

(1982) 10 MAD CK 0009
In the Madras High Court
Case No : Writ Petition No. 4615 of 1982

D. Esra Sunder Singh

APPELLANT

Vs

State of Tamil Nadu and Another

RESPONDENT

Date of Decision : 08-10-1982

Acts Referred:

Customs Act, 1962 — Section 107, 108, 111, 113, 2(39)

Citation : (1984) 15 ELT 385

Hon'ble Judges : Maheswaran, J;Gopalkrishnan, J

Bench : Division Bench

Advocate : P.R. Krishnan, for the Appellant; Public Prosecutor, for the Respondent

Judgement

Gopalakrishnan, J.—The petitioner is the brother of one Dalsingh, a detenu under the Conservation of Foreign Exchange and Prevention of

Smuggling Activities Act, 1974 (Central Act 52 of 1974) (hereinafter referred to as the COFEPOSA Act).

2. The petition is for the issue of a writ of habeas corpus directing the State of Tamil Nadu to produce the body of the detenu Dalsingh before this

court and for giving the direction to set him at liberty. The detenu is now confined in the Central Prison, Madras, under the orders of the State of

Tamil Nadu in its proceedings No. S.R. 2464-3/81, dated 19-10-1981 under the provisions of the COFEPOSA Act.

3. The alleged grounds for the detention are -

1. Certain persons were apprehended on 12-6-1981 by the Customs Preventive Staff, Tuticorin, while conducting Coastal Patrol;

2. that they have given statements alleging that the detenu was engaging himself as a smuggler;

3. that on their information contraband goods were seized from one place;

4. that incriminating documents were found in the detenu's residence;

5. that on the facts the following position, namely -

(i) in July 1980 the detenu was apprehended with smuggled liquor while he was transporting the same in his car MDT 2833 for which he was

imposed a penalty of Rs. 1,000/-;

(ii) from the documents seized from his residence the detenu's counterparts in Sri Lanka in his past smuggling activities are known;

(iii) private account slips indicating transactions in Cassettes dated 4-2-1981 show his connections with smuggled goods even in the year 1981;

(iv) despite the detenu's denial dated 7-7-1981, the detenu's connection and involvement in the goods seized from the residence of Thiru

Samudram on 12-6-1981 are clearly spoken to by the detenu's brother-in-law Thiru P. Gurunathan and Thiru T. Samudram from whose

residence the goods were seized;

(v) the detenu's attempt to export beedi leaves through the Sri Lanka launches on the night of 11-6-1981/12-6-1981 is clearly spoken to by

Thiruvalrgal Michaelraj, Francis, Mani, Pushparaj and his brother-in-law Thiru P. Gurunathan, who were apprehended on the spot at the seashore

of Vellapatti;

(vi) in the context of the deposition made by the individuals apprehended on the spot who according to the detenu bore no ill-will or malice against

him and in view of the fact that the deposition made by Thiru Gurunathan leading to the recovery of contraband goods stored at his instance, the

detenu's denial of any connection with the seized goods in his statement does not carry conviction, is clear.

4. In his affidavit, the petitioner, besides setting out the above, alleged that the order of detention is one without the authority of law, illegal and void

and without jurisdiction besides being the result of mala fide exercise of power. It is further alleged by the petitioner that there is absolutely no basis

for the allegation of smuggling beedi leaves. Further, the activities referred to by the detaining authority may at best be referable only to Section

3(1)(iii) and 3(1)(iv) of the act which are offences of transporting, or concealing or keeping smuggled goods, whereas the satisfaction of the

detaining authority is referable to clause (1) of Section 3. This, according to the petitioner, clearly shows that the detaining authority had not applied

his mind before passing the detention order. In the absence of contemplated satisfaction u/s 3(1), the detention order, according to the petitioner, is

one without the authority of law.

5. It is further alleged by the petitioner that the detaining authority was not furnished with full particulars and therefore his subjective satisfaction is vitiated.

6. It is further alleged that the confessional statements both from the detenu and the other witnesses in this case were obtained by coercion and

undue influence and as such they may not have any value. Such retracted nature of the confessions has not been brought to the notice of the

detaining authority and this has also vitiated the subjective satisfaction of the said authority.

7. It is further alleged that the detenu was not furnished with the documents on which the satisfaction was arrived at. Such violation, according to

the petitioner, offends Article 22(5) of the Constitution of India.

8. The petitioner further submits that if at all, this is a case for prosecution under the relevant provisions, and not a case for preventive detention.

There are no bona fide in the detention order, inasmuch as the alleged activities of the detenu were found on 12-6-1981, the detention order was

passed on 19-10-1981 and the detenu was arrested only on 12-12-1981. Thus long delay shows that the detention is not with a view to prevent

smuggling, but only a mala fide exercise of power. There is absolutely nothing on record to show that unless the detenu is detained under the

preventive detention he will engage himself in smuggling activities. In the absence of such prognosis, the detention of the detenu under the

COFEPOSA Act is not valid.

