

(1968) 05 DEL CK 0013
In the Delhi High Court
Case No : Criminal Writ No. 2 of 1968

Mohd. Iqbal

APPELLANT

Vs

Superintendent, Central Jail, Tehar, New Delhi and Others

RESPONDENT

Date of Decision : 17-05-1968

Acts Referred:

Citation : AIR 1969 Delhi 45 : (1969) CriLJ 186 : (1969) ILR Delhi 56 Supp

Hon'ble Judges : T.V.R. Tatachari, J;S.K. Kapur, J;Hardayal Hardy, J

Bench : Full Bench

Advocate : Harjinder Singh and Ravinder Nath, for the Appellant; Bishamber Dayal and V.D. Misra, for the Respondent

Judgement

S.K. Kapur, J. (Concurring)

1. The petitioner, who is a Pakistan national, was arrested by the Customs Authorities on 18th October, 1964, in pursuance of a raid at D-115, defense Colony, New Delhi, u/s 104 of the Customs Act. He was produced before the Additional District Magistrate on 19th October, 1964, and ordered to be released on bail,

2. Regarding the amount of bail there is a controversy between the parties as, according to the petitioner, he was ordered to furnish a bail bond in the sum of Rs. 3,000/- which was subsequently increased to Rs. 5,000/-, but, according to the supplementary affidavit of the respondents, the bail amount was Rs. 20,000/- with one surety which was enhanced by the learned Sessions Judge to Rs. 30,000/- with two sureties. Before the petitioner could be actually released from jail by furnishing bail bond he was served with an order under clause (g) of Sub-section (2) of section 3 of Foreigners Act (31 of 1946). The petitioner challenged the said order by a writ petition filed in the Punjab High Court which was dismissed on 26th November, 1964. The petitioner again challenged his detention by another writ petition (Criminal Writ Petn. No. 48-D of 1965 (Punj)) before the Punjab High Court, but that was also dismissed on May 10, 1968. The

petitioner was also proceeded u/s 5 of the Registration of the Foreigners Act. He pleaded guilty and was sentenced to two months rigorous imprisonment.

On 28th June, 1965, a complaint was filed against the petitioner u/s 182/109, Indian Penal Code, and he was ordered to pay a fine of Rs. 200/- On 19th August, 1965, an order was made against the petitioner under subsection (1) of section 4 of the Foreigners Act when the petitioner was in detention u/s 3(2)(g) of the said Act, inter alia, directing that the detenu shall not be taken out of the jail for any purpose without the previous permission of the Administrator of Delhi. The petitioner then made an application to the Court of the Additional District Magistrate praying that he should be allowed to withdraw the personal bond of Rs. 5,000/- and be remanded to judicial custody.

3. There is another application, dated 31st May, 1965, by the petitioner in the case A. C. Customs v. Mohd. Iqbal, u/s 104/135, Customs Act, 1962, against him, inter alias stating--

"In the above-noted case my personal bond may be cancelled as I do not want to remain on bail any more in the above-mentioned criminal case."

It is alleged by the petitioner that upon his application before the Additional District Magistrate, a regular challan was directed to be put in against the petitioner, as early as early as possible. The petitioner's application for special leave to appeal against the decision of the Punjab High Court in Criminal Writ No. 48-D of 1965 (Punj) and a petition under Article 32 of the Constitution challenging his detention were dismissed by the Supreme Court. From paragraph 9 of the petition it appears that he filed one more SLP against the judgment of the Punjab High Court which was also dismissed on 31st March, 1966, but since nothing turns on those decisions so far as the present case is concerned, it is unnecessary to go into further details thereof.

4. On the petition of the petitioner u/s 561-A of the Criminal Procedure Code in which the petitioner had inter alias prayed for a direction that the challan be filed against him in the criminal case, H. R. Khanna, J. in his order dated January 3, 1966, observed--

"The detention order has been made to enable the Customs Authorities to complete enquiries into the various activities of the petitioner, and Mr. Bishamber Dayal, on behalf of the respondents, states that every effort is being made to expedite the matter. According further to him, the Customs Authority would finalise the matter and file a complaint against the petitioner within about three months."

Khanna J. dismissed the petition with the above observations and a complaint was filed against the petitioner u/s 135 of the Customs Act, S. 23(1)(A) of the Foreign Exchange Regulation Act and section 120B, Indian Penal Code, which is pending and in which there are in all 43 persons accused. It is pertinent to point out that the petitioner made two confessional statements on 18th October, 1964,

and 19th October, 1964, giving detailed version of his activities regarding smuggling of the gold which, according to the petitioner, he was forced to make under coercion. On 30th October, 1967, the petitioner made an application in the Court of Shri H. L. Sikka, Magistrate First Class, praying that he was willing to plead guilty and, Therefore, his case be separated from that of the other accused persons and he be convicted and sentenced according to law. This petition was also signed by the petitioner's counsel, Mr. Harjinder Singh.

There is still another application, Annexure "O" (Cr. Misc. No. 486 of 1967) to the State's supplementary affidavit made by the petitioner in this Court praying that the criminal case against the petitioner be separated from the case of the other accused persons and the Magistrate be directed to record the petitioner's confession. On 8th January, 1968, the order; of detention of the petitioner u/s 3(2)(g) of the Foreigners Act was rescinded and that order along with the impugned order of detention was served on the petitioner on 9th January, 1968, in jail. The impugned order is dated 9th January, 1968, made by the Administrator, Union Territory of Delhi, directing -the detention of the petitioner under clause (b) of Sub-section (1) of S. 3 of the Preventive Detention Act with a view to regulating the petitioner's continued presence in India. The grounds of detention were served on the petitioner on 12th January, 1968, which it is necessary to reproduce--

"1. That, acting on the information that you, under the assumed name Lachman, were receiving and disposing of smuggled gold at your premises, No. D/-115-defense Colony, your premises were searched by Customs officials on 18-10-1964.

