It is only those pages referred in Annexure CA-4, which does not find place in Ann. CA-2. That shows Ann. CA-2 and CA-4 completes the total English documents for which

translations were supplied. We have further found that some of the pages which do not find place either in Annexure CA-2 or CA-4 are those pages of the documents which are in foreign language other than English which are in German about which we shall be dealing later.

33. The petitioner relied on the following cases and observations made therein:--

Harikisan Vs. The State of Maharashtra and Others, :--

In order that the detenu should be in a position effectively to make his representation against the order of detention, he should have knowledge of the grounds of detention, which are in the nature of the charge against him setting out the kinds of prejudicial acts which the authorities attribute to him. Communication in this context must, therefore, mean imparting to the detenu sufficient knowledge of all the grounds on which the order of detention is based.

Nainmal Partap Mal Shah Vs. Union of India (UOI) and Others, :--

Where the grounds of detention furnished to the detenu were in English which the detenu under the provisions of COFEPOSA did not know or understand, and no translated copies either in the regional language or at least in Hindi was supplied to him, there was a clear violation of the provisions of Article 22(5) of the Constitution.

In that case in the counter-affidavit the respondents after controverting the allegations stated that the grounds were explained to the detenu by the authorities. Admittedly, this is not a case in which a translated copy of the grounds of detention was served on the detenu. Even explanation orally of the grounds of detention as averred since did not mention the authority the respondents' contention was not believed.

In Kamla Kanyalal Khushalani Vs. State of Maharashtra and another, :--

The documents and materials relied upon in the order of detention form an integral part of the grounds and must be supplied to the detenu *pari passu* the grounds of detention. If the documents and materials are supplied later, then the detenu is deprived of an opportunity of making an effective representation against the order of detention. Before an order of detention can be supported, the constitutional safeguards must be strictly observed.

Mohd. Zakir Vs. Delhi Administration and Others, :--

It is the constitutional mandate which requires the detaining authority to give the documents relied on or referred to in the order of detention *pari passu* the grounds of detention in order that the detenu may make an effective representation immediately instead of waiting for the documents to be supplied with. It is manifest that question of demanding the documents is wholly irrelevant. The infirmity in this regard is violative of constitutional safeguard enshrined in Article 22(5) of Constitution.

Ibrahim Ahmad Batti alias Mohd. Akhtar Hussain alias Kandar Ahmed Wagher alias Iqbal alias Gulam Vs. State of Gujarat and Others, :

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 admittedly not supplied to the detenu at all....

These documents recovered from three flats in three different societies, include, for instance, documents like bills and vouchers showing purchases made from some shops.... All these, in our view, are material documents which have obviously influenced the mind of the detaining authority in arriving at its subjective satisfaction and these are all in a script or language not understood by the detenu, and, therefore, the non-supply of Urdu translation of these documents has clearly prejudiced the petitioner in the exercise of his right to make an effective representation against his detention and hence the safeguard contained in Article 22(5) is clearly violated.

In this case the Court came to the conclusion that non-supply of the translation copy of the documents were material documents which influenced the mind of the detaining authority in arriving at its subjective satisfaction and few of these documents also were referred in the grounds of detention and were relied upon by the detaining authority. Once the detaining authority relies on a document in the grounds of detention and if the Court in a given case comes to the conclusion that it influenced the mind of the detaining authority then its non-supply would be violative of the right under Article 22(5) of the Constitution.

Mrs. Tsering Dolkar Vs. Administrator, Union Territory of Delhi and Others, :--

The detenu has to be informed about the grounds of detention in a language which he understands. The fact that the detenu's wife knew the language in which the grounds were framed does not satisfy the legal requirement.

In the matter of preventive detention, the test is not one of prejudice but one of strict compliance with the provisions of the Act and when there is a failure to comply with those requirements it becomes difficult to sustain the order.

34. The aforesaid authorities enunciate that non-supply of the documents relied upon by the detaining authority in the grounds of detention and even supplying the documents in the language not known to the detenu is violative of Article 22(5). The Courts repeatedly have been saying that the authority must supply all the documents relied by the detaining authority which constitute grounds of detention. This would mean supplying the copy in the language the detenu understands in case the document is in a language other than the language known to the petitioner. It is incumbent duty of the authority concerned to supply the translated copy of the same. The right enshrined to a detenu under Article 22(5) of the Constitution is to afford him the earliest opportunity of making a representation against the said order. The opportunity must be to make an effective representation and not a formal representation. No representation could

be made by a detenu effectively unless he knows the language of the documents relied by the detaining authority. Thus, any supply of the documents relied upon in a language different than the language known to the detenu would vitiate the detention order in view of Article 22(5) of the Constitution of India. Further, the opportunity which has to be afforded had to be the earliest and for that reason any supply of document later by delaying the opportunity of making a representation also has been held to violate the right of a detenu under Article 22(5) of the Constitution.

