
(1981) 06 MAD CK 0028
In the Madras High Court
Case No : Writ Petition No. 2856 of 1981

Kaiser Otmar

APPELLANT

Vs

The State of Tamil Nadu and 2 Others

RESPONDENT

Date of Decision : 02-06-1981

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1981) 06 MAD CK 0028

Hon'ble Judges : M.N. Moorthy, J; Balasubrahmanyam, J

Bench : Division Bench

Advocate : Mr. K. Rangavajjulu for Petrs, for the Appellant; The Public Prosecutor and Mr. R. Thiagarajan, Senior Central Government Standing Counsel for the Respts., for the Respondent

Judgement

Balasubrahmanyam, J.—This is a petition for the issue of a writ of habeas corpus. The petitioner is an Austrian national aged about 51 years. He arrived at Madras by Air from Singapore on the 13th January of this year. On 15th and 16th January, a number of smuggled foreign wrist watches and metal watch straps were recovered from unaccompanied baggage belonging to the petitioner in the Air Cargo Complex of the Meenambalckam Airport. On the 17th January, even the personal baggage of the petitioner which had been earlier cleared by the Customs disclosed on further search a few more contraband watches as well as a duplicate passport. The Preventive Officers of the Customs Department had taken signed statements from the petitioner on the 16th and 17th January about the circumstances in which the baggages containing the smuggled watches and watch straps were dispatched from Singapore to India by Air. On the 18th January, at the instance of a Preventive Officer of the Customs, the Chief Metropolitan Magistrate remanded the petitioner to judicial custody in the Central Prison, Madras. On the 31st January while the petitioner was still under remand in the Central Prison, the State Government ordered his preventive detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (hereinafter referred to by its popular name as the COFEPOSA

Act). The petitioner made representations against the order of detention to the Advisory Board but without success. He has now filed this petition under Art. 226 of the Constitution of India, for a writ of habeas corpus against the State Government, which is the detaining authority, the Collector of Customs, whose Department was instrumental in placing the materials before the State Government leading to his preventive detention and also the Superintendent of Central Jail, Madras, which is presently executing the detention order. The petitioner's contention is that the detention by the State Government is illegal and he must be set at liberty.

2. The order of detention was passed under S. 3 (1) of the COFEPOSA Act. The order states that the petitioner was being detained, because the State Government was Satisfied that it was necessary to detain him with a view to preventing him from smuggling good, and from engaging himself in keeping or concealing smuggled goods-

3. The COFBPOSA Act is avowedly intended to provide for preventive detention in two kinds of cases: (1) To prevent any person from acting prejudicially in the matter of conservation or augmentation of foreign exchange, and (2) prevention of smuggling activities. In the present case, the order of detention was passed not for preventing the petitioner from (sic) smuggling goods and from being engaged in ke ping or concealing smuggled goods. Cls. (i) and (ii) of S i (I) of the Act provides in express terms for preventive detention of individuals in such cases. Under the Act, an order of preventive detention can be passed by the State Government or other detaining authority both against Indian citizens and against foreigners, if other requirements of section are present. S. (3) of the Act indicates that grounds must exist in order to enable the detaining authority to pass the order of detention. For, under this provision, it is incumbent on the detaining authority to deliver a copy of the grounds to the individual detained within five days of the making of the order. However, despite the statutory requirement that grounds must exist to justify a detention order, it is now accented on all hands that the decision to order preventive detention is entirely within the subjective satisfaction of the detaining authority. The implication of this position, in law, is that where grounds for detention exist and the detaining authority states that it is satisfied that the individual in question has to be detained to prevent him from being engaged in one or the other of the apprehended acts or conduct, then the satisfaction entered by the authority concerned cannot be reviewed by the superior courts of the land on the score merely that upon the grounds stated, the decision ought not to have been arrived at. It has, however, been held by the Supreme Court that although the court cannot entertain any review of the merits of a detention order, yet it is permissible for the court to look into the record and satisfy itself that the detaining authority was posted with all relevant facts vital to the entering of the satisfaction of the detaining authority.

4, Mr. Rangavajjula, learned Counsel for the petitioner, addressed his

submissions before this Court only from the above premises. He said that he was not canvassing the correctness or advisability of the decision of the State Government. Nor did he urge us to apply our independent minds to the materials in the case to test the correctness or validity of the State Government's satisfaction as to the necessity for the detention of the petitioner. All that he urged was that this Court should examine the grounds disclosed by that State Government to the petitioner with a view to finding out whether all the facts which had a vital bearing on the question as to whether the petitioner is to be detained or not were in fact made available or were adverted to by the State Government before it passed its order of detention.

5. The central theme of Mr. Rangavajjula's argument, in this connection, was that a very important fact bearing on the petitioner's case was withheld from the State Government either by accident or by design (sic) and it had an intimate connection with, or a bearing on, the other facts, which the State Government had taken into consideration and on the exclusives basis of which it had come to a satisfaction. The fact which, according to learned counsel, was not properly posted before the State Government was that the petitioner was under arrest by the preventive Officers of the Customs Department on the evening of 15th January and thenceforward he was under their custody continually till 4 p.m. on the 18th January when he was produced before the Chief Metropolitan Magistrate and remanded to judicial custody. According to learned counsel, the arrest of petitioner and his subsequent custody with the Customs Department without being produced before the Magistrate for more than 70 hours constituted an illegal detention. Learned counsel pointed out that it was during this period of time that sworn statements were taken from the petitioner and the contents of the sworn statements were the main basis on which the State Government subsequently passed the detention order. Learned counsel further submitted that the statements taken by the Customs Officials from the petitioner during this prolonged period of illegal custody were by no means voluntary. The State Government was not made aware of the peculiar circumstances in which these statements were obtained from the petitioner,

6. Learned counsel further pointed out that subsequent to his remand by the Chief Metropolitan Magistrate under judicial custody on the evening of the 18th January, the petitioner had written a letter in his own hand addressed to the Collector of Customs retracting the previous three statements taken from him by the Customs Officials on the 16th and 17th January. This retracted statement was made on the 28th January. When the State Government made the detention order on the 31st, it did not advert to the fact that the petitioner had retracted from his so-called confessions of earlier dates. The State Government had no opportunity, therefore, to consider the contents of the earlier statements in the context of the subsequent retraction. This, according to learned counsel, was quite a serious gap in the information made available before the detaining authority.