2. That, at the time of search, Jasbir Singh, Kartar Singh, Krishan Chand and Ram Chand were found besides you, in that house. Before the identity of Kartar Singh could be established he managed to escape from the premises. The identity of Kishan Chand was established as Mahoob Ali S/o Ali Bux, House No. 686, Bazar Simmian, inside Bhatigate, Lahore (Pakistan). The identity of Earn Chand was established as Akhtar Ishitiaque son of Nazir Hassan, House No. 9-Mustaffa Welfare Town, Habib Ganj, Lahore.

3. That you are an important executive of a powerful gold smuggling syndicate of Lahore engaged in smuggling of gold from Pakistan to India and the transfer of sale proceeds of the smuggled gold in foreign currency out of India. In connection with your smuggling business, you have been coming to India at regular intervals without valid passport documents.

4. That in connection with the smuggling business, you have devised a Code and a key to disguise the messages sent and received in connection with the receipt of contraband gold and with the help of Indians purchased cars with great cavities designed therein.

5. That you were arrested under the Customs Act and granted bail, you were also detained under the provisions of section 3(2)(g) of the Foreigners Act by the

Ministry of Home Affairs, but that order has now been rescinded.

6. That your being at large will be a constant danger to the economy of India by continuing to act as agent to the operation and extending their contacts and activities.

7. That I am satisfied that you are likely to continue to act in furtherance of your aforesaid activities and that it is necessary to regulate your presence in India. With a view, Therefore, to regulate your continued presence in India, I have passed the order of your detention under clause (b) of Sub-section (1) of section 3 of the Preventive Detention Act, 1950 (IV of 1950)."

The petitioner made in representation against his detention and in paragraph 8 (3) thereof he, inter alia, stated that-

"in fact it is not clear to the petitioner, as to what "syndicate" signifies? However, the petitioner has been challaned for smuggling of gold and on account of detention, he is prepared to plead guilty to the charges."

In paragraph 8 (4) he said-

"As regards ground No. 4, it is absolutely wrong and denied."

4A. The learned counsel for the petitioner informs us that before the Advisory Board the petitioner stated that the grounds of detention served on him were vague and the Government expressed willingness to furnish further facts to the petitioner. The Advisory Board, Therefore, adjourned the proceedings and the petitioner was supplied with further facts. In the memorandum signed by the Administrator conveying further facts to the petitioner, it is said-

"I am satisfied that it is against the public interest to disclose to you facts and particulars regarding the quantity of gold smuggled, the names of other members of the gang of which Shri Mohd. Iqbal is an associate, the dates, places and persons whom he contacted, the nature of his activities, the assistances, communications made, persons, agents and means employed or otherwise, other than those which have already been mentioned, as also the details of the cars purchased."

This memorandum is not dated but it was not argued before us that further facts were supplied to the petitioner late in derogation of his right under clause 5 of Article 22 of being given earliest opportunity of making representation. The petitioner's detention was, however, confirmed by the Advisory Board. The further particulars supplied to the petitioner are-

"1. In ground No. 1 the premises D/115, defense Colony, were in occupation of Shri Mhd. Iqbal.

2. In ground No. 2 S/Shri Jasbir Singh, Kartar Singh, Kishan Chand and Ram Chand are the associates of Shri Mohd. Iqbal. It may be mentioned here that Kishan Chand is the alias of Mehboob Ali, and Ram Chand is the alias of Akhtar

Ishitiaque, both of whom are Pakistani nationals.

3. In ground No. 3 the Gold Smuggling Syndicate mentioned therein is headed by one Mohd. Aslam who has an Oil Factory on Multan Road in Lahore. In regard to the coming of Shri Mohd. Iqbal to India at regular intervals without valid passport documents, it may be mentioned that he started coming to India from the end of 1963 onwards.

4. In ground No. 4 the Indians mentioned therein are the same as are mentioned in ground No. 2 and who are the associates of Sh. Mohd. Iqbal." As will appear from this judgment later, we are more concerned with ground Nos. 3 and 4. The said grounds will, when further particulars are incorporated therein, read as under:

"(3) That you are an important executive of a powerful gold smuggling syndicate of Lahore engaged in the smuggling of gold from Pakistan to India and the transfer of sale proceeds of the smuggled gold in foreign currency out of India and the said syndicate is headed by one Mohd. Aslam who has an oil factory at Multan Road in Lahore. In connection with your smuggling business, you have been coming to India at regular intervals without valid passport documents, and you started coming to India from end of 1963 onwards.

(4) That in connection with the smuggling business, you have devised a Code and a key to disguise the messages sent and received in connection with the receipt of contraband gold and with the help of Indians purchased cars with great cavities designed therein. The Indians mentioned above are the same as we mentioned in ground No. 2 and who are associates of Sh. Mohd. Iqbal."

5. Having continuously remained in jail since 18th October, 1964, and having failed in various attempts to secure his release or even his conviction in the case pending u/s 135 of the Customs Act the petitioner filed the present petition challenging the order of detention dated 9th January, 1968, under clause (b) of Sub-section (1) of section 3 of the Preventive Detention Act, The learned counsel for the petitioner vehemently contended that the petitioner was willing to confess his guilt in the pending case and willing to suffer the imprisonment which may extend up to a maximum of five years and fine, but still he was being detained under the Preventive Detention Act, for ulterior motives. This in short is the history of petitioner's struggle to secure his release and now we have been called upon to pronounce upon the validity of the impugned order.