9. With the above allegations, the petitioner has prayed for the release of the detenu.

10. The first respondent, through its Joint Secretary, Public (SC) Department, has filed a counter-affidavit, inter alia, refuting the allegation

mentioned in the affidavit in support of the petition except those that have been admitted in the counter-affidavit. According to the first respondent,

the statements given by the witnesses were without any coercion or undue

influence and the witnesses have spoken to the effect that they were waiting on the seashore at the instance of the detenu expecting the arrival of biri leaves for illicit export to Sri Lanka. But for the timely presence of the Customs party the export goods, i.e., biri leaves would have arrived and illicitly exported to Sri Lanka successfully. Moreover, Thiru Gurunathan, the detenu's brother-in-law, one of the persons apprehended on the shore, has clearly indicated in the statement dated 12-6-1981 that on the night of 10-6-1981 there was an illicit landing of contraband goods from Sri Lanka for the detenu and the same has been kept secreted in the house of Thiru Samudram at Tuticorin as per the instructions of the detenu. He also led the Officers to the said house and as a result of the search of the house, contraband goods, such as cassette recorders, car stereo players, poleyester textiles, all of foreign origin, valued at Rs. 1,31,587.50, were recovered and seized by the Officers. This evidence of Thiru Gurunathan has considerable value in forming the opinion by the detaining authority. Apart from the statement of the detenu's brother-in-law Thiru Gurunathan, the statements of Thiru Pushparaj, Thiru Samudram etc. clearly corroborates the statement of Gurunathan and establishes that the detenu had been engaging himself in smuggling activities which attract the provisions of Section 3(1)(1) of the COFEPOSA Act, which has been correctly applied with a view to prevent the detenu from such prejudicial activities.

11. The first respondent has also denied the averments of the petitioner to the effect that the grounds and the relevant documents were not supplied to the detenu. On the other hand, according to the first respondent, the grounds with complete details of the detenu's involvement in the smuggling activities have been supplied to him. The detaining authority, after taking into consideration all the materials placed before him, has passed the detention order, and there is absolutely nothing vague or uncertain or irrelevant in the grounds placed before the detaining authority.

12. According to the first respondent, summons were issued to the detenu u/s 108 of the Customs Act, 1962, on 16-6-1981 itself requiring his presence on 23-6-1981. The detenu evaded service. Ultimately, the summons were affixed on the doors of his house on 3-7-1981. Subsequently, he appeared for enquiry only on 7-7-1981, after obtaining anticipatory bail. This

itself, according to the first respondent, shows that the detenu was fully in touch with his advocate. Hence the allegation as if the statement was taken by force and coercion cannot be correct. It is further pointed out that it is pertinent to note that the detenu has not in any way controverted the penalty of Rs. 1,000 imposed on him by the Assistant Collector, Customs, Tuticorin, for his involvement in the customs seizure case effected on 29-7-1980. Further, in the absence of non-retraction by those who have given statements, it has to be concluded that the detenu is involved in smuggling activities. These particulars which were before the detaining authority have made him pass the order in question and the satisfaction of the detaining authority u/s 3(1) is in no way vitiated.

13. The fact that incriminating documents were seized from the residence of the detenu the next day of the seizure also strengthens the case for detention. Since the detenu had gone underground immediately after the seizure, he could not find time to destroy them. The smuggling activity of the detenu in the past has been admitted by him in his statement dated 7-7-1981, and further, his indulgence in smuggling of goods seized on 12-6-1981 was well spoken to by various persons apprehended on the share and also by Thiru Samudram from whose premises the contraband goods were recovered. Thus, it is clear, according to the first respondent, that the detenu has been continuously engaging himself in smuggling activities which formed the basis for his detention.

14. It is further submitted by the first respondent that the copies of all the documents referred to in the grounds of detention relied on by the detaining authority for forming the subjective satisfaction have been furnished to the detenu and they have been acknowledged by the detenu himself. Regarding the allegation in paragraph 9 of the affidavit filed by the petitioner in support of the petition, the first respondent submitted that the representation of the detenu dated 18-1-1982 against the order of his detention was received by the Government on 19-1-1982, that remarks of the Collector of Customs and Central Excise, Madurai, were called for on 19-1-1982 itself, and the remarks were received by the State Government on 23-1-1982. The representation was carefully examined and rejected by the State Government on 26-1-1982 on circulation to the Minister for Co-operation and Law and to the Chief Minister. It is further

contended by the first respondent that the detenu acknowledged its receipt on 26-1-1982 and hence the condition of the petitioner that his representatives were not considered and that such failure will violate the guarantee given under Article 22(5) of the Constitution, is baseless.

15. It is further submitted by the first respondent that the goods seized fall within the category of notified goods under Chapter IVA, of the Customs Act, and as the impugned order was not based on a misconception of facts and law, the detention order is not invalid in any manner. It is reiterated that the detaining authority after considering all the materials placed before it has arrived at the subjective satisfaction to detain the detenu under the COFEPOSA Act as it was evident that prosecution will not have a deterrent effect on the detenu to contain him from his future smuggling activities.