7. As to the last point raised by Mr. Rangavajjula concerning the retraction statement sent by the petitioner on the 28th January it is stated by the learned Public Prosecutor that the petitioner's retraction was addressed to the Collector of Customs, who himself did not come to know of it before 31st January. The delay, however, was not due to the postal department. In the counter affidavit filed in this Court by the Joint Secretary, Public Department, Government of Tamil Nadu, it is stated that the said petition written on the 28th by the petitioner was forwarded to the Collector of Customs by the Superintendent of Central Prison, Madras only on 2nd February and that being so, it was much too late to be brought to the notice of the detaining authority for being considered. For, by then, the order of detention had already been passed on the 31st January.

8. We realize the sheer chronological impossibility for the detaining authority to have taken into account an important document such as the petitioner's retraction statement, When it had not seen the light of day till the moment of issue of the detention order. But, whose fault was it that no one knew about this statement of retraction no one who mattered ? The counter affidavit of the Joint Secretary makes it clear that the petitioner's letter Had got stuck in the office of the Prison Superintendent for five precious, but wasted days. We dare say that in the ordinary course of postage there was just a chance that the petitioner's communication, dated the 28th would have reached the Collector of Customs. The Superintendent of Central Prison who has been impleaded as the third respondent has not filed any independent counter affidavit in this court in answer to the rule nisi, explaining the circumstances under which a letter written by the petitioner as an under trial, which is his classification under the Prison Manual, on a matter of great importance to him was delayed for five days and not promptly forwarded by the jail authorities to the addressee, namely, the Collector of Customs. We feel that there cannot be any lawful excuse or even pretext for the Superintendent of the Central Prison to have arrested this important communication, for a while on its onward postal journey. Whatever might be the range of discretion of the Prison Superintendent as respects outward correspondence from the jail from convicts doing their term, so far as communications by under trials and detenu's are concerned, he has no role excepting that of an animated post office. This means that he should have dispatched the petitioner's letter of the 28th with the utmost dispatch. It is easy to see the enormity of the damage done to the petitioner's cause by the procrastination of the Superintendent of Central Prison in this case. If the letter of the petitioner had not been locked up in the prison, but had been allowed its passage outside to the Collector of Customs either on the 28th January or at the latest on the 29th, the Customs officials would have had a chance of placing this letter on file as part of the record on the basis of which the State Government might have exercised its personal satisfaction.

9. The principal complaint voiced by the petitioner in his letter, d. 28th January was that his earlier statements to the Customs Officials were forcibly taken and were not voluntary. In the counter affidavit sworn to by the Joint Secretary,

Public Department, Government of Tamil Nadu, it is asserted that even on a perusal of the text of the earlier confessional statements, the State Government had reason to believe that these statements had been rendered voluntarily and without compulsion of any sort. The question however, is not whether the detaining authority could, on the materials, come to a particular conclusion or not. The question is whether all the information worthy of being considered had a chance of freely flowing into the counsels of the State Government before the decision to order preventive detention was taken. It may be that even after perusing the retraction the detaining authority might still have felt convinced that the earlier confessions were true and the retraction was an afterthought and of no consequence. The whole point of the petitioner's complaint before us is that the retraction was not placed before the detaining authority sufficiently in time to enable the detaining authority to evaluate the weight of such retraction. It is in this context that we find no words too harsh to condemn the indifference which punctuated the handling by the jail authorities of the petitioner's mail.

10. Regrettable as the delay caused by the third respondent had been in this regard, we are, however, unable to accept the contention of the petitioner's learned counsel that today we should ourselves take into consideration the retracted statements of the petitioner and proceed to declare the satisfaction of the detaining authority as unjustified. We decline to under take this task. When the law is that we have no jurisdiction to judge the correctness or advisability of the decision of a detaining authority even on the materials which the detaining authority had before it, much less have we the power to declare the decision of that authority as unjustified on the basis of materials which were not before that authority, for some unfortunate reason or other, but which are now being produced before us in these proceedings.

11. There is, however, considerable force in the other argument urged by learned counsel for the petitioner, namely, that the detaining authority was not at all told of the truth or even of the bare facts of the arrest and the illegal detention of the petitioner for more than 70 hours before he was produced before the Magistrate by the Customs Officials. Learned counsel said that he was virtually a prisoner in the customs house and was taken hither and thither by the Preventive Officers. According to learned counsel, the truth relating to this period of the petitioner's custody is an important factor in the context of which the confessional statements deserved to be examined by anyone who was interested in arriving at a proper conclusion and if these facts had been placed before the State Government, whatever might be the ultimate value which the State Government might have attached to these facts it would certainly have taken these matters into consideration.