6. The petition came up for hearing before my Lords Hardy and Tatachari, JJ. who by order dated 21st February, 1968, referred it to a larger Bench. The two contentions that persuaded Hardy and Tatachari, JJ. to refer the matter to a larger Bench were-

(1) Whether sections 3 (1) (a) and 3 (1) (b) of the Preventive Detention Act should be read together or independently; and

(2) The prejudicial activities on which the detaining authority purported to base

his satisfaction were more than three years old and too remote in point of time to have any rational connection with the conclusion reached by the authority that the detention of the petitioner was necessary, Subsidiary to the second contention was the contention that the service of the order of detention was not valid as at that time the petitioner was already in jail and, Therefore, incapable of indulging in any prejudicial activities. This is how the matter has come before us.

7. There is difference of opinion between the parties on the question whether the bail order in favor of the petitioner still subsists or not. According to the petitioner it is not, inasmuch as he was arrested by the Customs Authorities before the presentation of the challan u/s 104/135, Customs Act, and a fresh bail was required after the challan had been presented and, in any case, the challan against the petitioner was not only u/s 135 but also u/s 23(1)(A) of the Foreign Exchange Regulation Act and section 120B, Indian Penal Code. According to the supplementary affidavit of the respondents, however, "the bail order still remains in force". Even in ground No. 5 of the grounds of detention it is said "that you were arrested under the Customs Act and granted bail," The petitioner not having placed sufficient materials before us on this aspect, I would proceed on the assumption that the bail order is in force. In the circumstances that obtain in this case it calls for more than ordinary care lest the activities alleged against the petitioner should induce any prejudice against dispassionate scrutiny. Courts recognise and adhere to the principle that where rule of law thrives, fears and suspicions perish. The prison walls in this country are not indices of either arbitrariness or suppression of liberties of persons within our country but of our determination to maintain the rule of law and suppress disorder. There may be errors or overzealousness on the part of the executive but the Courts endeavor to rectify both and maintain the dignity of persons under the protection of our laws. With full consciousness of the fact that constitutionalism has never been more important than today, I proceed to examine the rival contentions of the parties.

8. The high traditions of the Bar as partners in the administration of justice have been amply demonstrated in this case by industry and fairness in the presentation of the case by both the learned counsel. The learned counsel for the petitioner raised the following contentions.

(1) When a person is confined in jail the freedom of his activities is controlled and there cannot be a valid order made u/s 3 of the Preventive Detention Act or served on him when in jail custody.

(2) When a person is detained for specific offence no order under the Preventive Detention Act can validly be passed as it would be circumventing the provisions of the Criminal Procedure Code and denying to the detenu the statutory right of supervision by the Court,

(3) The grounds furnished are vague and indefinite and some of them are

irrelevant and non-existent thereby depriving the petitioner of his constitutional right of effective representation as envisaged by Article 22(5) of the Constitution.

(4) The detention order has been passed for a collateral purpose and is mala fide. The detaining authority appears to have acted mechanically on the advice of the Customs Authorities who want to punish the petitioner for past acts and to extort a confession in pending cases to be used against persons who are standing trial with the petitioner in the criminal case,

(5) The detention of the petitioner has no rational or direct connection with the purpose set out in Section 3 of the Preventive Detention Act and is, Therefore, illegal and outside the scope of the Act Section 3(1) (b) must be read with Section 3 (1) (a) of the Act and in that situation the petitioner could be detained u/s 3 (1) (b) only if the detaining authority was satisfied that it was necessary to prevent him from acting in any manner prejudicial to the various matters set out in Sub-clauses (i), (ii) and (iii) of clause (a) of Section 3. If Section 3 (1) (a) and 3 (1) (b) are read independently. Section 3(1) (b) will be unconstitutional being outside the competence of the Parliament as it would not be a Legislation falling under entry 9 of list 1 of the Seventh Schedule to the Constitution and entry 3 of the Concurrent List in the said Schedule, and

(6) Section 3 (1) (b) is ultra virus the Constitution as it gives unlimited power to the executive to pick and choose any foreigner out of foreigners similarly situate thereby violating Article 14 of the Constitution.

9. As to the first contention, the learned counsel for the petitioner was more emphatic about the illegality in the service of the detention order on the petitioner during his custody than on the making thereof. So far as making of the order is concerned, I do not see how in the circumstances of the present case, it can be seriously objected to. The order u/s 3 (1) (a) is to be made on the subjective satisfaction of the detaining authority. That subjective satisfaction is subject to certain exceptions, not justiciable. The detenu cannot, Therefore, ask the Courts to test the satisfaction of the detaining authority by application of objective tests. That subjective satisfaction is in certain aspects open to judicial review but the area thereof is limited. For instance, the detenu may contend that the grounds supplied to him could not possibly lead a reasonable mind to the conclusion arrived at by the detaining authority. In testing such a contention, the Courts cannot go into the inadequacy of the materials on which satisfaction is founded. The Court can strike down the detention order if

(a) the grounds furnished to the detenu are found to be extraneous or irrelevant In the sense that they are foreign and not germane to the matters which fall to be considered under the relevant statute; or

(b) the grounds furnished are such as deprive the detenu of the constitutional right of making a representation against the order, as guaranteed by Article 22(5) of the Constitution; or

(c) the order is mala fide; or

(d) there is a violation of the constitutional provisions such as supply of all the grounds on which the order of detention has been made; or

(e) there has been a non-application of mind by the detaining authority.

