

(1987) 09 DEL CK 0034

In the Delhi High Court

Case No : Criminal Writ Appeal No. 146 of 1987

Madhu Khanna

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 25-09-1987

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 22(5)

Citation : (1988) CriLJ 1324 : (1987) ILR Delhi 7

Hon'ble Judges : S. Ranganathan, J;P.K. Bahri, J

Bench : Division Bench

Advocate : M.G. Karam Ali, N.C. Chawla, R.M. Bagai and R.P. Lao, for the Appellant;

Judgement

P.K. Bahri, J.

(1) Smt. Madhu Khanna, wife of the detenu Vishwanath Khanna, has filed this petition under Article 226 of the Constitution of India for quashing the detention order passed against Vishwanath Khanna on December 11, 1985 by the Administrator of Union Territory of Delhi u/s 3(1) read with Section 2(f) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA Act") with a view to preventing him from abetting the smuggling of gold and also the declaration dated February 14, 1986 made by Additional Secretary to the Government of India, u/s 9(1) of the Cofeposa Act.

(2) It may be mentioned at this stage that earlier also this very petitioner had filed a writ petition in this Court challenging the said detention orders and same was dismissed on May 30, 1986. The petitioner filed a social leave petition and also criminal writ petition before the Hon'ble Supreme Court which admittedly were dismissed. A review petition was filed in the Supreme Court which was also dismissed and another criminal writ petition was filed in the high court which came to be dismissed on December 19, 1988.

(3) It is the case of the petitioner that the grounds now set up in this writ petition were neither pleaded, urged or agitated in the previous proceedings and thus the present writ petition is competent for challenging the impugned detention orders.

(4) Facts leading to the passing of the said detention order, in brief, are that admittedly the detenu entered into a contract with the Afghan embassy for importing on their behalf certain air conditioners under the import allowed by the Government of India to the Afghan Embassy. Two air conditioners thus were imported by the detenu from Hongkong under the exemption certificates granted by the Government of India in the name of Ashok Kumar of Afghan Embassy and they arrived in India through Lufthansa Flight No. LH-661 under Awb No. 220-2383 0660 dated the 18th May 1985. Shri Satish Antal was an employee of the clearing agent who presented the papers. On suspicion, the said air conditioners were checked in the presence of Vishwanath Khanna, the indenting agent for Ashok Kumar and Satish Antal, the employee of the clearing agent and one of the air conditioners on being opened was found to contain metallic box which was opened and 195 gold biscuits (ten tolas each) were found. Shri Ashok Kumar did not claim the said gold biscuits. A voluntary statement of Ashok Kumar u/s 108 of the Customs Act, 1962, was recorded on May 23, 1985, itself and so also the statements of Satish Antal and of Vishwanath Khanna, detenu. It was found from the statement of Satish Antal that the modus operandi for importing the air conditioners on behalf of Afghan Embassy adopted by the detenu was that air conditioners used to be got cleared through some clearing agent and sometime the air conditioners used to be taken to the premises of the detenu and after some period they used to be taken for delivery to the Afghan Embassy. These facts did show a grave suspicion that the detenu was including in smuggling of gold. It was also alleged against the detenu that on May 28, 1985, another consignment of air conditioners was detected for which also detenu was the indenting agent for Afghan Embassy and 221 gold biscuits of 10 tolas each were recovered from the three air conditioners. On the basis of these facts, the impugned detention order was made and on or about January 23, 1986, the detenu was taken into custody and the order was served on him. Thereafter, Shri M. L. Wadhawan, Additional Secretary to the Govt. of India, has made the declaration on February 14, 1986, u/s 5(1) of the Cofeposa Act for detaining him for a period of two years. In all seven grounds have been pleaded in the writ petition in challenging the detention orders. Elaborate arguments have been addressed before us, particularly in respect of grounds Nos. (vi) & (vii). We will deal with these grounds at first.