12. The learned Public Prosecutor submitted that even on the footing that the petitioner had been under illegal custody of the Customs Officials from the night of 15th January till the evening of 18th January, that fact would have had no bearing whatsoever on the evaluation or appreciation by the detaining authority

of the weight to be attached to the confessional statements and other materials. The learned Public Prosecutor pointed out that apart from the confessional statements made by the petitioner the actual discovery and seizure of as many as 374 foreign wrist watches and 373 Metal watch straps of a total value of Rs. 2,68,325 must stare any one in the face, least of all, the detaining authority. The learned Public Prosecutor also pointed out the recovery of a duplicate passport from the interstice of one of the baggages which accompanied the petitioner. The learned Public Prosecutor accordingly urged that even granting that the custody of the petitioner by the Customs Officials was illegal, the fact that the State Government was oblivious to it could not be a ground now for challenging the order of detention.

13. Mr. Thyagarajan, learned counsel appearing for the Collector of Customs, however, preferred to go farther and deny that there was any illegal detention of the petitioner on the 15th, 16th, 17th, and 18th January. Learned counsel denied that the petitioner was arrested by any of the Customs Officials on the evening of 15th January. On the contrary, he asserted that the petitioner was put under arrest by a Preventive Officer of the Customs only at 11 a.m. on 11th January and within 24 hours of such arrest at 4 p.m. on the very same day he was produced before the Chief Metropolitan Magistrate made an order for judicial custody.

14. We are satisfied that the petitioner was placed under arrest by one or other of the Preventive Officers of the Customs Department, Madras, on the night of the 15th January. The imputation to the contrary found in the counter affidavits filed in this case both by the Joint Secretary, Public Department, Government of Tamil Nadu and by the Assistant Collector of Customs is based on a misconception of what an arrest is under the law. Our legal system does not require that an arrest should be attended with any ritual or even that it should be ostentatious. It is not necessary that a man in order to get arrested should be taken prisoner; nor does the law regard as arrest only the ceremonial of handcuff or manacle. An authority is said to arrest another man if it prevents the latter from willing his movements and moving according to his will. Under enlightened modern conditions it seldom becomes necessary for any police officer or other authority empowered to make arrests to actually seize or even touch a person's body with a view to his restraint. Utterance of a guttural word or sound, a gesture of the index finger or hand, the sway of the head or even the flicker of an eye are enough to convey the meaning to the person concerned that he has lost his liberty. In the present case, it is not denied but is admitted in paragraph after paragraph of the counter affidavit sworn to by the Assistant Collector of Customs that the petitioner was taken from place to place. It is not suggested that the petitioner was taken from one part of the city to another by friend, philosopher or guide. Although the description in the affidavit is couched in indirect speech, it is quite clear that when the petitioner was said to be "taken" he was taken by the Customs Officials and by nobody else. Two counter affidavits in this regard have been filed by the Assistant Collector of Customs. The second affidavit was filed after we remarked that the earlier one was devoid of

particulars. Both the affidavits make it clear that the petitioner was "taken", that is, taken into custody, immediately after a haul was made of smuggled watches. That was at 615 p.m. on the 15th January, and the venue was the Air Cargo complex at the Meenambakkam Airport. The petitioner was thence taken to his hotel room downtown. At about 7.45 p.m. on the 15th, the hotel room was searched by the Customs Officials till 9.45 p.m. where after the detainee was "taken" by the Customs Officials along with his baggage for investigation to the Custom House. He was interrogated at the Custom House till 10.30 p.m. on the 15th. It is admitted that the petitioner spent his night in the Custom House quarters on the 15th. The next morning, a confessional statement was taken from him by a Customs Officer. The petitioner was taken to the Air Cargo Complex in the afternoon and two more items of unaccompanied baggage were examined in his presence, and the contents confiscated. The Customs Officials then took him back to the Custom House at 8.30 p.m. At the Custom House, again another statement was taken from him at Custom House. He was in the Custom House during that night. On the next morning i.e., on 17th January while he was still staying in the Custom House, his personal baggage which he brought along with him was searched in the premises of the Custom House. On the night of the 17th January which was the third successive night, he remained in the Custom House and was produced before the Magistrate by the Customs Official at 4 p.m. on the next day, namely, the 18th.

15. These facts speak for themselves. The record shows that there were as many as three Preventive Officers who were in-charge of the interrogations and of taking the petitioner from place to place. It is now asserted that the petitioner was arrested only at 11 a.m. on the 18th January. According to the records of the Customs Officials, the officer who made the arrest was one Vijayaraj. The records entered the arrest as having been made at 11 a.m. on the 18th. This Officer, Vijayaraj, has not filed any independent affidavit in this Court as to how and in what manner he made the arrest and what was the degree of freedom the petitioner had been enjoying in his company or in the company of his brother officer prior to 11 a.m. on the 18th January. The two other Preventive Officers- Chakrapani and Perumal Iyah, who were concerned with the seizure and confiscation of the goods at the Air Cargo Complex and the search and seizure of articles at the hotel room and who apparently took the petitioner from Airport Terminal to the hotel room and from the hotel room to the Custom House have not filed any affidavits in this Court as to how and in what manner they had been "taking" the petitioner from these places and how it came to pass that, the petitioner spent three nights and three days in the Custom House premises. In the supplemental counter-affidavit filed by the Assistant Collector of Customs, it is asserted that the petitioner preferred to have his lodgings at the Custom House rather than in the hotel room which he had earlier booked for his stay in the city and which he vacated on the night of the 15th after the Customs Officials took charge of him. It is also stated that at 12 midnight on 15th January, the petitioner knocked at the Custom House and expressed his preference for

spending the night in the comforts of the Custom House rather than in any other place in the city. There is a levity in our vernacular speech which sometimes refers to a prisoner as a government guest and the jail as a guest house. But, we rarely mean these appellations as seriously as the Assistant Collector of Customs has portrayed the Custom House in his supplemental counter affidavit. We are unable to swallow the story that the petitioner cleared his personal belongings and vacated a starred hotel of his own accord and at dead of night actually wangled from the Customs authorities a place for rest and sleep in the bosom of the Custom House. It is preposterous to suggest that the petitioner found his situation as a non-paying guest of the Custom House so much to his liking that he did not stir out of the place for nearly three days and nights on end. Irony apart, we have no doubt whatever that the man was arrested immediately after the first box of unaccompanied baggage was opened and contents discovered from its secret chambers on the 15th January itself. For, he was thereafter not a free agent and not only could he not go anywhere he wished, but he was being dogged by the Customs Officials all the while and was completely under their will and their surveillance.