10. In support of the plea that the authority concerned has not applied his mind or the order is mala fide, a detenu can legitimately contend that on the facts on which the detention order has been based, no reasonable mind could have come to the conclusion that detention was necessary. The learned counsel for the petitioner relying on *Rameshwar Shaw Vs. District Magistrate, Burdwan and Another*, said that the past activities which are alleged against the petitioner in the grounds of detention are too remote in point of time and have no rational connection with the conclusion arrived at by the detaining authority that the detention of the petitioner was called for. The learned counsel also said that in this case, like *Rameshwar Shaw Vs. District Magistrate, Burdwan and Another*, the petitioner was an under-trial prisoner confined in jail without any bail order in force and, Therefore, the detention order could neither be made nor served on the petitioner. In *Rameshwar Shaw Vs. District Magistrate, Burdwan and Another*, their Lordships of the Supreme Court said-

"In this connection. It is, however, necessary to bear in mind that the past conduct or antecedent history of the person on which the authority purports to act, should ordinarily be proximate in point of time and should have a rational connection with the conclusion that the detention of the person is necessary. It would, for instance, be irrational to take into account the conduct of the person which took place ten years before the date of his detention and say that even though after the said incident took place nothing is known against the person indicating his tendency to act in a prejudicial manner, even so on the strength of the said incident which is ten years old, the authority is satisfied that his detention is necessary. In other words, where an authority is acting bona fide and considering the question as to whether a person should be detained, he would naturally expect that evidence on which the said conclusion is ultimately going to rest must be evidence of his past conduct or antecedent history which reasonably and rationally justified the conclusion that if the said person is not detained he may indulge in prejudicial activities. We ought to add that it is both inexpedient and undesirable to lay down any inflexible test. The question about the validity of the satisfaction of the authority will have to be considered on the facts of each case."

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"As abstract proposition of law, there may not be any doubt that section 3 (1) (a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail; but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person

in jail. Take for instance, a case where a person has been sentenced to rigorous imprisonment for ten years. It cannot be seriously suggested that soon after the sentence of imprisonment is pronounced on the person, the detaining authority can make an order directing the detention of the said person after he is released from jail at the end of the period of the sentence imposed on him. In dealing with this question, again the considerations of proximity of time will not be irrelevant. On the other hand, if a person who is undergoing imprisonment for a very short period, say for a month or two or so, and it is known that he would soon be released from jail, it may be possible for the authority to consider the antecedent history of the said person and decide whether the detention of the said person would be necessary after he is released from jail, and if the authority is bona fide satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released. The antecedent history and the past conduct on which the order of detention would be based would, in such a case, be proximate in point of time and would have a rational connection with the conclusion drawn by the authority that the detention of the person after his release is necessary."

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It is obvious that before an authority can legitimately come to the conclusion that the detention of the person is necessary to prevent him from acting in a prejudicial manner, the authority has to be satisfied that if the person is not detained, he would act in a prejudicial manner and that inevitably postulates freedom of action to the said person at the relevant time. If a person is already in jail custody, how can it rationally be postulated that if he is not detained, he would act in a prejudicial manner? At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order u/s 3 (1) (a), and this basis is clearly absent in the case of the petitioner."

11. The learned counsel for the petitioner also relied on *Makhan Singh Tarsikka Vs. The State of Punjab*, where the same principle was reiterated by their Lordships of the Supreme Court. Again in *Godavari Shamrao Parulekar Vs. State of Maharashtra and Others*, a similar question arose for consideration. In this case the appellant was detained under Preventive Detention Act and the order of the detaining authority, which had been reported to the Government for approval, was to remain in force for 12 days u/s 3 (3) of the Preventive Detention Act unless, in the meantime, it had been approved, by the State Government. The State Government, however, decided to revoke the order under the Preventive Detention Act and pass an order itself under the defense of India Rules. Their Lordships of the Supreme Court distinguished the two earlier decisions on the ground that in those cases the service of the order of detention

was held to be bad because the detenus there were in jail in one of the two circumstances, namely,--

(a) as an under trial prisoner and the period of his confinement was indeterminate; and

(b) as a convicted person and his sentence had still to run for some length of time.

11-A. Their Lordships of the Supreme Court, Therefore, held those cases to be inapplicable and observed-

"The State Government, however, decided to revoke the order of November 7, 1962 and instead decided to pass an order under the Rules on the same day namely November 10, 1962. In these circumstances it would be in our opinion an empty formality to allow the appellants to go out of jail on the revocation of the order of November 7 and to serve them with the order dated November 10, 1962 as soon as they were out of jail Where the detention is not of two kinds considered in the cases of Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, and Makhan Singh Tarsikka Vs. The State of Punjab, and is either under the Preventive Detention Act or under the Rules, and its duration is dependent upon the will of the State Government, we cannot see any reason for holding that if the State Government decides to revoke an earlier order of detention it cannot pass a fresh order of detention the same day and serve it on the detenu in jail, for the two orders are really of the same nature and are directed towards the same purpose. Further the order of the Commissioner dated November 7, 1962 was subject to the approval of the State Government without which it could only be in force for 12 days. In these circumstances the order passed by the State Government on November 10 under the Rules when it had decided to revoke the order of November 7, 1962, would in our opinion be perfectly valid so far as the time of the making of order was concerned and its service in jail on the persons who were detained not as under-trials or as convicted persons but as detenus, could not be assailed on the ground on which the order of detention was assailed in the cases of Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, and Makhan Singh Tarsikka Vs. The State of Punjab, . The principle of those two cases cannot in our opinion be applied to a case where a fresh order of detention is passed after the cancellation or revocation of an earlier order of detention."