35. Turning to the facts of the present case, we find and as we have held earlier the translated copy of the document annexed to the grounds of detention were given along-with the grounds of detention on the same day i.e. 10th December, 1990, and some of the documents which were left out, the translated copies of the same, were supplied to the detenu on the 14th December, 1990. In view of this, it cannot be said that there is any non-compliance which would constitute violation of Article 22(5) of the Constitution. The petitioner also referred to a document at p. 25 in annexure in the rejoinder-affidavit showing one of the document supplied and further stated, there are few more like this, which are other than in English and in foreign language (German) for which no translated copy was supplied. Hence, the detention order is illegal. The respondent's reply is, these documents are only tickets and other travelling documents supplied to the aforesaid two persons detained at the Indira Gandhi International Airport at New Delhi by the airline concerned for travelling abroad which were recovered from their possession at the time of their arrest. The contents of these documents neither relied nor were material documents in formulating the grounds of detention as against the petitioner and thus non-supply of the translated copies of the same could not constitute violation of any constitutional right of the detenu.

36. The right under Article 22(5) of the Constitution to make effective representation should be stretched to its legitimate sphere. The petitioner strongly relied on paragraph 24 of the grounds of detention wherein it is referred "... I have relied upon the documents mentioned in the enclosed list." The enclosed list is all the documents from pages 1 to 1428. The argument is once it is said "I have relied upon the documents mentioned in the enclosed list", then nothing short of any documents from the said list, the translated copy should have been supplied. Before holding violation of Article 22(5) on account of non-supply of any translated copy, it is the bounden duty of the Courts to scrutinise each case and in case any document which could have influenced the mind of the detaining authority, having been referred in the grounds of detention and being the material document, if not supplied it could be held violative of Article 22(5). But mere non-supply of every document or its translated copy not within the circumstance as aforesaid cannot constitute infringement of Constitutional right of the detenu guaranteed under Article 22(5).

37. The question in this context and on the facts of this case is whether the

printed literature in the ticket and other travel documents, which was recovered from the person travelling could in this case be held to be material documents which influenced the mind of the detaining authority in making grounds of detention. Firstly, from the perusal of grounds of detention we do not find in the present case, anything to show, nor even during hearing it was pointed that detaining authority either referred to or its contents influenced her mind in constituting grounds of detention. Even where detaining authority mentions I have relied upon documents placed before him only means no other than one placed before him. But each such document, as in the present case also, could not be material documents for constituting the grounds of detention which could have influenced the mind of detaining authority. In any case the documents in foreign language (German), tickets and other travelling documents issued by the Airline concerned as aforesaid could not be construed as such document which was either referred to in the grounds of detention or which influenced the mind of detaining authority in formulating grounds of detention. Thus, non-supply of the translation of its contents would not in this case constitute a case of violation of principles of natural justice or of Article 22(5).

38. Petitioner's further contention is that some of the pages of documents are ineligible, this also amounts to non-supply in the eye of law. Reliance was also placed by the petitioner in *Ganesh Prasad Kapoor Vs. State of U.P. and Others*, in which it was held:-

In the instant case, the photostat copies of the documents and relevant materials which were relied upon by the detaining authority were not supplied to the detenu along with the order of detention.

It was held that this amounts to infringement of the right guaranteed to a detenu under Article 22(5) of the Constitution. In this case also, the reference has been made that the detaining authority relied on those documents but the same was not supplied.

39. This proposition cannot be disputed, once the detaining authority relies on document, which constitutes a ground of detention if not supplied or if supplied it is ineligible, it restricts a detenu of making effective representation and thus amounts to infringement of his constitutional right. The court has to see firstly whether such documents really influenced the mind of the detaining authority in formulating the ground of detention or not. Even reference of such documents in the grounds of detention, if made casually, cannot by itself be constituted as material document. If it could be found by the court that any such document could have influenced the mind of the detaining authority then its non-supply, or non-supply of its translation or non-supply of legible copy of the same, would amount to infringement of a detenu's constitutional right. The petitioner has not shown in the present case any such ineligible document or foreign language documents (German) as aforesaid either to have been referred to in the grounds of detention or it could be stretched to draw any inference that it could have influenced the mind of the detaining authority in formulating the grounds of

detention. Apart from this even for coming to the conclusion that a particular document is ineligible which has been supplied to the detenu along with the grounds of detention it is necessary to examine the original document supplied to the detenu. In the present case, admittedly those original documents were never produced before this Court and only a photostat of the original document supplied to the petitioner were annexed along with the affidavit and in the absence of original document no inference could be drawn that the document supplied to the detenu was ineligible. So far some of the documents tickets and other travelling documents (German) supplied by airline concerned as aforesaid on perusal of original records we have not found any translation of the said documents either in English or Hindi to show that possible influence of those documents may be there on the detaining authority.

40. In *Abdul Sathar Ibrahim Manik Vs. Union of India and others*, , the Supreme Court held that non-supply of document which was not material, though referred casually in the narration of events would not invalidate the detention order, and held at pages 2270 and 2271 :

When the detaining authority has merely referred to them in the narration of events and has not relied upon them, failure to supply bail application and order refusing bail will not cause any prejudice to the detenu in making an effective representation. Only when the detaining authority has not only referred to but also relied upon them in arriving at the necessary satisfaction then failure to supply these documents, may in certain cases depending upon the facts and circumstances amount to violation of Article 22(5) of the Constitution of India. Whether in a given case the detaining authority has casually or passingly referred to these documents or also relied upon them depends upon the facts and the grounds, which aspect can be examined by the court.