16. It may be observed that it has always been the case of the Customs Authorities that, the watches and other articles and goods which they discovered from the accompanied baggage of the petitioner were smuggled goods which were liable for confiscation since they contrived the Baggage Rules and other provisions of the Customs Act and in fact were confiscated. The watches as well as the rest of the contents of the baggages were confiscated by the officials on the evening of the 15th January. This was the first haul they made. They, then and there, knew or must have reason to suspect that the petitioner might be implicated for an offence punishable under S. 135 of the Customs Act. Under S. 127 of the Customs Act, confiscation of contraband goods shall not prevent prosecution for an offence under S. 135 of the Act. Hence with such evidence as they said they had before them immediately after the opening of the baggage on the night of the 15th if they had not arrested him then and there they would be taking a risk. To say therefore, that not only after the initial haul of the first unaccompanied baggage on the 15th January, but also after the subsequent haul of the two baggages on the 11th and the rummaging of his personal baggage on the 17th till the morning of the 18th, the Customs Officials who had been witness to all these happenings had allowed the petitioner to have free and unfettered movement is to ask us to believe the impossible. It would either mean that they have been grossly negligent of their duties and only by a providential chance that the petitioner was still within reach of the authorities to effect an arrest on 11 a.m. on the 18th or it might be that the petitioner had been under the thrall of the Customs Officials from the moment the first baggages were found to contain contraband. We prefer to put the latter interpretation on the facts and hold that the petitioner was arrested on the 15th and was kept under custody without interruption from that time onwards in the Customs House or wherever he was taken by the Customs Officials till 4 p.m. on the 10th when he was

produced before the Chief Metropolitan Magistrate. There can be no doubt whatever that this period of custody was illegal. Under S. 104 of the Customs Act, a proper officer of the Customs Department, if he is so empowered by the general or special order of the Customs-Collector can arrest a man if he has reason to believe that that person is guilty of an offence punishable under S. 135 of the Act. But, the provision insists that the officer making the arrest shall inform the person arrested of the grounds of his arrest and also that he should take the arrested person before a Magistrate without unnecessary delay. The Constitution is more specific. It lays down in Art.22 (1) that DO person who is arrested shall be detained, in custody without being informed as soon as may be of the grounds for such arrest nor shall be denied the right to consult, and to be defended by, a legal practitioner of his choice. Art.22 (2) lays down that "Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

17. In a way, the nebulous character of the petitioner's detention under the Custom House custody is implicitly admitted in the affidavit of the Assistant Collector of Customs. Even in the counter affidavit filed by the Joint Secretary of the Tamil Nadu Government while asserting that the petitioner was put under arrest by an officer of the Customs Department only on the morning of the 18th January, the Joint Secretary proceeds to say "In fact after recovery of watches and watch straps under a mahazar at the Cargo Complex, he was taken straight to Hotel where he was staying in Room No. 50 and his Room searched Which resulted in the recovery of traveler's cheque, incriminating documents and other items including tool and plywood planks with metal sides. Thereafter he was taken to Customs House for investigation. After completing all investigations the petitioner was actually arrested on 18th January, 1981 and produced before the Chief Metropolitan Magistrate, Madras." The stand taken by the Joint Secretary as well as the Assistant Collector of Customs is that the petitioner was put under arrest only after all investigations were completed. We find no justification for delaying it he production of the petitioner before the Magistrate till after all the investigations are completed. It was the bounden duty of the I Customs officials who had the power to arrest and who did in fact arrest the petitioner in this case to have produced the man before the Magistrate within 24 hours and either I press for his judicial custody or take orders to allow them to have him under their own custody for further investigation. I he Customs Officials did not follow this procedure.

On the contrary, they were a procedural law unto themselves. Having kept the petitioner under their grip the customs officials are now asking this Court to believe that the arrest was made only when they said they made the arrest.

18. The question for our consideration in the present proceedings however, is not

the arrest or the detention of the petitioner by the Customs Officials or even the validity of the judicial custody under orders of the Magistrate, but the subsequent order of detention passed by the State Government on the 31st January. This is because while the judicial custody by the Magistrate was super-imposed on the illegal custody of the Customs Officials the judicial custody itself was superimposed by the order of detention and it is the order of detention which is now challenged before us. Learned counsel for the petitioner submitted that even without the State Government having had the opportunity of studying the petitioner's retraction of his earlier confession, the fact that the confessional statements of the 16th and 17th January were made by the petitioner while he was under illegal custody could have been a matter of high relevance and significance in the appraisal of the facts by the State Government for the purpose of arriving at a decision as to whether the petitioner is to be detained or not. Learned counsel was quite aware that a confession before a Customs Official was not to be equated to that before a police officer. But, he said that there was a difference between a statement made by a person voluntarily on the one hand and the statement made by the same person on the conditions of arrest or conditions approximating an arrest. If this factum of the illegal custody had been placed before the State Government, what use they would have made of that fact and what interpretation they would have derived "there from may be a different question. But, learned counsel submitted that the absence of" any - information as to the petitioners having been in the custody of the Customs Officials and his spending "he nights in the Customs House in detention were material facts the withholding of which either by accident or by design rob the detaining authority of part of important and vital data essential for coming to. a right conclusion one way or the. other.