16. As regards the alleged delay, the respondent submitted that there is no delay at all since the statement of the detenu could be obtained only on 7-7-1981 and then only a decision about the need for preventive detention could be had. Even though the order was passed on 19-10-1981 itself, the detenu was evading apprehensions and he could be apprehended by the Customs party only on 12-12-1981 with great difficulty. The detenu was thereafter brought to the Central Prison, Madras, and lodged therein. This, according to the first respondent, clearly proves the guilty conscience of the detenu. There is absolutely no delay on the part of the respondent.

17. On these contentions, the first respondent contended that the Writ Petition is devoid of merits and has to be dismissed.

18. The detenu's brother, that is, the writ petitioner has also filed a supplemental affidavit alleging that on the date of enquiry i.e., on 7-7-1981, the detenu was an accused and the statement dated 7-7-1981 obtained from him under compulsion, threat and inducement when he was an accuse, comes within the Constitutional prohibition under Article 20(3) and therefore bad in law. It is further submitted that any satisfaction derived on the basis of such an illegal statement cannot form the basis for detention. As regards the allegation of absconding, alleged by the first respondent, the petitioner has flatly denied the same.

19. A rejoinder was filed to the supplemental affidavit on behalf of the first

respondent by the Joint Secretary, Public (SC) Department. In the rejoinder, it is stated that the detenu gave a negative statement on 7-7-1981 disowning the contraband goods seized from the premises of Thiru Samudram and that such a negative statement cannot be expected to have been extorted under duress. According to the first respondent, there had been no retraction from the detenu and the detention is not only based on the statement given by the detenu, but on valid materials and statements of persons apprehended on the spot and of Samudram from whose house the seizures have been effected. These statements are voluntary in nature, and they have not been retracted from. The first respondent again reiterated that the detenu was not available from 12-6-1981 to 7-7-1981 and that he appeared before the Customs Authority after obtaining anticipatory bail from Court. The statement given by the detenu, according to the first respondent, was a voluntary statement made to the Customs authority on 7-7-1981.

20. Mr. P. R. Krishnan, learned Counsel appearing for the Writ Petitioner, submitted that there is no satisfaction arrived at by the detaining authority as contemplated under the COFEPOSA Act, that vital facts have not been considered by the detaining authority before the impugned order was passed, that the documents and records relied on by the detaining authority have not been furnished to the detenu, that the detenu's representations to the Government were not sent to the Advisory Board, that the Advisory Board has not considered the detenu's representations to the Government, that the detaining authority has not considered this aspect, that this is a case for prosecution and not for preventive detention and that there is delay in passing the impugned order defeating the purpose of preventive detention.

21. Mr. Rajamanickam, the learned Public Prosecutor, on the other hand, submitted that the statements given by various persons connected with the smuggling along with detenu have not been retracted and they are enough for forming the opinion by the detaining authority. The learned Public Prosecutor has fairly stated that he is not basing his argument on the alleged statement given by the detenu as early as 29-7-1980 since a copy of the same has not been furnished to the detenu.

22. We have been taken through the grounds of detention and also the various

statements of witnesses and through the relevant provisions of the COFEPOSA Act.

23. The facts leading to the detention of the detenu are as follows : On 12-6-1981, the Customs Preventive Staff, Tuticorin, were conducting

Coastal Patrol in Vellapatti. At about 4 a.m., they noticed flash light signals being returned from the shore. When they went near, they noticed two

launches in the sea approaching the shore and some persons moving about in a suspicious manner. On seeing the Customs Officials, those persons

took to their heels, but, in spite of that, the Customs officers were able to apprehend Gurunathan, Pushparaj, Maichael Raj, Francis and Mani.

Some other persons had escaped. One of the apprehended persons by name Gurunathan is the brother-in-law of the detenu. On enquiry,

Gurunathan has stated that one Innasimuthu of Vellapatti is the landing agent for the detenu and that the contraband goods were hidden in the

nearby bushes. Gurunathan took out those goods and also took the Customs Officers to the house of one Samudram of Kelashanmugapuram,

Tuticorin, from whose house 36 numbers of Sanyo Radio Cassette Recorders, 74 numbers of Car Cassette Stereo Players, 90 numbers of Car

Cassette Radio Speakers, all of Japanese origin, and 16.75 metres of Polyester pant cloth of foreign origin were seized. The total value of the

seized articles is Rs. 1,31,587.50. From the statements given by Gurunathan, Pushparaj, Maichael Raj, Samudram and others it has been made

clear that the detenu along with others were engaged in smuggling goods like foreign liquor, cigarettes, tape-recorders etc. Samudram, in his

statement, has specially stated that at about 11-30 a.m. on 11-6-1981 the detenu met him and told him that he was in possession of foreign tape-

recorders, car cassette players and car stereo speakers and pant cloth, landed illicitly from Sri Lanka and asked him to help him by keeping them

secreted and disposing them for a commission. Samudram has further stated that on the same day, i.e., 11-6-1981, at about 13-30 hours while

both Samudram and the detenu were standing in the street at Malesharmugapuram where the detenu resides, Gurunathan whom Samudram knows

and who is the brother-in-law of the detenu, came in a van and had chat with the detenu aside, and that then the detenu indicated to Samudram

that the contraband goods had arrived in the van and requested that he should secret the same in his house. Samudram took the van and unloaded

the packages into his house. At that time, the detenu and Gurunathan were present.