41. In the present case, we do not find nor petitioner could point out any such document or which would be said to have influenced the mind of the detaining authority in formulating grounds of detention.

42. The right of a detenu enshrined under Article 22(5) has received special significance in view of *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, . In this context, it is well settled that no person shall be deprived of his life or personal liberty except according to procedure established by law and thus representation referred under Article 22(5) if it has to be effective representation the opportunity to the detenu has to be fair and reasonable. In order to give fair and reasonable opportunity, detenu must be supplied with all the documents, if not in the language known to the detenu its translated copy in the language known to him and the copy supplied should be legible but such document could only be which is relied by and which could have influenced the mind of the detaining authority in formulating grounds of detention.

43. Next, it was strenuously urged that ground of detention being in English and official language for the Union of India being Hindi after passing of the Official

Languages Act, 1963, the detention order vitiates. The petitioner relied on Article 343(1) to urge that the Official Language of the Union is Hindi in Devnagari script and further Article 343(2) though provide notwithstanding anything in Clause (1), the same shall be for a period of fifteen years from the commencement of the Constitution, then after the coming into force of the aforesaid 1963 Act in view of the language used therein the detention order should have been in Hindi in Devnagri script. Reliance was also placed on Section 3(3) of the Official Languages Act, 1963.

44. Section 3(1) of the Official Languages Act, 1963 provides:

Notwithstanding the expiration of the period of fifteen years the English language may, as from the appointed day continue to be used, in addition to Hindi.

The argument is the words used "in addition to Hindi" only means Hindi has to be there though over and above English may be used. Reference was made to various Articles of the Constitution apart from Articles 343, 346, 348 and 210 in support of the contention. Reliance was placed in the case *Madhu Limaye and Another Vs. Ved Murti and Others*, . In this case Sri Raj Narain as intervener wanted to present his case in Hindi. The Supreme Court merely permitted him for sometime to argue in Hindi as it was a Habeas Corpus Petition, but later not able to follow him, cancelled his intervention by reference to Article 348 of the Constitution that the language of the Supreme Court is English. This case in no way helps the petitioner. In *Union of India (UOI) and Others Vs. Murasoli Maran*, , the Presidential order made the training in Hindi compulsory for certain class of all Central Government employees below 45 years which was challenged. The Supreme Court upheld the said order and held at page 231 :

It is erroneous to suggest that the Presidential Order of 1960 became invalid after the passing of the Official Languages Act. The Presidential Order keeps in view the ultimate object to make the Hindi Language as Official Language but takes into note the circumstances prevailing in our country and considers it desirable that the change should be a gradual one The Act merely continues the use of the English language in addition to Hindi.

This authority does not hold that any order passed by the Central Government in English would be invalid. On the contrary by the use of the words "The Presidential Order keeps in view the ultimate object to make the Hindi language as official language..." and further "... the change should be gradual" makes it explicit that Hindi being exclusive official language even after passing of the Official Languages Act cannot be held. Then Section 3(1) of the Official Languages Act significantly uses the words, "... English language may ... continue to be used, in addition to Hindi" only shows continuity of English language for official purposes. "Continue to be used" could have no other meaning except to continue to do what existed earlier. It is not in dispute, earlier English language was admittedly used for official purposes then that was permitted to be used even after coming into force of the Official Languages Act.

It further sanctions the use of Hindi language. The Official Languages Act, 1963 is also for in principle what was said of the Presidential Order for bringing the change from English to Hindi in a gradual way.

45. We have considered the submissions made on behalf of the petitioner and after perusing the decisions cited by him and examining the various provisions of the Constitution of India and the Official Languages Act we do not accept the submissions made on behalf of the petitioner. The detention order, though passed in English, would not be invalid after passing of the Official Languages Act, 1963.

46. Next, learned Counsel for the petitioner urged that there was delay in disposal of his representation. The contention is that though he made the representation on 22nd December, 1990, it was only disposed of on the 18th January, 1991, and this shows the callousness and the casual manner in which it was disposed of. Hence, the detention order is liable to be set aside on this ground alone. Reliance was placed in the case *Harish Pahwa Vs. State of U. P. and Others*, , in which three days delay was held to be bad. Similarly, in *Gazi Khan alias; Chotia Vs. State of Rajasthan* and another, , in which seven days" delay was held to be bad in law. On the other hand, reliance was placed by the respondents in the case of *Babul Mitra Vs. State of West Bengal and Others*, , wherein in respect of one month"s delay it was held that the order does not vitiate. Similarly, in *M. Mohammad Sulthana v. The Joint Secretary to Govt. of India, Finance Department*, AIR 1990 SC 2222 even sixty days" delay was held not to vitiate the detention order.