12. These decisions lead me to the conclusion that in the circumstances of the case there was nothing wrong or illegal in the making of the detention order. The petitioner could secure his release on bail and was in fact ordered to be released on bail. He could also be acquitted of the charge at any time. In any of these eventualities it may have been difficult for the detaining authority to collect all the materials, apply its mind, make necessary enquiries necessary "to regulate his continued presence in India". The petitioner is not an Indian national, he is alleged to be an important executive of a gold smuggling syndicate In Lahore

and these and other circumstances could, I am satisfied, lead a reasonable man to the conclusion that an order for detention should be made with a view to regulating his continued presence in India.

13. As to the proximity of time with the alleged activities, the learned counsel for the petitioner contended that the allegations against him as disclosed in the grounds related to the years 1963-64 and were too remote in point of time to lead the detaining authority to the conclusion that it was necessary to detain him. That argument has no merit. As their Lordships of the Supreme Court said in Rameshwar Shaw's case, the validity of the satisfaction of the detaining authority has to be considered on the facts and circumstances of each case. The allegation against the petitioner is that he is still an important executive of a gold smuggling syndicate of Lahore. His confinement in jail from 18th October 1964, will, Therefore, not make much difference as his existing membership of the syndicate etc. would be a factor proximate in point of time to justify the making of an order of detention. Moreover, the nature of the activities alleged are of the type that if they were carried on in 1963-1964 they could not be termed as so remote as to be destructive of the validity of the order. This then takes me to the question whether the order of detention could be served on the petitioner. This matter has two aspects-

(1) As I have said earlier the petitioner has failed to produce any material before us showing that the bail order is not in force. If that order is in force then all that the petitioner has to do is to furnish sureties and secure his release. It cannot then be said that the petitioner is confined to jail for an indeterminate period.

(2) Their Lordships of the Supreme Court were in the decisions mentioned earlier dealing with section 3 (1) (a) where one of the pre-requisites for making an order of detention is the necessity to prevent the detenu from acting in any manner prejudicial to defense of India, security of States and the maintenance of supplies and services etc. It is in the light of this requirement that their Lordships came to the conclusion that it could not be necessary to prevent a person from indulging in any prejudicial activities if he was confined to jail for an indeterminate period. That principle may not apply with that strictness to section 3 (1) (b). Detention u/s 3 (1) (b) is made with a view to regulating the detenu's continued presence in India or with a view to making arrangements for his expulsion from India. The possibility of a foreigner being acquitted or released on bail on any date when taken to Court for being produced before a Magistrate cannot be ignored. It may also be necessary in certain cases to pass an order of detention so that the detenu is not taken out of jail for any purpose. It may be said that if a person is confined in jail for an indeterminate period there can equally be no occasion for regulating his continued presence in India as there could be no occasion for preventing him from acting in any prejudicial manner particularly where detention is, as in this case, on the ground that if the detenu is at large he will be a danger to the economy of India, yet the fact remains that in case of foreigners the aforementioned factors may not be irrelevant. For the

purposes of this case, however, it is not necessary to pronounce on the second aspect and I rest my decision only on the first point.

14. Coming now to the argument that sections 3 (1) (a) and 3 (1) (b) should be read together, the learned counsel for the petitioner said that the whole of S. 3 deals with preventive detention and is, Therefore, a law made under Entry 9 of List I and Entry, 3 of List Iii of the Seventh Schedule to the Constitution. These entries authorise the legislature to make law for preventive detention for reasons connected with defense, foreign affairs or the security of India; persons subject to such detention (Entry 9) and preventive detentions for reasons connected with the security of a State, the maintenance of public order or the maintenance of supplies and services essential to the community; persons subjected to such detention (Entry 3 of List III), The law made under Entries 9 and 3 must, Therefore, be a law connected with the matters set out in these two entries. Those matters have all been incorporated in Section 3 (1) (a) inasmuch as under that clause a person can be detained only with a view to preventing him from acting in any manner prejudicial to the defense of India, the security of the State and various other matters set out in clause (a). There is no such express limitation in section 3 (1) (b) and if two Sub-sections are read separately, section 3 (1) (b) will authorise detention "with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India" and that detention may be for reasons unconnected with the various matters set out in the aforementioned Entries 9 and 3, such as defense, foreign affairs or security of India.

According to the learned counsel for the petitioner section 3 must, Therefore, be so read as to authorise detention only for reasons mentioned in the said two Entries 9 and 3, and that object can be achieved only by reading sections 3(1) (a) and 3(1) (b) together. The learned counsel for the petitioner further suggested that in case section 3 (1) (b) is read as an independent provision authorising detention even for reasons unconnected with defense, foreign affairs or security of India, the section will fall outside Entries 9 and 3 and, Therefore, outside the legislative competence of the Parliament. The learned counsel for the petitioner, Therefore, wanted us to read section 3 (1) (b) in such a way as to confer authority to detain a person with a view to regulating his continued presence in India for the purpose of preventing him from acting in any manner prejudicial to the various matters set out in clauses (i) to (iii) in section 3 (1) (a). When asked whether he would go to the extent of suggesting that preventive detention u/s 3 (1) (b) "with a view to making arrangements for his expulsion from India" must also be subject to the said limitations and for the purposes set out in clause (a) the learned counsel for the petitioner frankly conceded that that part of section 3 (1) (b) could not be read with section 3 (1) (a). The reason given by the learned counsel was that under latter part of section 3 (1) (b) a person could be detained "for making arrangements for his expulsion from India; and such detention could not in the very nature of things be for preventing him from acting in any prejudicial manner as envisaged by clause (a) section 3 (1).