(5) It is admitted fact that in respect of the recovery effected on May 28, 1985, the detenu apprehending his arrest had given an application seeking anticipatory bail which was allowed by Shri V. B. Baikal, Additional Sessions Judge vide order dated September 28, 1985. It is pleaded by the petitioner that copy of the application for bail and the order made thereupon, were the vital documents which ought to have been placed for consideration before the detaining authority

and as they were not either placed before the detaining authority or considered by the said authority, the detention order suffers from vice of non-application of mind by the detaining authority to the vital documents. It was pleaded that in case the detaining authority had been apprised of the said facts the detaining authority might not have passed the detention order. It was further pleaded that in respect of the first recovery the detenu had been granted bail and the criminal revision petition was filed by the prosecution challenging the bail order which was dismissed by this Court on August 7, 1985 and the said order of the Court was also not brought to the notice of the detaining authority and thus non-placement of the said vital documents before the detaining authority which could have influenced the mind of the detaining authority in passing the detention order also vitiates the detention order. In the counter filed by the respondents in the shape of affidavit of Shri A. S. Dagar, Deputy Secretary (Home), it was clearly mentioned that the anticipatory bail application and the order passed thereon and the order passed by the Hon'ble High Court dismissing the petition for seeking cancellation of bail were placed before the detaining authority and these were considered by the detaining authority before passing the detention order. We had seen the original file containing the detention order and found that averments made by Shri Dagar in this connection are correct because the copies of the application and the bail order and the order of the High Court were part of the documents which had been placed before the detaining authority which were considered by the detaining authority before passing the impugned order.

(6) It is pertinent to mention that in the counter-affidavit of Shri Dagar it was pleaded as follows :

"IT is also submitted that either bail applications moved by the detenu wherein he had pleaded innocence were also placed before the detaining authority and copies of the same have also been supplied to the detenu."

Proceeding the averment in that very para, reference was made with regard to the anticipatory bail application and the order made thereon and the order of the Hon'ble High Court. It is to be mentioned here that some bail applications had been moved on behalf of the detenu earlier in respect of which reference has been made in the grounds served on the detenu and the copies of the same have been also supplied to the detenu. A list of documents of which copies were supplied to the detenu contained reference to such bail applications at Serial Nos. 26, 30 & 43. It is now clear that the copies of the anticipatory bail application and the order made by Shri V. B. Bansal, Additional Sessions Judge, and the order made by the Hon'ble High Court were not included in the list of documents of which copies were supplied to the detenu. It was submitted on behalf of the detenu that a false averment has been made in the affidavit of Shri Dagar that copies of the said documents have been supplied to the detenu. If we read the averment quoted above, it is true that Shri Dagar had tried to be somewhat vague with regard to the aforesaid documents whether the copies of the same have been actually supplied to the detenu or not because while making

reference to the aforesaid documents having been placed before the detaining authority he did not in that particular sentence mention that copies of the said documents have been supplied to the detenu. He made reference to other bail applications which were also placed before the detaining authority and averred that copies of the same also have been supplied to the detenu. The use of the word "also" in this sentence has prompted the contention on behalf of the detenu that this averment made by Shri Dagar is palpably false and against the record. We are not even shown any receipt of the detenu by virtue of which the copies of the aforesaid documents were supplied to the detenu whereas admittedly copies of the documents contained in the list of documents annexure "C" to the writ petition were supplied to the detenu under his signatures. I here is a mode being followed for supplying copies of the documents to the detenu and the same mode should have been adhered to if some additional copies of documents besides those mentioned in annexure "C" had been supplied to the detenu i.e. some receipt should have been taken from the detenu. There is thus no proof that the above documents were supplied to the detenu nor does Shri Dagar's affidavit categorically say so. It is because of this position of facts and the lacuna in the affidavit of Shri Dagar that Mr. Bagai, who appeared for the Union of India and Mr. Lao, who appeared for the Delhi Administration, advanced arguments treating the matter on the footing that in fact copies of said anticipator bail application, order made thereon and the copy of the order of the Hon'ble High Court dismissing the application seeking cancellation of bail, were not supplied to the detenu. We wish that Shri Dagar had taken some care while drafting the counter affidavit to this writ.