19. These arguments were met by the learned Public Prosecutor by saying that in the events that happened on the 15th to 19th January, there was scope for argument whether the petitioner was arrested on the 15th and was in the custody of the Customs Officials till 18th and whether that custody amounted to illegal custody. The question therefore, whether the petitioner was under illegal custody of the Customs Officials was not a mere baiter of factual information, but was a matter of legal finding or inference from various facts relating to the petitioner's movements, the searches, the interrogations and the like. According to the learned Public Prosecutor, the court's jurisdiction in a matter of preventive detention under the COFEPOSA Act and other allied enactments is to see whether the basic facts which had a relevance to the case were before the detaining authority and not whether those who provided the facts to the detaining authority desisted from providing the said authority also with relevant inference from those facts. According to the learned Public Prosecutor it is no part of those who purvey information to the detaining authority to also caution the authority against drawing incorrect inference there from. If therefore, the facts were there the task of interpreting those facts and drawing inferences there from is matter which rests entirely with the detaining authority and if the detaining authority

should, in the process, err in the matter of drawing its conclusions from facts that cannot be a matter for interference by this Court.

20. We have considered the legal submissions on both sides with care. They raise a point of some subtlety. On the one hand this Court has undoubtedly a jurisdiction to probe the record and find out if all facts which are worth attention were placed before the detaining authority. On the other it is quite clear that this Court cannot go into the correctness or otherwise of the process of judging or evaluating or interpreting the basic facts. In given cases, it may be quite a matter of nicety to find out if any given factual consideration amounts to a primary fact of whether it is an inference or conclusion on facts. In the present case, we are not sure that the State Government as the detaining authority had all the cards on the table.

They did have the facts relating to discovery of smuggled watches and straps, their confiscation, the discovery of the duplicate passport and the statements attributed to the petitioner. But, we are satisfied that the State Government did not have even the slightest inkling that the statements attributed to the petitioner were made by him while he was under constraint of the Customs Officials. It may be a matter for a trained legal mind to decide whether on the given facts there was or there was no an arrest of a person. But, in the present case there is nothing whatever to indicate that the State Government was appraised of the fact that all the while the petitioner was making statements and was being moved from the Airport to the hotel and from there to the Customs House, he was solely under the charge of the Customs Officials. The grounds of detention do not disclose that the detaining authority was informed that the petitioner was interrogated at the Customs House, that he gave his statements in the Customs House on the 16th and 17th and that he spent three days and nights within the precincts of the Customs House. The order of detention was: served on the petitioner through the Superintendent of Central Prison; so was a copy of the grounds marked to the petitioner through the same official of the Central Prison. But apart from these indications, the grounds of detention drawn up by the detaining authority do not show that it was aware that the petitioner was produced before the Magistrate for judicial custody only on the 18th January even though right from 15th night he never could call his time or his liberty his own.

21. Having regard to the purpose and scheme of the COFEPOSA Act and the important function and good results its provisions are expected to bring about especially in the matter of prevention of anticipated foreign exchange violations and of anticipated smuggling activities, the detaining authority might often be put to the necessity of taking quick decisions on the basis of fast moving factual, situations. Luckily for the State Government in this case they could go about their business; of evaluating facts in order to record their satisfaction without being hustled by the. march of events. This is shown amply by the fact that the memorandum of grounds furnished by the detaining authority -to the petitioner

runs into as many as ten closely typed pages. As we earlier pointed out, the Customs Officials had the petitioner brought under their heel as early as on the 18th January, if not earlier when they had him detained under judicial custody. From the 18th January till the 31st January, the State Government had more than ample time to study the facts, sift them and come to a conclusion of their own. Obviously, the better part, if not the whole part, of the materials bearing on the question of detention had been supplied by the officers of the Customs Department and were properly available before the State Government. But, it also appears from the counter-affidavit filed by the Joint Secretary, Public Department on behalf of the State of Tamil Nadu that the detaining authority had the services of the members of a body described in the counter-affidavit as the "Screening Committee". The reference to the "Screening Committee" occurs in the following sentence in the counter-affidavit filed by the Joint Secretary. "The fact that the petitioner was then in judicial custody upto 31st January, 11*81 was taken note by ail members of the Screening Committee when his name was proposed for a detention under the COFEPOSA Act." At the hearing we asked the learned Public Prosecutor as to what this body called "Screening Committee" was. We heard him say that it was a body consisting of several officers of the Customs Department. The learned Public Prosecutor "however, hastened to add that this Screening Committee was not a statutory body by which we understood him to mean that there were no statutory rules or regulations governing the composition, personnel, the deliberations and the binding nature of the decisions of this body in respect of orders of detention under the COFEPOSA Act. The information by the Public Prosecutor was somewhat intriguing, because it appears from the above passage quoted from the counter-affidavit that this Screening Committee, although it has no existence or locus standi in the eye of the law, Still had a membership all of whom, in the present case, would seem to have played an important in the formation of the opinion by the detaining authority when the question arose as to whether the petitioner should be put under preventive detention or not. A Screening Committee, if it is to be true to its name, is not merely a body which feeds but one which sifts them, appraises them, evaluates them and gives its own opinion all of which would amount to "Screening". It is clear from the counter-affidavit of the Joint Secretary that the role that the members of the Screening Committee played in the deliberation was not to purvey information to the detaining authority but to consider and take note of relevant circumstances when examining the proposal for detention of the petitioner under the COFEPOSA Act. In other words, they were not at the producing end of, information, facts or data, but were at the receiving and the evaluating end of facts, and by all accounts were given a pre-eminent position in the matter of (sic) assessing the effects of facts in the context of decision-making on the question of detention or otherwise.