When driven to that position the learned counsel for the petitioner suggested that the power to detain a person with a view to regulating his presence in India must in any case be held limited by the various purposes in section 3 (1) (a). It is difficult to conceive that the legislature intended that a part of section 3(1)(b) and section 3 (1) (a) should be read together while a part of section 3 (1) (b) be read independently. That apart, the construction suggested on behalf of the petitioner suffers from lack of inherent reasonableness.

The object of the two Sub-sections is separate and distinct, and section 3 (1) (b) authorises detention for "regulating the continued presence of a foreigner in India" or with a view to making arrangements for his expulsion from India. Such detention need not necessarily be with a view to preventing him from carrying on any prejudicial activities, set out in section 3 (1) (a). Whether or not such a power of detention would violate Article 14 is a different question, but, at present I am concerned only with the construction of section 3 (1) (b). In my opinion section 3 (1) (a) and section 3(1) (b), must be read independently and section 3 (1) (b) held to authorise the detention of a foreigner "with a view to regulating his continued presence in India" unfettered by the limitations set out in section 3 (1) (a). Section 3 (1) (a) applies both to Indian nationals as well as foreigners and if the arguments of the learned counsel for the petitioner were right then it would have been unnecessary to enact a special provision in section 3 (1) (b) authorising detention for regulating the presence of a foreigner in India. If detention under both S. 3(1) (a) and section 3 (1) (b) was authorised only for preventing a person from engaging in prejudicial activities expressed in section 3 (1) (a) then the object of the legislature could have been achieved by section 3 (1) (a) alone.

15. Having considered the above aspects, I now proceed to deal with another objection by the learned counsel for the petitioner. He contended that the grounds of detention were extremely vague and the petitioner had been denied his constitutional right of making a representation to the Advisory Board. The learned counsel for the petitioner mainly relied on *Rameshwar Lal Patwari Vs. State of Bihar*, . In that case the petitioner had been detained u/s 3 (1) (a) (iii) of the Preventive Detention Act. The Second and third grounds of detention in that case were-

"(2) His trucks always take to wicked routes to Saithia (West Bengal) and he himself pilots them.

(3) A businessman of Barahiya disclosed that he (Rameshwar Lal Patwari) visited Barahiya on several occasions and purchased gram, gramdal under various names and smuggled them to West Bengal."

15A. Their Lordships held grounds Nos. 2 and 3 to be vague. It is not disputed by the learned counsel for the respondents that if any of the grounds are vague then subject to the respondents' claim of privilege under Article 22(6) of the Constitution and section 7(2) of the Act, the order of detention would be bad.

Article 22(5) requires two things.

(1) furnishing of the grounds; and

(2) affording the detenu earliest opportunity of making representation.

15B. It is now settled by the various decisions of the Supreme Court including *Rameshwar Lal Patwari Vs. State of Bihar*, that if some of the grounds served on the detenu are vague and do not convey proper particulars to enable the detenu to make a representation, the detention would be illegal being violative of the constitutional right of making an effective representation. The learned counsel for the petitioner did not in view of the decision of their Lordships of the Supreme Court in *The State of Bombay Vs. Atma Ram Sridhar Vaidya*, ask us to ignore the additional particulars supplied to the detenu. In *The State of Bombay Vs. Atma Ram Sridhar Vaidya*, Kania, C. J. delivering the majority judgment observed:

"The argument that supplementary grounds cannot be given after the grounds are first given to the detenu, similarly requires a closer examination. The adjective "supplementary" is capable of covering cases of adding new grounds to the original grounds, as also giving particulars of the facts which are already mentioned, or of giving facts in addition to the facts mentioned in the ground to lead to the conclusion of fact contained in the ground originally furnished. It is clear that if by "supplementary grounds" is meant additional grounds, i.e., conclusions of fact required to bring about the satisfaction of the Government, the furnishing of any such additional grounds at a later stage will amount to an infringement of the first mentioned right in Article 22(5) as the grounds for the order of detention must be before the Government before it is satisfied about the necessity for making the order and all such grounds have to be furnished as soon as may be. The other aspects, viz., the second communication (described as supplemental grounds) being only particulars of the facts mentioned or indicated in the ground firstly supplied, or being additional incidents which taken along with the facts mentioned or indicated in the ground already conveyed lead to the same conclusion of the fact, (which is the ground furnished in the first instance) stand on a different footing. These are not new grounds within the meaning of the first part of Article 22(5). Thus, while the first mentioned type of "additional" grounds cannot be given after the grounds are furnished in the first instance, the other types even if furnished after the grounds are furnished as soon as may be, but provided they are furnished so as not to come in conflict with giving the earliest opportunity to the detained person to make a representation, will not be considered an infringement of either of the rights mentioned in Article 22(5) of the Constitution."

16. I, Therefore, proceed to consider the argument about the vagueness of the grounds in the light of the grounds as they originally existed and the further particulars supplied.

17. A person detained without trial has very meagre safeguards and those

safeguards have to be applied by Courts with scrupulous care and circumspection. Violation thereof and particularly of the constitutional right to make a representation must render the detention illegal. The cardinal precept upon which the constitutional safeguards ultimately rest is that the Government should be one of laws and not of men. The Courts have to be watchful against stealthy encroachments on constitutional rights and administer the laws on the hypothesis that rights of persons flow not from the mercy of men but from the mandate of laws though made by men. Grounds 3 and 4 even with the additional particulars appear to me extremely vague, I have already, set out the said two grounds as they would read after incorporating the additional facts.