(7) Be that as it may, the grounds urged in sub-paras (vi) & (vii) of main para 11 would not help in challenging the detention order because it has been shown factually that these vital documents were, placed before the detaining authority and thereafter the detaining authority had passed the impugned order of detention. However, Mr. M. G. Karamali on behalf of the petitioner has come up with the contention that the copies of the aforesaid documents having been not supplied to the detenu at any time should lead this Court to quash the detention order. No specific plea was taken in the writ petition on this point. The petition proceeded on the footing that these documents had not been supplied to the detenu because they had not been considered by the retaining authority and could not have known that the, document, would have been placed before the detaining authority and yet not supplied to him. So, we have considered the counsel's plea in depth and we proceed to give our opinion on the same. It is now settled law that Article 22(5) of the Constitution of India requires that the grounds of detentions should be served on the detenu expeditiously and the said constitutional requirement would not be complete unless and until the documents and the material and the basic facts on the basis of which the detention order is made, are supplied to the detenu pari passu the grounds of detention. This is the first facet of the safeguard enshrined in Article 22(5) of the Constitution. The other facet of this Article is that the detenu must be afforded an earliest

opportunity of making a representation against the detention order. It is also settled law that the documents and the material which must be supplied to the detenu. Along with the ground of detention, if not so supplied, would vitiate the detention order. It is not necessary that supply of such documents and material should be demanded by the detenu. The question which has been passed before as is as to what are the old material and the document which constitute the basic facts on which the order of detention is based so that it could be held that non-supply of such documents and material is fatal to the detention order. It is no doubt, argued and rightly so by the Karamali that application for grant of bail and the order made thereupon are vital documents which have to be placed before the detaining authority before the detention order is made because these documents are likely to influence the mind of the detaining authority in arriving at some conclusion either for passing the detention, order or declining the request of the sponsoring authority for passing the detention order in *Anant Sakharan Raut Vs. State of Maharashtra and Another*, . It has been held that in case the detaining authority is not made aware of the bail application and the order made thereon the same would amount to total absence of application of mind and the detention order made in such a case would be void. In *Ram Dass Chauhan Vs. The Administrator, Union Territory of Delhi and others*, the application made by a co-delinquent for grant of anticipatory bail and the order made thereupon were relied upon along with a blank sheet containing some signatures of detenu and a visiting card recovered from the house of co-detenu and of which copies were not supplied to the detenu on demand being made it was held that documents on which reliance had been placed for passing the detention order and in case copies of the said document. on demand being made were not supplied, the detention order would be bad. In *Sita Ram Somani Vs. State of Rajasthan and Others*, , the bail application containing retraction of confessional statement of the detenu was not placed before the detaining authority and it was held that It amounted to non-application of mind vitiating the detention order. In *Kamla Kanyalal Khushalani Vs. State of Maharashtra and another*, , it was held that all the documents and material relied upon in the order of detention form an integral part of the grounds and they must be supplied to the detenu *pan passu* the grounds of detention. (See also *S. Gurdip Singh v. Union of India & Others*, Air 198 Sc 362(5)). In this case, this defect does not exist for, as we have pointed, out above these vital documents were placed before the detaining authority. The question we have to address ourselves to is whether the non-supply of the documents to the detenu even without any demand by him, violates the first facet of Article 22(3). In our view, the answer to this question should be in negative. 7A. It is one thing to say that all material which is relevant with regard to the question whether a particular person should be detained or not must be placed before the detaining authority for its subjective satisfaction, Any material which is likely to influence the mind of the detaining authority on the question posed before him one way or the other has to be placed before the detaining authority. In case any such vital material or document of fact which is likely to influence the mind of the detaining authority

on the conclusion which the detaining authority has to arrive at on his subjective satisfaction is not placed before the detaining authority the detention order would be vitiated as it would amount to non-application of mind. (See *Ashadevi v. K. Shivrai & Another*. AIR 1979 SC 447 and *Mohd. Shakeel Wahid Ahmed Vs. State of Maharashtra and Others*, . However, is it quite a different matter when it comes to framing the grounds for detention because it is only after the detaining authority has considered all the material documents and facts which are relevant and has come to the conclusion on subjective satisfaction that a particular person is to be detained, that the detaining authority has to mention the material facts and documents in the ground of detention. At this stage, the detaining authority has to consider which, out of the vast volume of material placed before him, have influenced his decision to place the detenu under detention. He sets out then the material facts and also refers to or relies upon the documents and material on which he has based his conclusion. It is his duty to supply such material and documents on which the detention order is based to the detenu *pari passu* the grounds of detention. Thus, in our view, there are two stages of the matter. At the first stage the detaining authority has to come to the conclusion based on his subjective satisfaction on all the material facts and documents placed before him and the second stage arises after the detaining authority has arrived at its opinion regarding detention of a particular person. In respect of the first stage, if any vital document or material which is beneficial to the detenu and is relevant to the matter, is not placed before the detaining authority the detention order can be struck down on account of non-application of mind. But where all relevant material and vital documents have been placed before the detaining authority then the second stage comes and at this stage the detaining authority may not consider it necessary to pass the detention order on all the information and documents before him. He may consider it sufficient to refer to or rely upon only some of the material or documents and may not seek the aid of the others in support of his order of detention. He has to go through a process of selection and then formulate the grounds of his satisfaction for passing the detention order. Such grounds would include the material documents on which the conclusion to detain is arrived at. It is only copies of such documents that should be supplied to the detenu even without his demand, as part of the grounds of detention.