24. The Customs Officers, as a follow-up action, searched, the premises of the detenu of 13-6-81. At that time, the detenu was not available. The

search resulted in the recovery and seizure of certain incriminating documents with Sri Lanka addresses indicative of his association with smuggling

activities.

25. In spite of search by the Customs Officer and issue of summons, the detenu was not available until he got anticipatory bail and appeared

before the Customs Officers on 7-7-1981.

26. The detenu, on his appearance, gave a statement to the Superintendent of Central Excise, Customs Preventive, Tuticorin and in that statement

he admitted his smuggling activities in the past and has also stated that he was dealing in liquor bottles and cigarettes smuggled from foreign shops

and that once he was apprehended by the Tuticorin Customs with a consignment of 60 bottles of whisky and 24 bottles of beer on 29-7-1980

while he was transporting them in his car MDT 2833, which was also seized. The detenu has further admitted in his statement that smugglers from

Sri Lanka agreed to send goods from their country illicitly and in return required him to send biri leaf bundles, that he accepted the barter deal in

pursuance of which he had received from them goods like Radio, Tape Recorders, Nylon Fishing Nets, etc. landed illicitly on three occasions and

in return he had illicitly exported biri leaf bundles. The detenu has further stated in his statement that following a case of robbery at Sri Lanka in

March 1981, which had led to the tightening up of vigil by the Sri Lanka Customs and the Police, no further consignments were received by him

and that he too decided to give up smuggling since then.

27. As regards the seizure of contraband goods made on 12-6-1981 from the house of Samudram, the detenu has denied any connection with the

said goods. No doubt he has stated he was aware of the smuggling activities through the Vellapatti Coast and also knew certain individuals hailing

from Vellapatti. Of course, the detenu has refuted all the statements given by the witnesses before the Customs Officers, but, at the same time,

admitted that there is no enmity or animosity between him and the witnesses. When confronted with an address written on the Cigarette Packet

Cover to the effect "'W. A. Jones, 31/54/4 Thalayeddi Shore Silabam, Ceylon'", he has denied the same. He has admitted that the documents seized

by the Customs from his house on 13-6-1981 which contain entries under date 4-2-1981, give details of the number of cassettes, two-in-one,

stereo etc. They also mention the hire charges for lorry and the cost of polythene bags. These particulars in the documents were explained by him

by stating that they were the details of account settled by him when he was previously engaged in smuggling activities. Among the documents

seized, were letters in Sinhalese Script, and the detenu has admitted that he was visited Ceylon during the year 1981.

28. There is also specific admission by the detenu in the statement that he smuggled foreign liquor bottles in the month of July, 1980, in his car

MDT 2833 and that in the statement given on that occasion he had admitted that he purchased smuggled foreign liquor bottles from certain

unknown persons in the early hours of 29-7-1980 for Rs. 7,296 and concealed the same in his car MDT 2833 the same day, that immediately

afterwards he took the car towards Tirunelveli with the intention of disposing of the goods at Courtalam but that he was intercepted by the

Tuticorin Customs at Pudukottai Outer and the car with the contraband goods were seized.

29. Thus, from the above said narration of facts, it is clear that in July, 1980 the detenu was apprehended with smuggled liquor while he was

transporting the same in his car MDT 2833 that from the documents seized from his residence there were quite a few Sri Lanka addresses, which,

as admitted by him, relate to his counterparts in Sri Lanka in his past smuggling activities, that private account slips indicating transactions in

cassettes dated 4-2-1981 reveal the detenu's connection with the goods smuggled even in the year 1981, that though in his statement dated 7-7-

1981 he denied any connection with the goods seized from the residence of Samudram on 12-6-1981, his connection and involvement in the said

goods are clearly spoken to by his brother-in-law Gurunathan and Samudram from whose residence the goods were seized, that the detenu's

attempt to export biri leaves through the Sri Lanka launches on the night of 11-6-1981/12-6-1981 is clearly spoken to by Maichael Raj, Francis,

Mani, Pushparaj and his brother-in-law Gurunathan, who were apprehended on the spot at the Sea Shore of Vellapatti and that according to him

those individuals who were apprehended and who have also given statements, bore no ill-will or malice against him. For all the abovesaid reasons

the authority felt the necessity of detaining the detenu under the provisions of the COFEPOSA Act since he thought that the detenu will continue in

indulging in his activities. Quoting all these incidents in extense, the authority, viz., the Joint Secretary to Government, Public (SC) Department,

called for the Explanation of the detenu in writing.

