

(1989) 07 DEL CK 0012

In the Delhi High Court

Case No : Criminal Writ Appeal No. 412 of 1988

Mohd. Saleem

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-07-1989

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1)

Citation : AIR 1989 Delhi 340 : (1989) 39 DLT 421 : (1989) 24 ECC 225

Hon'ble Judges : V.B. Bansal, J;M.K. Chawla, J;Charanjit Talwar, J

Bench : Full Bench

Advocate : Harjinder Singh, Rohit Kochhar, R.L.Mehta, Sunil Mehra, Rajender Dutt, Jayant Bhushan, S.Kohli and Reena George, for the Appellant;

Judgement

Charanjit Talwar, J.

(1) The following five questions formulated by a learned Single Judge have been referred to us for decision. 1. "Whether the judgment given in the case of Ibrahim Bachu Bafan Vs. State of Gujarat and Ors, is binding on the point, whether the officer who passes the detention order has the power to revoke the order?" 2. "Whether the judgment given in the case of State of Maharashtra and Another Vs. Sushila Mafatlal Shah and Others, is per incuriam inasmuch as the law laid down in the case of Ibrahim Bachu Bafan (supra) by a larger bench was not taken note of ?" 3. "Where in the grounds of detention the detenu has been given a right to make a representation to the officer, who has passed the detention order, in addition to his right to make a representation to the appropriate Government, still is it incumbent upon the officer concerned not to dispose of the representation made to him at his own level?" 4. "Where the detaining authority had reached the subjective satisfaction keeping in view all relevant material, could the court substitute its own decision?" 5. "Whether no reasonable person could reach subjective satisfaction that the detention order should be passed on the sole ground that passport of the detenu had been seized

when particularly the detenu is at large?"

(2) In the present petition for issuance of writ of habeas corpus the detenu has challenged the order of detention dated the 11th July, 1988 made by a specially empowered officer u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short the Cofeposa Act). It appears from the reference order that during arguments a number of pleas were urged before the learned Single Judge. He has negatived all but two of the contentions. One of those is that the detenu had been effectively prevented from indulging in smuggling activities as he continued to be in judicial custody, not having been granted bail. The further averment in support of this plea was that by virtue of the seizure of his passport, he was unable to smuggle goods. Thus the order made by the detaining authority is without application of mind apart from being punitive in nature. The last two questions, i.e., questions No. 4 and 5 arise out of that argument.

(3) Another contention is based on the fact that the representation made by the detenu seeking revocation of the impugned order was dealt with and decided by the specially empowered officer himself. The plea is that the appropriate Government being the detaining authority was mandatorily obliged to decide the same as per the law enunciated by the Supreme Court in the State of Maharashtra and Another Vs. Sushila Mafatlal Shah and Others, and, Therefore, the detenu had been deprived of his right under Article 22(5) of the Constitution. The first three questions arise out of this argument.

(4) In the opinion of the learned Single Judge, the law laid by the Supreme Court in Ibrahim Bachu Bafan Vs. State of Gujarat and Ors, , which was decided by a division bench comprising three Judges of the Supreme Court, would be binding under Article 141 of the Constitution of India. According to the learned Judge, as per the ratio of this case. the officer who made the order of detention has the inherent power to revoke or modify the said order. Therefore, the decision by another division bench of two judges of the Supreme Court in Sushila Mafatlal Shah's case (supra) that only the appropriate Government and not the empowered officer is to deal with and decide the representation made by the detenu against the order of detention, is per incuriam It is advantageous to quote from the reference order: "The crucial question which arises for decision is whether the officer who had passed the detention order has the power to revoke the said detention order or not? In Ibrahim Bachu Bafan Vs. State of Gujarat and Ors, , a case decided by three Hon"ble Judges of the Supreme Court, this question came up for consideration specifically and after noticing Section 11(1) of the Cofeposa Act wherein the words "without prejudice to the provisions of Section 21 of the General Clauses Act, 1897" have been used to indicate that the power which is available to the officer concerned under the said provision stands preserved, the Supreme Court held that the officer who passes the order has the power to revoke or modify the said order. So, it was clearly laid down that the officer, who passed the detention order by virtue of Section 21 of the General