(8) It had been argued by the learned counsel for the petitioner vehemently that all those documents and material which are considered by the detaining authority, at the first stage should be deemed to be material and vital documents also when the second stage comes for "framing the grounds of detention. In support of his contention reliance is placed on *Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others*, . It has been held in this judgment that there is no particular charm in the expressions "relied on", "referred to", or "based on", because ultimately all these expressions signify, one thing, namely, that the subjective satisfaction of the detaining authority has best arrived at on the documents mentioned in the grounds of detention. In this judgment the facts

were that copies of the two documents which had been referred in the grounds of detention were not supplied. The High Court on looking up the record had found those two documents to be not vital documents. The Hon''ble Supreme Court, however, held that, as those documents have been relied upon in the grounds of detention, it was not the duty of the High Court to look to the record and come to the conclusion that they were not "the basis for passing the detention order because it was for the detaining authority to determine whether the said documents were basis" for passing the detention order and as the detaining authority had referred to those two documents in the grounds of detention, so they have to be treated as basis for passing the detention order. We do not find this helpful in the present case for two reasons. In that case, the documents were referred to in the grounds. Of course, it is possible that even when some documents are referred to in the grounds of detention, such a reference may still be only a casual reference which did not go into the thought process of the detaining authority (vide *Mst. L.M.S. Ummu Saleema Vs. Shri B.B. Gujaral and Anr,*) but, where a reference is made to some documents in the grounds of detention, the court can normally presume that the detaining authority considered them relevant for the passing of the detention order. It cannot be inferred from this case that all documents which were before the detaining authority should be supplied to the detenu as part of the grounds even though not referred to or relied upon in the grounds. Secondly. on facts also the judgment cited is distinguishable because here we know the nature of the documents. The same by no stretch of reasoning could be termed as forming the basis of passing the detention order. After all. only the documents and material which are inculpatory and incriminating could be considered as the foundation for passing the detention order. There could be .other documents and material which may be necessary to be placed before the detaining authority to enable it to come to a fair conclusion as to whether he should pass or should not pass the detention order. Yet if those documents and material are exculpatory and extenuating and are not incriminating it cannot be said with any rationality that the said documents and material have been relied upon for passing the detention order. The first flung on this aspect of the cause brought to our notice by Mr. Bagai is *Vakil Singh Vs. The State of J. and K. and Another,* in which it was laid down that "he grounds within the contemplation of Section 8(1) of the Maintenance of Internal Security Act, 1971, means material on which the order of detention is primarily based and apart from conclusions of facts : "grounds" have a factual constituent also and they must contain he pith and substance of primary fads but not subsidiary facts of evidential details. The law on the subject was elaborated and explained in *Khudiram Das Vs. The State of West Bengal and Others,* In this judgment, a Bench of four Hon''ble Judges unanimously had considered the matter and .laid down the ratio that Article 22(5) of the Constitution necessitates that all basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to the making of the order of detention must be communicated to the detenu so that the detenu may have an opportunity of making an effective representation against