30. It is clear from the facts of the case that the grounds of detention were furnished to the detenu on 19-10-1981. The copies of the statements of

the witnesses including that of the detenu were furnished to him during June-July, 1981. Such furnishing of documents is evidenced by the

acknowledgement of the detenu under his signature. No doubt a copy of the statement alleged to have been given by him on 29-7-1980 when he

was apprehended while transporting illicit liquor in his car has not been furnished to him. The learned Public Prosecutor is not very much concerned

now about this document for proving the case against the detenu. The learned Public Prosecutor has also conceded that he is not pressing the

ground which is the subject-matter of smuggling in July, 1980. If so, there is no need for the supply of a copy of the statement of the detenu of the

year 1980 and also the other particulars regarding the levy of penalty for smuggling illicit liquor during 1980.

31. Before considering the materials on which the detention has been ordered, we can usefully refer to the decisions on the subject which were

cited by the counsel on either side.

32. Khudiram Das Vs. The State of West Bengal and Others, discusses about the subjective satisfaction that has to be arrived at by the detaining

authority before it passes an order of detention. In nutsheel, it is stated that such satisfaction should be based upon relevant materials and it should

not be arbitrary, vague, fancil, but it must be legal and regular. No doubt, the Court cannot go into the adequacy or sufficiency of the grounds on

which the order of detention was passed, but definitely it can examine whether on the grounds given to the detenu any reasonable authority could

possibly come to the conclusion such as the detention order.

33. In Smt. Hemlata Kantilal Shah Vs. State of Maharashtra and another, the Supreme Court has observed that the Court has to judge whether the facts narrated constitute a ground for detention and as to whether the facts given will enter and influence the detaining authority in coming to its subjective satisfaction. The Supreme Court, in this decision, has held that possibility of a prosecution or the absence of it is not an absolute bar to an order of preventive detention; the authority may prosecute the offender for an isolated act or acts of an offence for violation of any criminal law, but if it is satisfied that the offender has a tendency to go on violating such laws, then there will be no bar for the State to detain him under a Prevention Detention Act in order to disable him to repeat such offences. What is required is that the detaining authority is to satisfy the Court that it had in mind the question whether prosecution of the offender was possible and sufficient in the circumstances of the case. There is also a specific observation in that judgment that the past conduct or antecedent history of a person can appropriately be taken into account in making a detention order. It is indeed largely from prior events showing tendencies or inclinations of a person that an inference can be drawn whether he is likely in future to act in a manner prejudicial to the maintenance of supplies and services essential to the community or his act of violation of foreign exchange regulations and his smuggling activities are likely to have deleterious effect on the national economy. The Supreme Court, in that decision, has further stated that the High Court under Article 226 and the Supreme Court under Article 32 of the Constitution has to see whether the formalities enjoined by Article 22(5) have been complied with by the detaining authority. If the formalities have been complied with, the Court cannot examine the materials before it and find that the detaining authority should not have been satisfied on the materials before it and detained the detenu under the Preventive Detention Act, for, that is the function of an appellate Court.

34. In yet another case reported in Ashadevi Mehta (Detenu) Vs. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Another, , the facts were :-

A detention order, under S. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, was passed by the

respondent against the detenu (appellant's husband) with a view to prevent him from engaging in transporting smuggled gold. When the detenu was

in the custody of the Customs Officers, his advocate addressed a letter and sent a telegram to them protesting against his detention and illegal

custody beyond 24 hours and also expressing an apprehension that he was being detained with a view to obtain confessional statements under

duress. It was admitted that the advocate's request for permission to remain present at the time of interrogation of the detenu was turned down by

the Customs Officers. The advocate was also told that the detenu would be produced before a Magistrate at 5-30 p.m. on the day of her request.

But that was not done. He was produced on the following day and was remanded to judicial custody permitting further interrogation by the

Customs Officers. During such interrogation while in judicial custody, the detenu refused to sign the further statements and squarely resiled from his

earlier confessional statements disowning the facts therein stated. While the detenu's application for bail was pending before the Magistrate, the

respondent passed the impugned order.

In her petition under Article 226 of the Constitution for the issue of a Writ of habeas corpus, the appellant contended that the order of the detaining

authority was liable to be set aside because full facts of the case were not intimated to it before detention order was passed, and, therefore, there

was complete non-application of mind of the detaining authority to the attendant vital circumstances. The High Court dismissed the petition.

35. An appeal was preferred to the Supreme Court, and the Supreme Court while allowing the appeal held as follows :-

(1) The impugned order was invalid and illegal because there was complete non-application of the mind of the detaining authority to the most

material and vital facts which would have influenced the mind of the detaining authority one way or the other as these were neither placed before it

nor considered by the detaining authority.

(2) It is well-settled that if material or vital facts, which would influence the mind of the detaining authority one way or the other on the question

whether or not to make the detention order, are not placed before or are not considered by the detaining authority it would vitiate its subjective

satisfaction rendering the detention order illegal. The detaining authority must

exercise due care and caution and act fairly and justly in exercising the power of detention and if taking into account matters extraneous to the scope and purpose of the statute vitiates the subjective satisfaction and scope and purpose of the statute vitiates the subjective satisfaction and renders the detention order invalid then failure to take into consideration the most material or vital facts likely to influence the mind of the authority one way or the other would equally vitiate the subjective satisfaction and invalidate the detention order.