47. The various authorities are repeatedly emphasising, in order to hold any detention order illegal, the court has to examine facts of each case. In a given case as in the case of *Harish Pahwa Vs. State of U. P. and Others*, , even three days" delay could be held to be bad in law while in other case even larger number of days be not held to be bad. The Court has to scrutinise facts of each case keeping in view the curtailment of the liberty of a man on one side and conduct of the respondent authorities, whether latter"s conduct of inaction, callousness, casualness, slackness are such which amount to curbing detenu"s further right of being set at liberty at an early date, if that be so, in effect it amounts to curtailment of detenu"s right to liberty itself. Thus, it has to be seen whether the authorities while disposing of representation is showing any slackness, callousness, casualness, inaction or is making leisurely treatment in disposal of the representation. For this we examined the file from the original records which were placed before us. From the records, we find that the petitioner submitted his representation on 22nd December, 1990, which was forwarded to the authority concerned on the next date, though it was a Sunday. The said representation was received in the Ministry of Finance on the 27th December, 1990. Thereafter, the same was sent to Pt. NDPS which was received on 31st December, 1990 (29th and 30th December, 1990, being Saturday and Sunday respectively). On the same day it was sent to the Deputy Director, Narcotic Bureau, Varanasi, and was received in the office at Varanasi on 10th

January, 1991. On the very next day i.e. 11th January, 1991, the documents as desired was posted at Delhi and was received back in Delhi on the 14th January, 1991. On 17th January the Under Secretary examined and placed it before the Detaining Authority. The detaining authority again placed the same before the Secretary, Government of India and on 18th January, 1991, the representation of the petitioner was rejected by the Finance Minister. There are two dates on which argument was raised regarding delay in disposal even after these dates were disclosed from the record. The first set of days is between 23rd December to 27th December, 1990, when the Superintendent, District Jail, Ghazipur forwarded the representation and was received in the Ministry of Finance, and other from 1st January, 1991 when it was sent by Pt. NDPS, Delhi to 10th January, 1991, on which date it was received in the office of Dy. Director, Narcotic Bureau, Varanasi. Regarding the first set of days it is revealed from the record that the said representation was sent through the Messenger Sri Indra Prakash Lal Srivastava of Ghazipur District Jail, who received the same on 23rd December, 1990. He carried two letters with him. One was to be delivered at Lucknow and the other (petitioner's representation with comment) at Delhi. He proceeded to Gorakhpur his home on 24th December, 1990, on his own by a private bus. 25th December was a holiday on account of X-Mas and on 26th December he delivered the letter at Lucknow, on the way meant for I.G., Prison, Lucknow and then reached Delhi and delivered the letter with the representation in the office of the Joint Secretary, Finance, Government of India on 27th December, 1990. Regarding the second set of dates, according to the respondents it was despatched on 1st January, 1991 by post from Delhi and was only received in Varanasi on 10th January, 1991. From a perusal of the letter dated 11th January, 1991, sent back along with the comment annexed a reference was made that in future, representation be sent by speed post to avoid delay. The delay could only be on account of it being sent by ordinary post and not speed post, Further, according to learned Counsel for the respondent the delay of delivery by ordinary post would only be on account of riots during that period in Varanasi.

48. However, on the aforesaid facts and circumstances and on. perusal of the original record we do not find that any inference of slackness, callousness, casualness, inaction or leisurely treatment of the petitioner's representation is made out. On the facts of this case we come to the conclusion that it cannot be held that there was any delay in disposal of the representation of the petitioner.

49. Next, the petitioner challenged the order dated 12th January, 1991, passed u/s 10(1) of the 1988 Act. The said order is issued by the Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue. This order records the satisfaction of the authority that the petitioner is likely to engage in illicit traffic i.e. purchase, sale, possession and abetting the export from India of Narcotic drugs in the city of Varanasi which is an area highly vulnerable to such illicit traffic. The argument is that the said declaration is required to be made in respect of detention order passed on or before 31st day of July, 1990. Such order has been passed by the Joint Secretary viz. the detaining authority mechanically.

Since the petitioner was detained by an order dated 4th December, 1990, i.e. order after 31st July, 1990, it could not be covered by Section 10(1). In the counter-affidavit it has been denied. Firstly, the declaration u/s 10(1) has not been made by the Joint Secretary viz. the detaining authority but by the Additional Secretary, Government of India, Ministry of Finance, and, secondly, the date 31st July, 1990, has been extended to 31st July, 1993 in accordance with the valid amendment by the Parliament of Section 10 of the Act. In view of this position, it cannot be said that the declaration made u/s 10(1) could be held to be without jurisdiction.

50. The second ground of attack that no reason has been recorded for passing the order u/s 10 is also not sustainable as we find that the said order records reasons by stating that the petitioner is likely to engage in illicit traffic i.e. purchase sale, possession and abetting the export from India of Narcotic drugs in the city of Varanasi which is an area highly vulnerable to such illicit traffic, as defined in Explanation I to Section 10(1) of 1988 Act. Once that satisfaction has been recorded, the argument, that no reason has been recorded, also fails. Therefore, in view of the aforesaid amendment to Section 10 and in view of the recorded reasons and the order being passed by Additional Secretary the petitioner's contention for declaring the order passed u/s 10(1) to be illegal also fails.