the order of detention. It was held that it was the duty of the Court to examine as to what are the true basic facts and materials which actually and in fact weighed with the detaining authority in reaching the requisite satisfaction. It was farther laid down that the court can certainly require the detaining authority to produce and make available to the court the entire record of the case which was before it so that the court may in its judicial scrutiny see whether there had been any basic facts and material taken into consideration for passing the order of detention which have not been communicated to the detenu. So it was settled authoritatively in this judgment that the court can call for the record and look: into the record in order, to see as to what are the basic facts and particulars which have been placed before the detaining authority which influenced the detaining authority in passing the detention order. The observations in the case of Kirat Kumar Chamanlal Kundaliya (supra) made on the facts already discussed have to be understood in the context of the other judgments. They point out that much importance should not be attached to words and that one has to see is whether the detaining authority can be said to have found the document in question basis and support for the order of detention. Can it be said that a bail application or an order made thereon be treated as basic facts and particulars which could influence the detaining authority in passing any detention order ? Such documents only could influence the detaining authority in not passing any detention order. In the aforesaid judgment again: it was observed that what does the word "grounds" mean ? Does it mean only the final conclusion reached by the detaining authority on which alone the order of detention can be made or does it include the basic facts and material from which the conclusions justifying the order of detention are drawn by the detaining authority. As pointed out in Khudiram's case (supra) the emphasis is clearly on the basic facts and material which influenced the detaining authority for making the order of detention which are liable to be communicated to the detenu It is so clear from the words used in this judgment to the following effect :

"IT is. Therefore, clear that nothing less than all the basic facts and materials which influenced the detaining authority in making the order of detention must be communicated to the detenu."

If any document can not on the face of it influence the detaining authority in passing the detention order, the same cannot be considered basic fact or material liable to be communicated to the detenu. .

(9) On behalf of the petitioner, reference has been made to certain unreported judgments of this court which we shall now consider. Criminal Writ No. 248/86, Amirali Dattoo Dalla v. Union of India & Others (12), dealt with a point where a report containing incriminating facts was considered by the detaining authority in passing the detention order, yet the copy of the said report was not furnished. Obviously that is not the case here because the bail application or the order made thereon granting anticipatory bail and dismissal of the petition by the High Court against the order granting bail are not the documents which could have

influenced the mind of the detaining authority in passing the detention order. Similarly in Criminal Writ No. 143184, Smt. Manjulaben Mulchand Shah v. Union of India & others (13), there were maternal documents which were not placed before the detaining authority which could have influenced the mind of the detaining authority and thus the order of detention was considered vitiated. That is not the case here. In Criminal Writ No. 179/86, Daya Ram v. Union, of India & Others (14), the application for grant of anticipatory bail and the order made thereon were not placed before the detaining authority resulting in the order of detention being declared invalid by this Court. So this judgment is also distinguishable. It does not go to lay-down, the law that such bail application and the order are the documents of which copies were bound to be supplied Along with grounds of detention. However, there are certain unreported judgments of the Bombay High Court which do support the case of the petitioner. There are Cr. Writ No. 6/87, Abdul Sathar v. State of Maharashtra (15) and Cr. Writ No. 20/87, Mrs. Amina Bai v. Dr. Gopal Singh(16). We find that in none of these judgments any detailed discussion has been made for holding that such exculpatory documents, which are liable to be considered by the detaining authority, are also required to be communicated to the detenu Along with the ground of detention. We may mention that in respect of the documents which are not the foundation for passing the detention order if any demand is made by the detenu for supply of the copies of such documents then the detaining authority, is bound to supply those copies of the documents to enable the detenu to make an effective representation against the detention order. In the present case the detenu. never made any demand for supply of copies of the aforesaid documents at any stage rather even in the writ petition no such grievance has been made that the copies of the said documents were not available with the detenu at any time. No plea was taken at all that copies of the said documents have not been supplied to the detenu. It would mean that in fact copies of said documents must have been available with the detenu at all relevant times that is why he did not make any grievance of the same at any time.

(10) Certain judgments have been cited which only lay down the well established principle of law that any document containing retraction of confessional statement if not placed before the detaining authority would result in vitiating the detention order. There are two opinions on this proposition of law that any material document which is favorable to the detenu if not placed for consideration before the detaining authority the same would be fatal to the detention order which might ultimately be passed.

(11) Mr. Bagai has brought to our notice a judgment of the Andhra Pradesh High Court, Rajesh Kumar v, Govt. of Andhra Pradesh, (1987) 3 APR 56. in which the judgment given in the case. of Kirat Kumar Chan1a.nlal kundaliya (supra) was also considered. Relying: on the judgment given in the case of Khudiram Das (supra) an I the judgment reported as Mst. 1.. Mst. L.M.S. Ummu Saleema Vs. Shri B.B. Gujaral and Anr, and also Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others, , had given the same ratio as

laid down by us above. In the case of Prakash Chandra (supra) it was observed as follows.