In the instant case three facts were not communicated to or placed before the detaining authority before it passed the impugned order against the detenu viz., (i) during the interrogation, in spite of the request, neither the presence nor consultation of the advocate was permitted, (ii) in spite of intimation to the advocate by the Customs Officers the detenu was not produced before the Magistrate at the appointed time and (iii) the confessional statements were squarely retracted by the detenu at the first available opportunity while he was in judicial custody. The first two had a bearing on the question whether the confessional statements had been extorted under duress from the detenu or not, while the third was in relation to the confessional statements which formed the foundation of the impugned order and as such were vital facts having a bearing on the main issue before the detaining authority.

(3) The fact that the request to have the presence or consultation of the lawyers was made and refused ought to have been intimated to the detaining authority. Further in passing the detention order the detaining authority based its decision on the detenu's confessional statements and, therefore, it was obligatory upon the Customs Officers to report to the detaining authority the retraction of those statements by the detenu. The fact of retraction would have its own impact one way or the other on the detaining authority before making up its mind whether or not to issue the impugned order of detention.

36. In *Sunil Dutt Vs. Union of India (UOI) and Others*, the Supreme Court had occasion to consider the sufficiency of the materials to be furnished to the detenu in order to enable the detenu to explain his case to the detaining authority. In that case, the Supreme Court observed -

It was not disputed before me that along with the grounds of detention which

were served on the detenu on July 11, 1980, none of the documents, either relied upon or referred to in the grounds, were served upon him. Admittedly, the service of such documents was destroyed up to July 19, 1980. It is obvious that those very documents must have formed the basis of making out the grounds of detention and ex hypothesi these documents were in existence and available for being served upon the detenu along with grounds of detention. Further, documents referred to in the grounds, were served as late as on August 4, 1980, with the result that the detenu was required to send his incomplete representation which he did on July 26, 1980. Clearly the safeguard guaranteed under Article 22(5) of the Constitution was violated. In Kamla Kanyalal Khushalani Vs. State of Maharashtra and another, this Court has observed as follows :-

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

37. In Thakor Mulchandani Vs. Assistant Secretary to the Government of Maharashtra and Others, the Supreme Court, dealing with a case where the list of the smuggled goods has not been supplied to the detenu, held - Where a list of smuggled goods is recovered from a detenu and is relied on in grounds of detention, it is a material document and non-supply of that document to the detenu would render the order of detention void. Until the list was supplied it was not possible for the detenu to make an effective representation against the order of detention to the detaining authority.

38. In Romesh Chandra Mehta Vs. State of West Bengal, , it has been held that the Customs Officer is not a police officer within the meaning of

Section 25 of the Evidence Act. Any statement made under Sections 107 and 108 of the Customs Act by a person against whom an enquiry is

made by a Customs Officer is not a statement made by a person accused of an offence.

39. Bearing the principles evolved in the decisions referred to above, we can now look into the facts of the case. The main grounds on which the

detention order has been passed are -

(1) that in July 1980 the detenu was apprehended with smuggled liquor while he was transporting the same in the car MDT 2833 for which he was

imposed a penalty of Rs. 1,000;

(2) that the detenu is connected with the goods seize from the residence of Samudram on 12-6-1981 as spoken to by number of witnesses and

those goods seized were smuggled goods; and

(3) that the detenu attempted to export biri leaves through the Sri Lanka launches on the night of 11-6-1981/12-6-1981 as spoken to by Maichael

Raj Francis, Mani, Pushparaj and Gurunathan, who were apprehended on the spot at the Sea-shore of Vellapatti.

40. The learned Public Prosecutor fairly stated that he does not effectively press ground No. 1 set out above, since copy of the statement dated

29-7-1980 given by the detenu has not been furnished to him.

41. Mr. P. R. Krishnan, learned counsel appearing for the petitioner, submitted that the statement of the detenu dated 7-7-1981 has been

furnished to him partially and not in full. It is seen from the files that the entire copy of the statement dated 7-7-1981 given by the detenu has been

furnished to him and there is his acknowledgement therefore signed by him. It is admitted by the learned Counsel in his name filed that the grounds

of detention, mahazar dated 12-6-1981, statements of Maichael Raj, Pushparaj, Samudram, Gurunathan, Mani Francis and the detenu and also

the mahazar dated 13-6-1981 have all been furnished to the detenu.