51. The next ground of attack is, there was no material on record to show that there was likelihood of the petitioner being released from the jail custody and further record reveals complete unawareness and non-application of the mind of the detaining authority when it records in paragraph 21 of grounds of detention "even though prosecution proceedings under the Narcotic Drugs and Psychotropic Substances Act, 1985 are likely to be initiated against you", when, in fact, not only complaint against the petitioner was filed by the respondent authority, but even bail application dated 3rd December, 1990, was moved by the petitioner in the said case, which is referred in paragraph 19 of the grounds of detention. The argument is once petitioner was in custody under the aforesaid 1985 Act and looking to the stringent provisions of the Act it could not be inferred that there was any likelihood of the petitioner coming out of jail and hence passing of the impugned order without considering this on the face of this would be illegal. Similarly, in view of the complaint having already filed by the concerned respondent authority in the concerned court at Varanasi under the aforesaid 1985 Act and warrant of arrest already issued by the said Court and bail application dated 3rd December, 1990 having already moved by the petitioner in the court of the Sessions Judge, Varanasi the recording of the fact in paragraph 21 as aforesaid shows complete unawareness of the facts existing on the record, since the records in this case was bulky of more than 1400 pages, which possibly the detaining authority could not have gone into within short period hence the detention order is illegal.

52. Admittedly, the bail application dated 3rd December, 1990, was moved by

the petitioner in Case No. 195 of 1990 under Sections 8, 21, 27A and 29 of 1985 Act and u/s 11, 135 of the Customs Act. According to this application he is under detention u/s 25, Arms Act at Ghazipur and has been served with B-Warrant to appear before the court at Varanasi though learned Advocate General appearing for respondent authority has denied service of any B-Warrant on the petitioner and from the records produced before us there was nothing to indicate service of any B-Warrant on the petitioner. Then the question arises on these facts, whether there was any likelihood of the petitioner coming out of bail under 1985 Act or not. Strong reliance was placed on Section 37 of 1985 Act, which has been introduced by means of Act II of 1989. This provides that no person accused of an offence punishable for a term of five years or more under this Act shall be released unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. This limitation is over and above for granting bail as provided under Code of Criminal Procedure, 1973. The argument is that the charges against the detenu being very serious and thus in view of Section 37 it could not have been reasonably inferred that the detenu is likely to be released on bail. The recording of satisfaction for preventive detention viz. that unless the detenu is detained there is likelihood of his indulging in the activities prejudicial to the State and public is the very consideration introduced u/s 37 and hence the detaining authority could not have come to the conclusion that there was any likelihood of the petitioner being released from jail.

53. We find from the admitted facts from the record that the detenu was arrested by the police of Police Station, Zamania, District Ghazipur on 21st November, 1990 under Sections 4, 25, 26, Arms Act and Section 207, Motor Vehicles Act in Case Crime No. 402 of 1990. Thereafter, on the 7th November, 1990, a complaint has been lodged by the Intelligence Officer of the Narcotics Control Bureau, Varanasi under Sections 8, 21, 27A and 29 of 1985 Act as against the four persons, viz. the petitioner, his father and his two brothers in the court of Sessions Judge, Varanasi. Further, a custody warrant was issued against the petitioner by the 2nd Additional Sessions Judge, Varanasi in Case Crime No. 195 of 1990 to the District Jail, Ghazipur on 22nd November, 1990, but the detenu remained in jail at Ghazipur and was never brought before the concerned court at Varanasi in pursuance to the same. The question for consideration is, could it be said on these facts that the detenu came under custody of the court of Additional Sessions Judge, Varanasi in Case Crime No. 195 of 1990 and in pursuance to said custody warrant or if it remained unexecuted the detenu continued in detention in District Jail, Ghazipur only in pursuance to Case Crime No. 402 of 1990. In case if it could be said that the petitioner came in the custody and was detained in view of the order passed by the concerned Varanasi Court under 1985 Act, then the argument raised on behalf of the petitioner may have some bearing. But having examined the records we do not find anything except issuance of custody warrant by the concerned court. Argument for the respondent is that for reasons not on the record the detenu was never sent to

the custody of the court concerned at Varanasi for initiating prosecution against him under 1985 Act. Neither we have seen on the records nor anything was pointed out on behalf of the petitioner that the order dated 22nd November, 1990 was executed before passing of the impugned order, by taking the petitioner in custody in the proceedings under the 1985 Act. It is true that the petitioner was under detention in Ghazipur Jail, but that was for the offence under the Arms Act and Motor Vehicles Act. The petitioner not being taken in custody under 1985 Act and the custody warrant not having been executed by bringing the detenu in detention under 1985 Act the argument of the petitioner regarding the stringent provisions of Section 37 of the 1985 Act would be inapplicable. Considering the offences for which detenu was in Ghazipur Jail in Case Crime No. 402 of 1990 and likelihood of petitioner coming out of jail and petitioner yet not coming under custody of Varanasi Court, further petitioner moving bail application in Case Crime No. 195 of 1990, the passing of the impugned order cannot be held to be invalid only on the ground that the petitioner was under detention in the District Jail, Ghazipur, or on account of non-consideration of Section 37 of 1985 Act.