"THE concept or "grounds" used in the context of detenu be put in cold storage while considering constitutional provisions for safeguards against misuse of powers by authorities though these constitutional provisions should be strictly construed."

It was further observed :

"THE concept or "grounds" used in the context of detention in Article 22(5) of the Constitution and in subsection (3) of Section 3 of Cofeposa, therefore. has to receive an interpretation which will keep it "meaningfully in tune with a contemporary notions. While the expression "grounds" for that matters includes not only conclusions of fact but also all the "basic facts" on which those conclusions were founded, they are different from subsidiary facts or further particulars or the basic facts"

So, it is clear that it is only the basic facts which are the fountain head of passing of the detention order which are to be communicated and not any subsidiary facts. In the present case the basic facts and the documents which show the recovery of the smuggled gold and the connection of the detenu with. the said recovery. The moving of bail applications and passing of the orders on such bail applications by the detenu are not the basic facts on which the detention order is based. After all it cannot be argued by any sense of rationality that any detaining authority could pass a detention order on such ancillary facts. The ancillary facts and the material and documents which although are liable to be considered by the detaining authority in forming its subjective satisfaction for passing the detention order but which are not incriminating or inculpatory the same are not liable to be communicated to the detenu Along with the grounds. of detention and in case the detenu makes a demand for apply of copies of such documents or communication of such material then the detaining authority is legally bound to supply the same and non-supply of the same may result in vitiating the detention order because then the detenu would be stated to have been prevented from making an effective representation against the detention order. The bail application and the order made thereupon and the order made by the Hon"ble High court rejecting the petition for cancellation of bail are in our opinion such ancillary though material facts which were bound to be considered by the detaining authority and they were in fact considered by the detaining authority before passing the detention order but they were not the documents nor the material on which the retention order is based. Hence, they were not liable to be communicated to the detenu Along with the grounds of detention. We must emphasise that such documents do not go to influence the mind of the detaining authority in passing the detention order. They could go to influence the mind of the detaining authority for considering that no detention order should be made. So, we hold that there is no merit in these two grounds pleaded by the petitioner for quashing the detention order.

(12) Now coming to ground No. (i) it was pleaded that the detaining authority should disclose whether a report u/s 3(2) of the Cofeposa Act has been sent to the Central Government in time i.e. within ten days and whether the same had been considered by the competent authority on behalf of the Central Government in time and if so, when Mr. Bagai has pointed out that this particular ground "was pleaded in the previous writ petition but was not pressed. He has read out the contents of the previous petition in respect of this ground. We find that except the words "as to whether the said report had been considered by the Central Govt. in time" the other argument; in respect of this ground are the same. In the eye of law this is not the way of pleading a particular ground because there is no such allegation made in this ground that the report was not sent in time and was not considered by the competent authority in time. We have gone through the copies of the judgment given by our court in the previous writ petition and also by the Hon"ble Supreme Court in the SLP and the writ petition and we find that no other grounds were urged except those, which had been considered in those judgments. So it is clear that the said ground was given up in the previous proceedings. It is settled that the principle of constructive res judicata does not apply in such criminal writ petitions of habeas corpus (See Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others, and Y. Kumar v. Union of India & Others, 1984 Cri. L.J. 3350. However, in the present case a particular ground was taken in the previous proceedings and was given up. .So, the said ground cannot be reagitated.

(13) In Poonam Lata Vs. M.L. Wadhawan and Another, , it has been made clear that if a point has been pleaded and not urged the same cannot be reagitated. At any rate. a report u/s 3(2) is sent to the Central Government and u/s ii the Central Government has power to revoke any detention order. So obviously such a report is meant for consideration of the Central Government but there is no time limit in which such a report has to be considered by the Central Government. It is true that if any representation is made to the Central Government and the same is not expeditiously dealt with then obviously the detention order could be vitiated on that score. But here no representation was made by the detenu to the Central Government seeking revocation of the detention order at any time. In the counter affidavit filed by Shri C. Rajan, Under Secretary to the Govt. of India, it was mentioned that this particular report was sent on December 12, 1985 and was received by the Central Government on December 16, 1985 and was scrutinised on January IV. 1986 by Shri M. L. Wadhawan, Additional Secretary copy. of the notification, has been filed on the record to show that Shri M, L. Wadhawan has been authorised for considering such a report.