22. We have searched in vain the COFEPOSA Act for functioning of an opinion-shaping body, such as the Screening Committee that has been referred to in the counter-affidavit as having interposed at least between the facts on the one hand

and the final decision-making on the other. We observe that almost casually we had made a note of this Screening Committee and obtained the paltry details across the bar from the learned Public Prosecutor as to the constitution of this body, its way of functioning and the importance which it had in the counsels of the detaining authority. Mr. Rangavajjula, the petitioner's learned counsel himself did not particularly advert to the presence of this foreign body in the decision-making apparatus of preventive detention. But, there may be a sense in which, and it is a vital sense too, the decision of the State Government as a detaining authority under S. 3 (1) of the COFEPOSA Act might be said to be vitiated for the reason that it had surrendered its prerogative of decision-making under that section to sundry officials who had no statutory locus standi and had preferred to sign their decisions as its own. This is because under S 3 (1) of the Act, the detaining authority must be either the Central Government or the State Government or any officer of the Central Government not below the rank of a Deputy Secretary or any officer of a State Government not below the rank of a joint Secretary. In the present case the detaining authority is the State Government itself and the Joint Secretary had signed the detention order only as one who authenticates the detention order and not as one who had made it. In these circumstances, to be told that the factum of judicial custody of the petitioner upto 31st January, 1981 was taken note of by all members of the Screening Committee when the petitioner's name was proposed for detention is to be told that persons who had no power to make orders under S. 3 (1) of the Act had a terrible hand at making it or had influence in the making of it. In a sense it might be said that what passes as the State Government's Order of detention under S. 3 (1) of the Act is really the order of a number of persons calling themselves a Screening Body who had no statutory existence, and what is more who have no authority under S. 3 (1) of the Act either singly or in combination.

23. As we said however, the petitioner's counsel was content to challenge the order of detention on the more familiar principle that vital facts relating to the illegal custody of the petitioner were not made available and were not adverted to by the detaining authority. We have earlier referred to the information purveyed by the learned Public Prosecutor that amongst the Screening Committee could be found an official or officials of the Customs Department. We were not overcurious to know the names of the officers of the Customs Department who played their part as members of the Screening Committee. The Assistant Collector of Customs who has sworn to affidavits in this case bears the designation of the Assistant Secretary, COFEPOSA. He is also in some of the documents described as "Assistant Secretary, Rummaging and Intelligence". This official had taken the stand in his counter-affidavits that the petitioner was not arrested on the 5th January and he was not in illegal custody of the Customs Officials till the 18th. We have earlier held that this assertion is contrary to facts and is a protective misinterpretation. If this represents the official line of thinking in the Customs Department, then whether this officer or any other officer of the

Customs Department had been* member of the Screening Committee it is more than likely that this interrogation of the facts would have been pressed home before the detaining authority as the proper view of the facts relating to the detention in custody of the petitioner from the 15th to the 18th January. In such a case, the so-called confessional statements taken from the petitioner would as easily have been put forward as accepted as having been made voluntarily and not while the petitioner was under formal custody or duress. Set against the presence of the screening Body and the presence of a member or members of the Customs Department participating in the deliberations of that body and in the absence of any scope for any other view point being put forward as to the facts, there can be no doubt whatever that the detaining authority must have proceeded on the footing that all the statements made were purely voluntary when the petitioner was in a state of utter freedom.

24. The Joint Secretary in his counter-affidavit had stated that even by looking at the mere aspect of the contents of the petitioner's confessional statements it appeared quite clear that those statements were made voluntarily. It might well be that where a statement rendered by an individual contains a wealth of details an inference may be drawn, in the absence of any indications to the contrary that such a statement issued forth from him in a free and easy manner without any extraneous influence or compulsion. But this may not always be the case. In any event when there is evidence that at the time when statements were made or taken from the petitioner he was at the beck and call of the Customs Officials, if not actually bound hand and foot by them, it is a moot question whether by looking at the mere aspect of the contents of the statements it can be said that they were rendered voluntarily. The point which we wish to make is that the detaining authority was not told the full facts about the petitioner's detention and the further facts that the statements were all obtained from him while he was under the custody of the Customs Officials. If these facts had been before the detaining authority and if they had properly taken these facts into account, how those factors would have affected their ultimate decision may be more than what we can say. But, all that we want to emphasize is that the selective omission or non-disclosure of relevant facts relating to the detention of the petitioner in Customs House is a non-disclosure of a material fact and a decision rendered in the absence of such material facts is thereby vitiated in law.