In ground No. 3, it is said that the detenu had been coming to India at regular intervals without valid passport documents. Except that in the additional facts supplied it is stated that he started coming to India "from the end of 1963 onwards", nothing is stated as to on what dates or when precisely he came to India without valid passport documents. If any dates were set out he may have been able to satisfy the Advisory Board that on those dates he was present in some other country or at some other place. After all, it is to be presumed that the detaining authority took note of those visits to India and then came to the conclusion that it was necessary to detain the petitioner. By the supplementary affidavit, the detaining authority has claimed a privilege under Article 22(6) and it has been stated that it is against public interest to disclose further facts. I will deal with the claim of privilege separately but it does appear that the detaining authority were possessed of certain further facts which have been withheld.

Again, it has not been stated in what foreign currencies were the proceeds transferred. Similarly, ground No. 4 does not give any particulars on the basis of which the detenu could make an effective representation. That appears to be the reason why in his representation the detenu had merely to say that ground No. 4 is absolutely wrong and denied. That hardly meets the requirements of Article 22(5). The detenu was not in a position, having regard to the facts, to make an effective representation. The said two grounds being vague the detenu would be entitled to succeed subject to the State's claim for privilege under Article 22(6),

18. The position with respect to the privilege is that in the original counter-affidavit the State did not claim it. It merely denied the allegation of the petitioner that the grounds were vague and indefinite. In the further affidavit filed by Shri Vinod Kumar, Under Secretary, the State for the first time claimed privilege in the following words:

"That detaining authority has with reference to the petitioner's representation, given to the petitioner further clarifications of the grounds of detention already furnished to him. A copy of the memorandum containing the said clarifications is attached as Annexure "M". The grounds of detention are not vague but are comprehensive and intelligible. The detaining authority is satisfied that it is against public interest to disclose any facts and particulars other than those which have been already furnished to the petitioner, as laid down in S. 7 (2),

Preventive Detention Act"

When I read words "particulars other than those which have been already furnished to the petitioner", I understand them to mean that what is against public interest to disclose are facts beyond the facts or particulars supplied initially and the further particulars supplied to the detenu and contained in Annexure "M". There is no statement in the further affidavit that the appropriate authority took any decision at the time of making the detention order or supplying the grounds to the detenu that disclosure of further particulars was against public interest- The paragraph of the further counter-affidavit suggests to me that the decision in this behalf was taken after supply of further particulars as contained in Annexure "M" and that conclusion flows logically from the statement that "the detaining authority is satisfied that it is against public interest to disclose any facts and particulars other than these which have been already furnished to the petitioner."

The learned counsel for the petitioner contended that the claim of privilege at that stage was vocative of Article 22(6) of the Constitution. Having said that, I am now in a position to decide as to what are the requirements of Article 22(5), as I have said earlier, are two -

(i) the authority making the detention order shall, as soon as may be, communicate to such person the grounds on which the order has been made; and (ii) shall afford him the earliest opportunity of making a representation against the order. Implicit in the requirement to afford the earliest opportunity of making a representation is the requirement to supply particulars and facts on which the detention order has been based. If in a case proper particulars are not furnished, the detaining authority may supply him further particulars and the requirements of Article 22(5) would be met if the further particulars are supplied within such time as not to take away the earliest opportunity of making a representation. It follows logically that supply of further facts is also the requirement of Art. 22(5). Under Clause (6) of Article 22 the detaining authority has been given a privilege to withhold facts the disclosure of which would, in the opinion of such authority, be against public interest.

The contention of the learned counsel for the petitioner was that the decision as to privilege must be taken at the time the grounds are furnished and the further affidavit on behalf of the State showed that that decision was taken when supplementary particulars were given to the petitioner and not at the time of furnishing the grounds. He relied in support of his argument on *Lawrence Joachim Joseph D'souza Vs. The State of Bombay*, . In that case an argument was raised in the High Court that the claim of nondisclosure made in the affidavit of the Under Secretary indicated a decision for non-disclosure by the Under Secretary himself and that too at the tune of filing the affidavit and consequently the claim of privilege was invalid. The High Court did not accept that contention as it felt satisfied that what was stated in the affidavit related to the decision of the detaining authority itself. The learned Judges of the High Court observed-

"There is nothing in the affidavit of Mr. Bambawala to suggest that it is now that the detaining authority is claiming privilege or applying its mind to the question of privilege..... The meaning is clear that at no time it was in public interest to disclose the details referred to in the particular paragraph of the affidavit and there is nothing to suggest that this question was not considered by the detaining authority at the time when the grounds were furnished."

While dealing with this finding of the High Court their Lordships of the Supreme Court said-

"No argument has been addressed to us how this conclusion is incorrect." The question before the Bombay High Court was different. Moreover, before their Lordships of the Supreme Court no argument was addressed to challenge the above-quoted conclusion of the High Court.

19. As I have said earlier, one of the obligations cast under clause (5) of Article 22 on the detaining authority is to afford the detenu the earliest opportunity of making a representation. It is under this head of the diverse mandates of clause (5) that the particulars have to be supplied as in the absence thereof the detenu cannot make an effective representation. Supply of further particulars would also, Therefore, be a requirement of clause (5) of Article 22 and consequently by reason of the overriding nature of Article 22(6) the right to claim privilege will extend as much at the time of supplying further particulars as at the time of the initial stage. If in a case where proper particulars are not supplied, the detaining authority can, subject to the requirement of "the earliest opportunity of making a representation", supply further particulars without violating clause (5) of Article 22 then I see no reason why the detaining authority cannot at the time of supplying further particulars say that having regard to the public interest "I can go thus far and no further". That would be so because by virtue of clause (6) of Article 22 nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose". In short the right of non-disclosure will overlie the mandates of Article 22(5) as to supply of the particulars in the grounds of detention and at a subsequent stage.