54. The principle that no preventive detention order should be passed when the detenu is in jail is founded on the principle that when a man is already in jail, there could be no likelihood of detenu doing any prejudicial activity which may be prejudicial to the society at large. However, this is only if detention of the detenu is such where he is likely to be detained for a long period or there is no likelihood or possibility of his coming out of jail, but this cannot be extended in all cases especially where detenu is under custody for a short term or there is likelihood of his coming out of jail. This balance is kept only to check the arbitrariness of the detaining authority from exercising this power under the preventive detention law. The Court repeatedly emphasised the exercise of this power with circumspection as one's liberty is eroded without any trial.

55. In Vijay Kumar Vs. State of Jammu and Kashmir and Others, , it was held at page 1027 :--

Preventive detention is resorted, to thwart future action -- But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons, a preventive detention order need to be made.

In Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, , it was held :--

...where a person has been sentenced to rigorous imprisonment for ten years, it cannot be seriously suggested that soon after the sentence of imprisonment is pronounced on the person, the detaining authority can make an order directing the detention of the said person after he is released from jail at the end of the period of the sentence imposed on him.... On the other hand, if a person who is

undergoing imprisonment, for a very short period, say for a month or two or so, and it is known that he would soon be released from jail, it may be possible for the authority to consider the antecedent history of the said person and decide whether the detention of the said person would be necessary after he is released from jail.

In Masood Alam etc. Vs. Union of India (UOI) and Others, , it was held at page 901 :--

The real hurdle in making an order of detention against a person already in custody is based on the view that it is futile to keep a person in dual custody under two different orders but this objective cannot hold good if the earlier custody is without doubt likely to cease very soon and the detention order is made merely with the object to rendering it operative when the previous custody is about to cease.

In Suraj Pal Sahu Vs. State of Maharashtra and Others, , it was held :

If there was an imminent possibility of the man being set at liberty and his detention coming to an end, then it appears as a principle, if his detention is otherwise necessary and justified then there is nothing to prevent the appropriate authorities from being satisfied about the necessity of passing an appropriate order detaining the person concerned.

In Vijay Kumar Vs. Union of India (UOI) and Others, , it has been held :-

Two facts must appear from the grounds of detention, namely:

(i) awareness of the detaining authority of the fact that the detenu is already in detention and

(ii) there must be compelling reasons justifying such detention, despite the fact that the detenu is already under detention.

In N. Meera Rani Vs. Government of Tamil Nadu and Another, , it was held :--

Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention.... 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 operate on his release. This appears to us, to be the correct legal position.

In Abdul Sathar Ibrahim Manik Vs. Union of India and others, , it was held :--

There must be awareness in the mind of the detaining authority that the detenu is in custody and that there should be cogent and relevant material showing that there is a compelling necessity to detain him. Since that was a case of public order, the learned Judges proceeded to consider the nature of the cases that were pending and ultimately on the facts and circumstances of the case held that

the absence of a reference to any one of such recent cases would show that the subjective satisfaction has not been arrived at properly. This reasoning cannot be applied to the facts of this case. In the grounds, the manner in which the gold biscuits were concealed is mentioned and that itself suggests that the detenu must have been indulging in smuggling activities. So there was relevant material on the basis of which the detaining authority was satisfied that there was compelling necessity to pass the detention order.

Then in *Smt. Azra Fatima Vs. Union of India (UOI) and Others*, , it was held :--

We have given our thoughtful consideration to the arguments advanced by learned Counsel for the parties on the above point. The latest decision of this Court on the above point in *Sanjeev Kumar Aggarwal v. Union of India* (supra) decided on 4th April, 1990 in which all the earlier cases decided by this Court have been considered including the cases of *N. Meera Rani* and *Dharmendra Sugan Chand Chelwat* (supra) on which reliance has been placed by the learned Counsel for the petitioner. It was observed in *Sanjeev. Kumar Aggarwal's* case that no decision of this Court has gone to the extent of holding 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 in the case of a detenu who is already in jail. The counsel for the detenu in the above case wrongly relied on *Shashi Aggarwal Vs. State of U.P. and Others*, and *Ramesh Yadav Vs. District Magistrate, Etah and Others*, and contended that the bail application could be opposed if moved or if enlarged the same can be questioned in a higher court and on that ground the detention order should be held to be invalid. The Court negatived the above contention by observing that in *N. Meera Rani's* case a Bench of three Judges noted the above observations in *Smt. Shashi Aggarwal's* case and *Ramesh Yadav's* case and it was said that they were made on the facts of those particular cases. The court further held in the above case that on material relied upon by the detaining authority it could not 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 prejudicial activities ... the material placed before the detaining authority and the facts mentioned in the grounds of detention clearly go to show that the detaining authority was fully aware that the bail application filed by the detenu had been rejected by the Additional Chief Metropolitan Magistrate, 8th Court, Bombay. The detaining authority was also conscious of the fact that the two other detenus who were arrested and detained in the same raid had already been released on bail. The antecedents of the detenu which were clear from his own statement went to show that he was initiated in drug trafficking in 1984 and employed as a delivery boy on Rs. 30/- per day and within a short span of four years the detenu himself started selling Narcotic Drugs and amassed huge movable and immovable properties in Bombay. In the present raid itself heroin and Mandrax tablets worth Rs. 1,13,42,000/-were seized from the ownership and possession of the detenu. Not only that the detenu was using three vehicles for

transportation of these Narcotic drugs. The detaining authority after taking into consideration the above materials placed before him, arrived at the conclusion that the detenu being in judicial custody may under the normal law of the land be granted bail and be in a position to continue to pursue his nefarious activities. The detaining authority in these circumstances considered it necessary to invoke the law of preventive detention under the Act to prevent the detenu from indulging in his prejudicial activities in future. In these circumstances it cannot be said that the order of detention was illegal on the ground that it was passed while the detenu was already in custody.