25 That non-disclosure or non attention to a material fact will vitiate in law even the subjective satisfaction of a detaining authority under the COFEPOSA Act is a position which is settled by the decisions of the Supreme Court. It is enough to cite one decision to that Court in *Kanchanlal Maneklal Chokshi Vs. State of Gujarat and Others*, . In the case before the Supreme Court an order of detention under the COFEPOSA Act under S 3(1) (iii) was in question. The order of detention was challenged by the wife of a detainee on the ground that three vital facts which had a material bearing in the case and would have influenced the mind of the detaining authority one way or the other were neither placed before it nor considered by it before it passed the detention order and hence the

detention order was liable to be set aside. The Supreme Court while deciding the point, took the opportunity of re-stating the law on the subject by observing that the subjective satisfaction requisite on the part of the detaining authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order. In that particular case the facts which were regarded as vital and which the detaining authority did not consider for one reason or another, all related to the events which happened prior to his detention and while he was being interrogated by the Customs Officials on suspicion of his being implicated in smuggling activities. Those facts were: (1) during his interrogation the Customs Authorities did not permit consultation with an advocate: (2) the detainee was not produced before the Magistrate by the Customs Authorities despite their assurance to the Advocate that he would be so produced, and (3) that the earlier confessional statements recorded by the customs officials were subsequently retracted.

26. The Supreme Court pointed out that the first two facts had a bearing on the question whether the confessional statements had been extorted under duress from the detainee and the third related to the credibility of the confessional statements which formed the main foundation of the order of detention. The Supreme Court accordingly held that there was non application of the mind on the part of the detaining authority to the most material and vital facts vitiating the satisfaction thereby rendering the detention order invalid and illegal.

27. Mr. Rangavajjula for the petitioner submitted that apart from the principle laid down by the Supreme Court in this decision, the facts found in the judgment rendered their relevance to the present case all the greater. Learned counsel pointed out that one of the contentions put forward on behalf of the detainee in that case was that the detainee was taken under the custody of the Customs Officials on the 13th day of a December but was produced before the magistrate and remanded to judicial custody only on the 15th December rendering the detention in between wholly illegal. Mr. Rangavajjula pointed out that this aspect of the case before the Supreme Court has a striking similarity to the facts of the present case. There can be no doubt that the law laid down and restated by the Supreme Court in this decision is binding on us and we should give effect to the principle of the dictum that wherever vital and material facts are not brought before or considered by the detaining authority, the nondisclosure or non consideration would vitiate the order of detention. We however, do not accept Mr. Rangavajjula's argument that this decision of the Supreme Court is also authority for the point that wherever a detention order under the COFEPOSA Act is preceded by the custody of the detainee by the Customs Officials and that custody is found to be illegal in the sense that the person arrested is not produced before the magistrate within a reasonable time or at the most within 24 hours and if the factum of illegal custody is not brought to the notice of the

detaining authority, that omission or failure should be regarded as vitiating the order of detention. Having read the decision of the Supreme Court carefully we are not satisfied that there was any omission at all in that case before the Supreme Court to place before the detaining authority the facts relating to the custody of the detainee by the Customs Officials, much less any omission on the part of the detaining authority to take note of the fact that such custody was illegal ; nor are we satisfied that the Supreme Court had particularly adverted to this aspect of the case. But, this however does not prevent us from deciding for ourselves on the facts of this particular case whether the non-disclosure of the facts relating to the custody of the petitioner by the Customs Officials does vitiate the order of detention passed by the State Government which is impugned before us. For the reasons which we have earlier mentioned we are satisfied that the order of the State Government is bad in law, because the facts relating to the detention of the petitioner from 6.15 p.m. on the 15th January to 4 p.m. on the 18th January in the Customs House and in other places dominated by the Customs Officials were not placed before the detaining authority, much less adverted to by that Authority before coming to the conclusion one Way or the other on the question of preventive detention of the petitioner. We are further satisfied that there was no possibility or even a fair chance of all material facts being fully and truly placed before the detaining authority, without any gloss, varnish or screening of any kind, considering the interposition of a Screening Committee consisting of the very Customs Officials whose stand has always been that the petitioner has never been under illegal custody.

28. There is yet another consideration bearing on this case. We have earlier mentioned that the order of detention passed by the State Government on the 31st January of this year was superimposed on the judicial custody under which the petitioner was already placed if the Central Prison, Madras, The judicial custody was apparently procured by the officials of the Customs Department at a time when they were presumably contemplating a prosecution under S. 135 of the Customs Act, U962. From the materials on record, it is not " difficult to say that they might have gone the whole hog with those proceedings and sought to obtain a conviction for an offence under S. 135 of the Act on the basis of the materials they air day had in their possession; The order of preventive detention however, is quite a different cup of tea altogether. It is not punitive in nature nor intended to be a prelude to prosecution. It is quite clear from the preamble as well as the long title to the Act as well as the clear and express provisions contained in S3 (I) of the Act that the object and function of an order of detention is to prevent the person against whom the order is being passed from engaging himself in a certain conduct or behavior either in the matter of violation of foreign exchange or in the matter of smuggling. While the object is prevention of future acts and curbing of future tendencies on the part of the individual concerned, it would be difficult, if not impossible, to get direct evidence or proof in all cases as to how any given individual is going to act or refrain from acting hereafter. Future behavior might up to a point be inferred from past patterns of

behavior and past acts or omissions may therefore, be relevant facts from which some kind of an insight can be got at in regard to a man's propensities or future tendencies. It is however, important to realize that past acts of a particular kind may not be an indicia of future tendencies of quite a different kind. In order to support one's belief that an individual is likely to act in a particular way in the future one must at least have evidence of past acts of the same individual in the same way.