Clauses Act has the power to revoke the detention order. If that is so, the question which arises for consideration is whether this decision of the Supreme Court delivered by three Hon"ble Judges still holds the field or not?" 4. We have read with the assistance of counsel the two judgments in question. In Ibrahim Bachhu's case, the Supreme Court was dealing with two writ petitions (No. 1541 and 1542 of 1984) wherein the petitioners had challenged separate orders of detention made against them under the Cofeposa Act. The petitioner in writ petition No. 1541 of 1984 in the first instance had been detained with effect from December 28, 1983. He challenged the order before the Gujarat High Court and while the said petition was being heard, the order of detention was revoked on April 5, 1984. However, on the same date, another order u/s 3(1) of the Cofeposa Act was passed directing his detention. The second order of detention was challenged by him in a subsequent writ petition before the High Court. A Division Bench of that court by order dated August 8, 1984 quashed the same by holding that the order of detention was violative of Article 22(5) of the Constitution and directed the petitioner to be set at liberty. Yet again on August 20, 1984 a fresh order was made detaining the petitioner on the same grounds. The said successive order of detention was impugned before the Supreme Court.

(5) The second petitioner (in Writ Petition No. 1542 of 1984) was detained with effect from January 12, 1984 pursuant to the order made u/s 3 of the Cofeposa Act. That order of detention was assailed by the petitioner in the High Court. In the course of hearing of the writ petition, that order was revoked on April 5, 1984 and on the same date another order of detention was passed thus the petitioner continued to be under detention. On April 10, 1984, the detenu filed another petition before the High Court seeking setting aside of the order dated the 5th April, 1984. On August 8, 1984 the High Court quashed that order but on August 20, 1984, a fresh order of detention was made. The challenge before the Supreme Court was to the order dated August 20, 1988. In a nutshell the contention put forth before the Supreme Court was that : "the power conferred u/s 11(2) of the Cofeposa Act is not available to be exercised where there has been no revocation u/s 11(1) of the Act of a previous order of detention, but has been quashed by the High Court in exercise of its extra-ordinary jurisdiction." Mr. Rajinder Dutt, learned counsel for the respondents during arguments before us agreed that the question which the Supreme Court was considering related only to the ambit and scope of Sub-section (2) of Section 11 of the Cofeposa Act. The Supreme Court after noticing the provision of Section 11 and its heading "Revocation of detention orders" accepted the above quoted contention of the counsel for the petitioner and held that :- "The words without prejudice to the provisions of Section 21 of the General Clauses Act, 1897" used in Section 11(1) of the Act give expression to the legislative intention that without affecting that right which the authority making the order enjoys u/s 21 of the General Clauses Act, an order of detention is also available to be revoked or modified by authorities named in clauses (a) and (b) of Section 11(1) of the Act. Power conferred under clauses (a) and (b) of Section 11(1) of the Act could not be

exercised by the named authorities u/s 21 of the General Clauses Act as these authorities on whom such power has been conferred under the Act are different from those who made the order. Therefore, conferment of such power was necessary as Parliament rightly found that Section 21 of the General Clauses Act was not adequate to meet the situation. Thus while not affecting in any manner and expressly preserving the power u/s 21 of the General Clauses Act of the original authority making the order, power to revoke or modify has been conferred on the named authorities." (Italics added)