(14) Counsel for the petitioner has vehemently argued that there has taken place a delay of about 24 days in considering the said report after it was received. So, the same is fatal to the detention order Mr. Bagai has pointed out that there were six or seven holidays during those 224 days and such like reports are received from all parts of the country and the officer who has to consider these report is is

also assigned with the work of passing detention orders in preparing the grounds for the same and thus a period of 16-17 days taken by him in scrutinising this particular report is not too much. He has argued that a report u/s 3(2) of the Cofeposa Act cannot be equated with a representation made by the detenu. He has pointed out that representation has to be given top priority and dealt with expeditiously and it has to be shown that no undue delay is caused in considering the representation but that is not the position with regard to a report u/s 3(2) of the Cofeposa Act. He has also pointed out that there is no specific ground made out in the writ petition that a delay has been caused in considering the report. If such a point had been raised the same would have been made by filing a counter affidavit giving out the details as to why it took even 16-17 effective days in considering the said report. We find merit in this contention of Mr. Bagai.

(15) Counsel for the petitioner has relied on *Sabir Ahmed Vs. Union of India (UOI)*, . In the cited case a representation had been made by the detenu to the Central Government but it was not considered for about four months. The Hon'ble Supreme Court while making a reference to Section 3(2) and Section 11 of the Cofeposa Act opined that u/s 11 the Central Government has a power to revoke the detention order and such power may either be exercised on information received u/s 3 from the State Government or it could receive a petition or representation from the detenu. It was held that whether or not the Central Government on such a petition revokes the detention order is a matter of discretion but this discretion is coupled with a duty and that duty is inherent in the very nature of the Jurisdiction. In that context, it was further observed that power u/s 11 is a supervisory power. It is intended to be an additional check or safeguard against the improper exercise of its power of detention by the detaining authority or the State Government and if this statutory safeguard is to retain its meaning and efficacy the Central Government must discharge its supervisory responsibility with constant vigilance and watchful care. It was held that the report received u/s 3 or any communication or petition received from the detenu must be considered with reasonable expedition and what is reasonable expedition is a question dependent on the circumstances of the particular case and no hard and fast rule as to the measure of reasonable time can be laid down. It certainly does not cover delay due to negligence, callous inaction, viable red-tapism and unduly protracted procrastination. It is true that the point in issue before the Hon'ble Supreme Court was not as to whether in what manner the report u/s 3 sent by the State Government is to be considered, the question which arose for decision before the Supreme Court was whether a representation if made by the detenu to Central Government should be given top priority or not. The Hon'ble Supreme Court held that the representation has to be considered with due promptitude and any unexplainable delay in considering such representation is fatal to the detention order. However, in the present case, as already observed by us, there was no unambiguous ground taken by the detenu in challenging the detention order on the score that the report u/s 3 of the Cofeposa Act has been not considered with due expedition by the Central

Government. Hence, the Central Government had no opportunity to meet such a plea now sought to be raised on the basis of the facts disclosed in the affidavit filed on behalf of the Central Government. So, we do not find any merit in this particular ground as well.

(16) Grounds (ii) to (iv) : In the statements of Satish Antal and D. P. Sharma recorded u/s 108 of the Customs Act, reference was made to certain pages of diary maintained by Satish and certain papers bearing Serial numbers 1, 9, 12 to 15, 18 & 22 allegedly given by detenu to D.P. Sharma with which the detenu was confronted while being examined u/s 108 of the Customs Act. It was contended that as these documents have been referred to and relied upon in the grounds of detention and copies of such documents having been not supplied to the detenu, the first facet of the constitutional safeguard that all material documents and facts, should be communicated to the detenu *pan passu* the grounds of detention is not satisfied. Hence, the order of detention is vitiated. We have gone through the statements of Satish Antal and D. P. Sharma and find that these documents and pages of diary were referred to casually in order to show connection of Satish and D. P. Sharma with the detenu regarding his having engaged them as clearing agents. These documents have no bearing on the material facts regarding the recovery of gold biscuits and the involvement of detenu regarding smuggling of the said gold biscuits. Even petitioner admitted that he had imported the said air conditioners on behalf of the Afgan embassy and had appointed the said persons as clearing agents. So, these documents were not intact the basis for making of the detention order. The detention order is not founded on these documents. Thus, for the reasons given by us above while dealing with grounds (vi) & (vii), we hold that non-supply of copies of these documents does not vitiate the detention order.