29. In the present case the State Government took note of the recovery of watches from the petitioner from his unaccompanied baggage and the discovery of the secret chambers in which those watches had been secreted. The grounds of detention also made pointed, reference at the discovery of a duplicate-passport from his personal baggage. From these existing materials representing proof of facts and events which had already happened, it would have been quite open to the State Government, as the detaining authority, to have arrived at a subjective satisfaction that if the petitioner- were left at large he would continue to indulge in smuggling activities and in keeping and concealing whatever he had managed to smuggle. The preamble to the order of detention clearly stated that the petitioner was being detained because the State government was satisfied as to the necessity of preventing the petitioner from smuggling goods and from being engaged in concealing or keeping the smuggled goods. However, a reference to the grounds of detention shows that the apprehension of the State Government was not that the petitioner was likely to go on indulging in smuggling activities and in concealing smuggled goods hereafter. On the contrary, what was stated in the grounds of detention was that the State Government was convinced that if the petitioner was not detained he would leave the country and thereby escape punishment even under the normal laws of the land- vide paragraph 2 of the grounds of detention. In other words, it seems to be the anxiety and apprehension of the State Government as detaining authority that the petitioner would abscond or escape from custody or jump bail and leave the country somehow in order to escape prosecution and punishment for his earlier contravention of the Baggage Rules in bringing and concealing smuggled goods. The apprehension, in short, is not that the petitioner would repeat and go on repeating his smuggling activities hereafter but that the petitioner would escape punishment for past acts of smuggling.

30. It seems to us that the apprehension voiced by the State Government in paragraph 2 of the grounds of detention has no relevance to the exercise by the State Government of its power of detention in the context of the present case. In the first place the belief of the detaining authority that a person who is apprehended in connection with an alleged offence at smuggling is likely to escape the arm of the law and stultify prosecution or conviction and sentence for that offence cannot amount to a belief that the individual would repeat his smuggling act. It is admitted by the Joint Secretary, Public Department, Government of Tamil Nadu in his counter-affidavit that the petitioner had not visited India earlier than at present. In this context if the, apprehension of the

State Government were that the petitioner would escape from this country, it would not amount strictly to a belief that he would risk coming to this country once again for indulging in smuggling activities. In other words, the main spring of action for preventive detention is wholly lacking on the very basis of the grounds of detention of the detaining authority. The object is not to prevent future smuggling but to prevent the petitioner from escaping the consequences of the law for a past act of smuggling. This is yet another vice which we have noticed in the present order of detention although this had not been adverted to or stressed by learned counsel for the petitioner. The distinction between preventing future transgressions of the law on the one hand and preventing a culprit from escaping the consequences of legal process for a past transgression of the law, on the other, is a distinction which must be clear even to the novice in criminal law and practice. If a person is apprehended on the basis of having committed an offence and is under judicial custody, he can very well be prevented from escaping the consequences of proceedings to bring him to book under the appropriate criminal law by the simple expedient of refusing to grant him bail. In such a case it is not only unnecessary, but quite outside the scope of the COFEPOSA Act to clamp down on him an order of preventive detention superimposed on the judicial custody which he is already undergoing. This line of thinking finds support from a decision of the Supreme Court in *Kanchanlal Maneklal Chokshi Vs. State of Gujarat and Others*, .

31. Before parting with this case, we would like to observe that the COFEPOSA Act does not discriminate between a citizen of India and a foreigner. Indeed, S. 3 (1) expressly mentions, in parenthesis, that the Act applies to a foreigner as well. A reminder of this kind is not out of place in the section, considering that the very object of the Act is to prevent the activities of smugglers. Smuggling essentially involves the participation of men, women, and even children, across state frontiers in breach of the law, oftentimes in breach of the laws of more than one country. It is not surprising, therefore, that in such activities aliens often figure in one role or another along with the natives. It is easy to see that in the very nature of things, transgressions of the law would not be different according to the nationality of the culprit. Hence the COFEPOSA Act as well as the Customs Act have laid down equal punishment and equal preventive action irrespective of whether the person involved is a citizen of India or an alien. By the same token we believe that a foreigner is entitled to the same protection of the laws as a local citizen, against unjust detention. Under private international law, which was being observed generally before the Universal Declaration of Human Rights in 1948, an alien was thought to be entitled to treatment according to accepted standards of civilization, even if adoption of those standards would mean that the alien should be accorded a higher standard of treatment than the local citizens. After the Universal Declaration of Human Rights in 1948, all human beings, wherever they populate the universe, are to be dealt with as individuals, first and last. The old dichotomy of nationals and aliens, was to be a thing of the past at least so far as the basic human rights were concerned. Under Art.9 of the Human

Rights Charter, "no one shall be subjected to arbitrary arrest, detention or exile". The substance of this prohibition is reflected in Art. 22 of our Constitution as well. This is yet another reason why this Court is under an obligation to see to it that the law of preventive detention under our COFEPOSA Act is administered not only properly, but fairly and equitably as between citizen and citizen, and citizen and foreigner. And because the Act expressly applies its provisions to both Indian citizens and foreigners alike, the standards on which the executive acts of preventive detention have got to be judged by this Court in individual cases will also have to be identical, and without discrimination. For instance, the Court will not apply less than proper tests to uphold a preventive detention merely because the detained individual might fit the description of an international smuggler, or because there is an apprehension that when once we let him go, it would be difficult to get at him. excepting that it might be through the good-offices of Interpol.

32 These are pragmatic considerations of an extraneous character on which to judge one way or the other a detention order. We have accordingly accorded to this case the kind of inquiry which has the imperative of the Supreme Court and asked the question : "Were material facts missed by the detaining authority while forming its subjective satisfaction AS to the necessity for ordering the preventive detention?" For the reasons we have earlier set out our answer is that in this case the State Government as the detaining authority did miss certain vital facts and considerations; That, in our judgment, has the effect "of vitiating the legality of the detention. We accordingly quash the order of detention of the State Government, dated 31st January, 1981 under S. 3 (1) of the COFEPOSA Act and direct the respondents herein to set the petitioner at liberty.