42. Apprehension of some of the associates of the detenu near the sea Shore of Vellapatti was made on 12-6-1981. Among those apprehended,

Gurunathan is a close relation of the detenu himself. He took the Customs Officials of the house of Samudram and in the presence of witnesses, the

Customs Officials recovered 36 numbers of Sanyo Radio Cassette Recorders, 74 numbers of Car Cassette Stereo Players, 90 numbers of Car

Cassette Radio Speakers, all of Japanese origin, and 16.75 metres Polyester pant cloth of foreign origin. All these articles were seized under a

mahazar, copy of which has been given to the detenu. The total value of the seized goods is Rs. 1,31,587.50. In this statement, the detenu has

flatly denied any connection with the goods seized from the residence of Samudram on 12-6-1981. Gurunathan and Samudram from whose house

the contraband goods were seized clearly and cogently given statements to the Customs Officers regarding the connection and involvement of the

detenu in the said smuggled goods. It is clear from the decisions noticed above that the statements made by these witnesses to the Customs

Officers are admissible in evidence and there is absolutely nothing made out from the records to discredit their testimony. Section 107 of the

Customs Act gives power to the Custom Officers to examine persons. Section 108 empowers the Customs Officials to summon persons to give

evidence and produce documents. Thus, the statements given by the witnesses are admissible for the purpose of forming the opinion regarding the

smuggling activities of the detenu. Mr. P. R. Krishnan no doubt submitted that action could have been taken under the Customs Act instead of

invoking the provisions of the COFEPOSA Act. According to the learned counsel, this is a fit case where the authorities ought to have invoked the

provisions of the Customs Act and not the Preventive Detention envisaged under the COFEPOSA Act.

43. Smt. Hemlata Kantilal Shah Vs. State of Maharashtra and another, which we have already seen, has clearly stated that the rule laid down is

that a prosecution or the absence of it is not an absolute bar to an order of preventive detention, the authority may prosecute the offender for an

isolated act or acts of an offence for violation of any criminal law, but if it is satisfied that the offender has a tendency to go on violating such laws,

then there will be no bar for the State to detain him under a Preventive Detention Act in order to disable him to repeat such offences. What is

required is that the detaining authority is to satisfy the Court that it had in mind the question whether prosecution of the offender was possible and

sufficient in the circumstances of the case. In some cases of prosecution it may not be possible to bring home the culprit to book as in case of a

professional bully, a murderer or a dacoit; as witnesses do not come forward to depose against him out of fear, or in case of international

smuggling, it may not be possible to collect all necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender

beyond reasonable doubt.

44. In this case, the State Government apprehended that unless the detenu is detained under the COFEPOSA Act, he will continue to indulge in

such activities. Hence, they detained him u/s 3(i) of the said Act, which is for smuggling goods. Section 2(e) of the said Act defines smuggling :

Smuggling has the same meaning as in clause 39 of Section 2 of the Customs Act, 1962 and all its grammatical variations and cognate expressions

shall be construed accordingly.

Section 2(39) of the Customs Act, 1962 states that "Smuggling" in relation to any goods, means any act or omission which will render such goods

liable to confiscation u/s 111 or Section 113".

Section 111 of the Customs Act gives the list of goods brought from a place outside India, which shall be liable to confiscation Section 113 of the

Customs Act deals with such goods which shall be liable to confiscation if an attempt is made to export them. The goods seized from the house of

Samudram in June, 1981, which we have stated in paragraphs supra, will definitely come within the prohibited articles for importation. It is clear

from the facts of the case that the Customs authorities on 12-6-1981 when conducting the Coastal Patrol at Vellapatti at about 4-00 A.M., found

some launches in the sea approaching the shore. They also found movement of certain persons near the shore and on seeing the customs officials

they took to their heels. The customs officials were able to apprehend only Gurunathan, Pushparaj, Maichael Raj, Francis and Mani even though

some of the persons have escaped. All these persons have given statements implicating the detenu herein. According to the officials, Gurunathan,

who had been apprehended among others, is the brother-in-law of the detenu and he has taken the customs official to the house of the Samudram

and from his house the articles we have referred to above were seized. The statements of Gurunathan and Samudram clearly make out that those

articles belonged to the detenu and only on his instructions they were kept at the house of Samudram. No doubt, the detenu has disowned these

articles and knowledge of any such activities on 12-6-1981. Nevertheless, the detenu has stated that the witnesses who have given statements bore no ill-will against him. The statement of the detenu is clear to the effect that he was involved in smuggling activities during 1980 and was apprehended when he was carrying illicit liquor in his car MDT 2833. But, according to the detenu, he has stopped smuggling activities subsequent to the said incident and also because of the fact that Sri Lanka customs and police have tightened their security following a case of robbery in Sri Lanka in March, 1981. Even though the statement given by the detenu during his apprehension on 29-7-1980 has not been furnished to him, after the apprehension of the detenu in the present action, the statements given by the witnesses and the detenu in the present incident have been furnished to him. The mere fact that the detenu has disowned any knowledge as regards the present smuggling referred to above, will be of no help to him because the detaining authorities had before them all the statements implicating the detenu in the recovery of goods in 12/13-6-1981 from the house of Samudram. The statements of Samudram and other persons amply make out the arrangement the detenu had with the foreigner to export beedi leaves for the articles smuggled into this country.