The present case of petitioner is almost similar to this last case of Smt. Azara Fatima.

56. From the aforesaid decision it is clear that merely a detenu is under detention cannot invalidate the order of detention under preventive detention law if the detaining authority is otherwise satisfied on the basis of cogent material on the record for compelling reasons that he must be detained in order to prevent him indulging in such prejudicial activities and further he is aware of the fact that the detenu is already under detention. In the present case, we find, the grounds of detention records awareness of the detaining authority that the petitioner is already in jail in the District Jail, Ghazipur and further records its satisfaction that there is compelling necessity of detaining him under detention as there is likelihood of the detenu indulging in illicit traffic of narcotics drugs in view of the trend of the detenu's activities in case he comes out of jail. Further, the fact that the petitioner was under detention as under-trial in the District Jail, Ghazipur only for offences under the Arms Act and the Motor Vehicles Act, it therefore, cannot be said that the passing of the detention order suffers from any illegality.

57. Regarding the question of unaware-ness of the detaining authority regarding initiation of the prosecution proceedings under 1985 Act the argument is that the complaint was filed in the Varanasi Court on 7th of November, 1990 and custody warrant being issued on 22nd November, 1990, and bail application having been moved by the detenu on 3rd December, 1990, in Case Crime No. 195 of 1990 under the 1985 Act shows that proceedings have already been initiated under 1985 Act and thus reference in the grounds of detention of initiation of prosecution against the petitioner is palpably wrong and shows the unawareness of the detaining authority.

58. So far as bail applications dated 3rd December, 1990 is concerned, it is true, it has been moved in the court of Sessions Judge, Varanasi in Case Crime No. 195 of 1990 under 1985 Act. But as we have held earlier the petitioner had not till passing of the impugned order come under custody of the Varanasi Court in the proceedings under 1985 Act. The moving of the said bail application shows attempt of the petitioner of being granted bail before coming in custody as other three accused viz. father and brother of the petitioner of the same Varanasi complaint were already granted bail before that date. In paragraph 9 of the counter-affidavit by the detaining authority it has been specifically averred "that

the petitioner has not been arrested in Case Crime No. 195 of 1990 under N.D.P.S. Act pending in the court of 2nd Additional Sessions Judge, Varanasi. We have already held, till passing of the impugned order there is nothing to show that the petitioner was brought under custody in the said proceedings at Varanasi. So far as the initiation of the prosecution as against the petitioner under N.D.P.S. Act at New Delhi, we find, the complaint is filed before the court of Additional Chief Metropolitan Magistrate, Patiala House, New Delhi only as against two persons detained at Indira Gandhi International Airport at New Delhi and not against the petitioner. The only prosecution which the petitioner could at best say to have been launched is the complaint filed at Varanasi with issuance of warrant by Varanasi Court on 22nd November, 1990. But, we find, after lodging that complaint further initiation proceedings remained at stand-still in spite of order being passed by the Second Additional Sessions Judge, Varanasi on 22nd November, 1990 to bring back within the jurisdiction of that court the petitioner for proceeding further under the N.D.P.S. Act, 1985. In our considered opinion initiation of prosecution cannot be said on either filing of F.I.R. or complaint as in the present case. After recording of F.I.R. investigation has yet to be made before prosecuting a person. Even in complaint filed under 1985 Act at least custody of the man has to be taken or declared absconder till it could be said regarding initiation of prosecution against that person. Even if on detail scrutiny, legally it is possible to record a point earlier than this, we feel that the recording of the fact in the grounds of detention that prosecution is likely to be initiated against the petitioner under NDPS Act cannot be said to be such as to draw an inference of unawareness of the detaining authority. On the positive side awareness which the detaining authority must have has to be pertaining to all material facts which constitutes recording of satisfaction of detaining a person including awareness of his being under detention. The two essential facts which must appear from the grounds of detention as held in the *Vijai Kumar v. Union of India* (supra) is the awareness of the detaining authority that the detenu is already under detention and there is compelling reason justifying such detention. These two facts are apparent in the present case. On the negative side unawareness or non-application of mind of the detaining authority could be inferred only if it did not consider any basic fact on record which if considered, his recording of subjective satisfaction to detain a person and to pass such an order at that time would have been affected. Every other fact even if it constitutes unawareness or non-application of mind could not be sustainable ground to challenge a detention order. Non-consideration of any basic fact whether would have affected the subjective satisfaction should be inferred with great circumspection by the courts and would depend on the facts of each case. The subjective satisfaction has to be for the compelling reason justifying detention and awareness of detenu being in jail and such detention not being for a long period. In the present case the attribution of unaware-ness and non-application of mind to the detaining authority is on account of its recording in the ground of detention "prosecution proceedings under Narcotic Drugs and Psychotropic Substances Act, 1985, are likely to be initiated against you". It was