20. The question then arises as to the point of time at which the detaining authority must apply its mind about the privilege. If the authority is not giving proper particulars in the grounds supplied to the detenu it must make up its mind at that time and record an order in that behalf. In case that is not done then the authority may soon thereafter decide on its own to supply further facts and may do so within proper time in which case no question of privilege will arise or the detenu may ask for further facts. In both the cases the authority when supplying further facts may say "it is not in the public interest to supply facts beyond the further facts supplied" and the decision taken will still be within the protection of Article 22(6). That will be so because supply of further facts will be curing the original defect of the grounds being vague and such supply of further facts can still be confined within the limits prescribed by Article 22(6).

In such an event the claim for privilege will be about facts beyond the further facts disclosed to the detenu. What will happen if the original grounds are vague, no decision to claim privilege is taken and recorded, no further facts are supplied and say three weeks later the authority records an order that facts were omitted in grounds on account of public interest. Then the claim of privilege may be bad on the ground that the authority did not direct its mind to the question of privilege when incorporating facts in the grounds and withheld such facts without proper application of mind with the result that earliest opportunity of making representation was denied without the detaining authority directing its attention for three weeks as to whether any facts were to be withheld and if so which.

On the other hand, if the authority applies its mind to all the facts, comes to the conclusion that an order of detention should be passed, passes the order but communicates vague grounds, the authority can on the next day apply its mind to the facts and take a decision that no further facts should be supplied as the same would not be in public interest or decide to supply some further facts. There may be nothing wrong in that. The heart of the problem always is: has an earliest opportunity of making representation been given to the detenu after proper application of mind?

20A. In this case the claim of privilege is contained not only in the further affidavit but also in the communication conveying further particulars. I may point out that there is no requirement that the decision regarding privilege must be communicated to the detenu. As to the merits of the claim the Court has no power to review the same as Court of appeal and substitute its views for those of the authority. There is nothing to show that the claim was for ulterior reasons. My conclusion, Therefore, is that the claim of privilege is valid. I may, however, point out that withholding the facts on the grounds of public interest is a serious invasion on an individual's liberty and must never be made in the absence of absolutely compelling reasons, The Courts must also scrutinise the claim of privilege with utmost vigilance so that no member of the body politic is deprived of the right of representation without proper justification.

21. As to the question raised in the contention of the learned counsel for the petitioner that a person detained for specific offence cannot be subjected validly to preventive detention, there is no force. As discussed earlier, a person may have been ordered to be released on bail or may be serving a short term sentence and in such circumstances it is not possible to hold that a person can never be preventively detained, the question of mala fides apart. No ground has been shown by the learned counsel for the petitioner to be irrelevant or non-existent and, Therefore, his argument in this behalf cannot be accepted. Similarly, I am not satisfied, in view of the materials before us, that the detaining authority acted mechanically on the advice of the Customs Authorities for the purpose of extracting a confession to be used against other co-accused. I see no reason to disbelieve the affidavits filed on behalf of the State that the detaining authority was satisfied about justification of the detention order.

22. The contention of the learned counsel for the petitioner that the petitioner's detention has no rational or direct connection with the purpose set out in Section 3 of the Preventive Detention Act is founded on his proposition discussed earlier that section 3 (1) (a) and 3(1) (b) must be read together. I have already said that these two clauses of Sub-section (1) of section 3 are to be read Independently and are directed to the achievement of different ends though to be achieved by preventive detention. The purpose of the petitioner's detention is for regulating the petitioner's continued presence in India. If clauses (a) and (b) of Sub-section (1) of section 3 have to be read independently then the limitations expressed in clause (a) cannot be imported in clause (b) and in that situation the argument of the learned counsel for the petitioner loses validity. As to the competence of the Parliament, to enact the said Act under Entries 9 and 3 of Lists I and III of the Seventh Schedule to the Constitution respectively, I am of the opinion that the law is within the competence of the Parliament. A law for preventive detention for the purpose of regulating the detenu's continued presence in India can be justified under the aforementioned entries as it would be a law connected, in any case, with "foreign affairs" under entry 9. A law for preventive detention connected with foreign affairs would be as much under the protection of clause (3) of Article 22 as such law dealing with matters covered under clause (a) of Sub-section (1) of S. 3 of the said Act.

23. That takes me to the last contention of the learned counsel for the petitioner based on Article 14 of the Constitution. The argument was that section 3 (1) (b) of the said Act gives unlimited powers to the Executive to pick and choose any foreigner for being subjected to preventive detention. This clause applies to all foreigners and, in my opinion, there are sufficient guiding principles governing the exercise of power by the Executive. Such a detention is authorised only with a view to regulating the continued presence in India of a foreigner within the meaning of the Foreigners Act, 1946 or with a view to making arrangement for the expulsion of such foreigner from India. The detaining authority has to apply his mind to the facts and is required, as soon as may be but not later than five days from the date of detention, to communicate to him the grounds on which an order has been made. Provision is also made for the earliest opportunity of making a representation against the order to the appropriate Government. In the face of these safeguards, I am unable to accept the argument that clause (b) of Subsection (1) of section 3 of the Act is hit by Article 14.

24. In the result, this petition fails and is dismissed.

Hardayal Hardy, J. (Concurring)

25. I agree.

T.V.R. Tatachari, J. (Concurring)

26. I agree.

GGM/D.V.C.

27. Petition dismissed.