45. In *Smt. Hemlata Kantilal Shah Vs. State of Maharashtra and another*, , which we have referred to in paragraphs supra, it is clearly stated that the possibility of a prosecution or the absence of it is not an absolute bar to an order of preventive detention. The only consideration is that the authority must be satisfied that the offender has a tendency to go in violating such laws and that there are grounds for detaining the detenu. Such detention is made in order to prevent the detenu, from repeating such offences. The said decision is also to the effect that the past conduct or antecedent history of a person can appropriately be taken into account in making the detention order. It is indeed largely from prior events showing tendencies or inclinations of a person that on inference can be drawn whether he is likely in the future to act in a manner prejudicial to the maintenance of supplies and services essential to the community or his act of violation of Foreign Exchange Regulations and his smuggling activities are likely to have deleterious effect on the national economy. The decision makes it clear that it is not for the Court to go into the sufficiency of the

materials for the detention order but it must examine whether all the formalities enjoined by Article 22(5) of the Constitution have been complied with.

46. Mr. P. R. Krishnan, the learned counsel appearing for the detenu contended that all the grounds mentioned by the authorities have not been

established and as such, the authorities could not have formed the subjective satisfaction to detain the detenu herein under the COFEPOSA Act.

According to the learned counsel, the material or vital facts which will influence the mind of the detaining authority one way or the other on the

question whether or not to make the detention order have not been established and as such, the subjective satisfaction alleged to have been arrived

at by the authorities concerned is vitiated. To support this proposition, the learned counsel referred to the decision reported in *Ashadevi v.*

Additional Chief Secretary AIR 1979 SC 477. We have already extracted the said decision in paragraphs supra. We do not think the facts of that

decision will apply to the facts of the present case.

47. Mr. P. R. Krishnan, learned counsel further submitted that all the grounds put forth by the detaining authorities have not been established and

as such, it will vitiate the subjective satisfaction arrived at by the authorities concerned. By Act 52 of 1974 Section 5-A has been introduced in

COFEPOSA Act. It reads as follows :-

5-A. - Where a person has been detained in pursuance of an order of detention under sub-section (1) of Section 3 which has been made on two

or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly -

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

(i) vague;

(ii) non-existent;

(iii) not relevant;

(iv) not connected or not proximately connected with such person; or

(v) invalid for any other reason whatsoever,

and it is not therefore possible to hold that the Government or officer making such order would have been satisfied as provided in sub-section (1)

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

(b) The Government or Officer making the order of detention shall be deemed to have made the order of detention under the said sub-section (1)

after being satisfied as provided in that sub-section with reference to the remaining ground or grounds.

48. In the light of the abovesaid provision in the COFEPOSA Act, we are afraid, we cannot accept the argument of Mr. P. R. Krishnan. There is

a clear ground stated by the authorities concerned wherein it has been alleged that the detenu is connected with the goods seized from the house of

Samudram on 12/13-6-1981 as spoken to by a number of witnesses and these goods seized were smuggled goods. This is an independent ground

and if that is made out, there is enough material for the detaining authority to form its opinion for passing the detention order under the

COFEPOSA Act against the detenu herein. We have carefully looked into the statements made by the witnesses, which according to a catena of

decisions, are admissible in evidence and can be looked into for passing an order of detention and they clearly make out the involvement of the

detenu in smuggling activities. As far as the persons who have given the statements are concerned, the detenu himself has stated that they bore no

ill-will against him.

49. Even apart from the abovesaid clinching material, on which the detaining authority has formed the subjective satisfaction to invoke the

provisions of the COFEPOSA Act, the detenu during the year 1980, according to his own admissions, was involved in smuggling activities. The

conduct of the detenu is absconding for a few days subsequent so the arrest of the witnesses in this case and search made in the house of one

Samudram, strengthens our conclusion as to the reasonableness of the subjective satisfaction arrived at by the detaining authority.

50. Mr. P. R. Krishnan, as doubt, suggested that the statements of the witnesses should have been taken into consideration and that of the detenu

also should not be taken as a piece of evidence against him since even before he was examined, the detenu has obtained anticipatory bail before

the Court of law. The detenu has not furnished the details of any pending investigation or filing of charge sheet against him. The fact remains that the

detenu had the assistance of an advocate inasmuch as he himself has stated that he obtained anticipatory bail before he was examined by the

customs officials. Hence, it is too much for the detenu to suggest that the statement has been obtained by threat and coercion.

51. Apart from all these aspects of the case, we are satisfied that ground No. 2, which we have extracted above, have been amply established and

that there is absolutely no bar for the detaining authority to form the subjective satisfaction on any one of the grounds alleged against the detenu

concerned. The ground alleged is not farce or fanciful and as such, we are of the view that the detaining authority had enough materials to form the

subjective satisfaction. It is not possible for us to get into the sufficiency of the materials as laid down by the decisions rendered by the Supreme

Court.

52. For all these reasons, we do not find any material, legal or factual, to interfere with the detention order passed against the detenu herein.

Accordingly, the Writ Petition is dismissed.