urged if the mind was applied to the three documents on the record viz. Complaint being filed at Varanasi, Varanasi Court having issued custody warrant and petitioner having moved bail application in the Varanasi Court in the same case crime number in which complaint was filed then it would not have recorded as aforesaid in the grounds of detention. Though we have already held on these facts that it would not amount to holding the detention order to be illegal but in the alternative we test on the aforesaid premises whether even if it could be said to be unawareness whether it would constitute grounds of holding detention order illegal. Whether prosecution has been initiated against the petitioner or not cannot and will have no bearing effect on the subjective satisfaction regarding -- "compelling reason justifying detention". It is the facts existing on record showing the antecedents and the present complaint against a person may have relevancy for recording the satisfaction. Even if no prosecution is initiated in law if the facts existing on record are such a detention order could be passed. On the contrary, even if a prosecution is initiated the detaining authority could yet refuse to pass a detention order in a given case. The non-application of mind could at best be said for the said three documents out of the three, the first document is the complaint, which was neither argued nor could be argued was not considered. The other two documents viz. the custody warrant and bail application could not by any stretch of imagination be facts constituting the consideration of "compelling reason justifying detention". The other part of premises "awareness of detenu being in jail" is not challenged as it is recorded in the ground of detention itself. This brings us to the last part of that premises "such detention not being for a long period". This would include detenu likely to be released from detention. The remaining two documents might have been relevant for this part only if the petitioner could have come under the custody of Varanasi Court in pursuance to the warrant of custody. Then Section 37 of 1985 Act would have been drawn and that coupled with moving of bail application the third document could have been relevant fact to be considered whether in view of this there could be any likelihood of petitioner coming out of jail. In the present case, the petitioner did not come under custody of the Varanasi Court prior to the detention order. Thus, even if the said documents were not considered it would not constitute such non-application of mind that if considered would have affected the subjective satisfaction of the detaining authority. If not coming in custody question of detenu being in detention for a long period or his likelihood of being released does not arise under 1985 Act. Thus, even if the detaining authority recorded "... prosecution proceedings under Narcotics Drugs and Psychotropic Substances Act, 1985, are likely to be initiated against you" it cannot be held to show non-application of mind or unaware-ness which could have effected his subjective satisfaction.

59. The detaining authority shows its awareness of the detenu's being in Jail since arrest on the 21st November, 1990, by the police of police station Zamania district Ghazipur in case Crime No. 402 of 1990 both under the Arms Act and Motor Vehicles Act. The detaining authority at the relevant time was faced with

the situation that even after filing of the complaint in the court at Varanasi the detenu had not come under its custody in spite of order dated 22nd November, 1990 passed by the court at Varanasi and on the 3rd December 1990 the petitioner having moved the bail application in the same case crime number in which complaint was filed in 1985 Act and further petitioner being only under detention in offences under Arms Act and Motor Vehicles Act then if it recorded compelling reason to pass the impugned detention order it cannot be held to be illegal. Admittedly, the detention of the petitioner was not under any order sentencing him for a long period of time nor he was under detention in the case crime under 1985 Act. The satisfaction recorded by the detaining authority is a subjective satisfaction and this court would not sit in judgment over the satisfaction of the detaining authority to come to its own conclusion. It recorded its satisfaction that there was likelihood of continued prejudicial activities by the detenu in case he is released from jail. Thus even in law if it could be said that the initiation of prosecution proceedings has already started on the finding recorded by us earlier it would not affect the impugned order. Thus, for the reasons, recorded by us, we are not satisfied even with this last argument on behalf of the petitioner.

60. As an ancillary argument to this last argument it was urged, there would not be any proper recording of satisfaction as it was not possible for the detaining authority to have perused the bulky documents of more than 1400 pages which was placed only on the last day on which the detention order was passed. This argument is misconceived on the last date viz. 4th December, 1990 only the message regarding the petitioner having moved bail application on the 3rd Dec., 1990 in the Varanasi Court was communicated. The bulky records was already there with the detaining authority from before. The detaining authority, apart from himself separately also along with the other members of the Screening Committee examined it when they met earlier. Thus, question of considering all the bulky records only hurriedly on the last date did not arise. On the date of passing of the detention order only one communication was sent to the detaining authority and that was the bail application moved by the detenu in Case Crime No. 195 of 1990 under 1985 Act in the court of Second Additional Sessions Judge, Varanasi. The detaining authority having considered all the documents earlier also considered the fact about detenu having moved the bail application. Thus, this argument also fails.

61. For the findings recorded by us earlier we do not find any sustainable ground has been raised by the petitioner to hold the detention order to be illegal.

62. Accordingly, the writ petition fails and is hereby dismissed.