(17) Mr. Bagai has in the alternative also argued that even if it is to be held that the aforesaid documents were vital documents and copies of the same ought to have been communicated to the detenu Along with the grounds of detention even then the effect of the same would be that one of the grounds of detention regarding the first incident of recovery of smuggling gold could be held to, be invalid but these documents had nothing to do with regard to the second ground of detention regarding the recovery of smuggled gold on May 28, 1985, so the order is invalid in view of Section 5A of the Cofeposa Act. Council for the petitioner, on the other hand, has relied upon Chandra Shekhar Ojha Vs. A.K. Karnik and others, , in which it has been held that Section 5A could come into operation only if the grounds of detention had been communicated in accordance with constitutional safeguard and unless and until the copies of the documents are communicated legally, the first facet of the constitutional safeguard granted by Article 22(5) would not be satisfied and the detention order could not be saved by taking resort to provisions of Section 5A of the Cofeposa Act. However, this judgment has not been followed by our High Court in Cr. Writ No. 75/84, Mohd. Shahid v. Administrator Union Territory of Delhi (25). In the case of Mohd. Shahid it was

clearly held by the Division Bench of the Court that the detention" order can be saved with the help of Section 5A of the Cofeposa Act if some of the grounds of detention are not effected by non-communication of any copies of essential documents while other grounds might be considered vitiated. We have no reason to dissent from the reasoning given in the judgment of Mohd. Shahid (supra) with which we respectfully agree and we hold that the detention order in question would not be vitiated even if it is to be held that the copies of the aforesaid documents were bound to be supplied to the detenu because those documents only pertained to the recovery of gold effected in the first instance and do not have any bearing with regard to the recovery of gold in respect of the second incident.

(18) Ground No. (v) : Last ground pleaded is that the grounds of detention are mechanical reproduction of draft sponsored by the officers in as much as the detenu has been referred in third person in the said grounds of detention instead of being referred as "you". We have perused the grounds of detention and find that the detenu had been, no doubt, referred in third person while narrating the facts but he has been referred as "you" in para 22 onwards which are the paras showing that these particular grounds of detention are meant for the detenu in order to enable him to make any representation against the detention order. So, it is not mechanical reproduction of any proposed grounds of detention by the detaining authority so as to be held! invalid. Counsel for the petitioner has relied upon Jai Singh and Others Vs. State of Jammu and Kashmir, . The facts in the cited case are completely distinguishable because in the cited case the grounds of detention which referred to Jai Singh in the third person did not make it clear that the said grounds were meant for him and in that context the Hon'ble Supreme Court held that it was mechanical reproduction of the police dossier as the detaining authority had only added the word "you" before the name of the detenu at different places. Such is not the case here. Reliance is also placed on Criminal Writ No. 230186, Smt. Veena Kapoor v. M. L. Wadhawan & others (27), which following the judgment given in the case of Jai Singh (supra) held the grounds of detention in this case as mechanical reproduction of the draft of the sponsoring authority. The detention order was completely in third person and did not make it clear that it was Vimal Kapoor who was to file any representation pertaining to the said ground as at nowhere the word "you" had been used in describing the detenu. On facts, the judgment is distinguishable. So, we find" no merit in this particular ground as well.

(19) Mr. Bagai has also vehemently contended that at filing of one criminal writ petition after another is just an abuse of the process of the court even though such a criminal writ petition may not be barred by the principle of constructive res judicata. We need not express our view on this particular point in this case because we have dealt with the ground raised in this petition in detail and have found no merit in the same.

(20) It is true the right of liberty of a citizen is paramount and is not to be trifled

with at the whim of the authority and the safeguards enshrined in Article 22(5) of the Constitution of India have to be given real meaning and strict compliance of the procedure prescribed is to be enforced and any digression on the part of the authority has to be struck down. But all the same the court is not supposed to take any hypertechnical view of the matter and the decision of the court should imbibe the commonsense. and in the present case if the view is to be taken that copy of every document must be supplied to the detenu whatsoever may be nature of the document then in all probabilities it would not be possible for any detaining authority to strictly comply with such procedure in any case whatsoever.

(21) Hence, we discharge the rule and dismiss the writ petition with costs of Rs. 2,000.00 . September 25, 1987.