(6) The Supreme Court negated the contention urged on behalf of the State that the power exercisable under sub-section (2) of Section 11 of the Cofeposa Act to make another order of detention u/s 3 thereof on the same grounds was available even when the earlier order of detention had been quashed by the High Court in exercise of its jurisdiction under Article 226 of the Constitution. Mr. Rajinder Dutt, however, in support of his contention that the specially empowered officer is entitled to revoke the order of detention under sub-Section(1) of Section 11 of the Act relies on an observation made by the Supreme Court in the following passage also wherein the main question fell for consideration. (We have supplied the Italics to highlight the submission of Mr. Dutt) :- "While under the General Clauses Act, the power is exercisable by the authority making the order, the named authorities under clauses (a) and (b) of Section 11(1) of the Act are also entitled to exercise the power of revocation. When the High Court exercises jurisdiction under Article 226 of the Constitution it does not make an order of revocation. By issuing a high prerogative writ like habeas corpus or certiorari it quashes the order impugned before it and by declaring the order to be void and striking down the same it nullifies the order. The ultimate effect of cancellation of an order by revocation and quashing of the same in exercise of the high prerogative jurisdiction vested in the High Court may be the same but the manner in which the situation is obtained is patently different and while one process is covered by S. 11(1) of the Act, the order is not known to the statute and is exercised by an authority beyond the purview of sub-section (1) of Section 11 of the Act. It is, Therefore, our clear opinion that in a situation where the order of detention has been quashed by the High Court, Sub-section (2) of S. 11 is not applicable and the detaining authority is not entitled to make another order under S. 3 of the Act on the same grounds."

(7) We have extensively quoted from the judgment to highlight the issue which had arisen in that case. The question, it is clear to us, was not whether specially empowered officer who made the order u/s 3(1) of the Cofeposa Act was entitled in law to decide the representation of the detenu seeking revocation of the order of detention ? The law laid is that after quashing of the detention order by the High Court, the detaining authority is not entitled to pass another detention order on the same grounds. But as the question whether the officer empowered u/s 3(1) of the Act to make a detention order becomes the detaining authority under the Cofeposa Act did not arise therein, Therefore, it did not fall for consideration. Section 21 of the General Clauses Act has been noticed merely to

analyze the powers preserved under it as u/s 11(1) of the Cofeposa Act, the power exercisable is without prejudice to provision of that Section.

(8) At this stage, we may note that we were informed that in a number of pending petitions, similar questions arise for consideration. Those petitions have been adjourned to await our decision. In some of them Mr. R.L. Mehta is counsel for the petitioners. In all the cases in which Mr. Mehta is appearing, the averment is that the detenus had filed only one representation addressed to the specially empowered officer. In the interests of justice, we permitted Mr. Mehta to address us. It is to be highlighted that in the petition before us the detenu had made a representation to the specially empowered officer as well as to the Central Government. It is admitted that the one made to the Central Government has also been rejected. Thus Mr. Dutt's contention is that the petitioner, on his own showing, has availed of his right to have his representation decided by the appropriate Government. We would advert to this submission later on.

(9) From the reference order, a part of which we have quoted above, it appears that the stand of the respondents before the learned Single Judge was that the Supreme Court in Ibrahim Bachu case (supra) has authoritatively pronounced that the specially empowered officer, who passed the order of detention has also the power to revoke or rescind that order and, Therefore, he is entitled to decide the representation of the detenu seeking revocation of the same. Before us, however, as noticed above, Mr. Dutt has conceded that such a question neither arose in the said case nor decided by the Supreme Court. His plea that by virtue of provision of Section 21 of the General Clauses Act, a specially empowered officer is entitled to decide the representation as he is empowered to revoke the detention order, is thus not based on the law laid in that case. He simply takes support for his contention from some of the observations of the Supreme Court in Ibrahim Bachu Bafan case (supra) (we have underlined those). The counsel's proposition is that the obiter dicta in that case has to be preferred to the dicta in Sushila lafatlal Shah's case (supra) as the later judgment is only by two Hon'ble Judges of the Supreme Court. He insists that the specially empowered officer is the detaining authority under the Cofeposa Act and in that capacity by virtue of provision contained in Section 21 of the General Clauses Act, he is, Therefore, empowered to revoke the order of detention.

(10) The stand taken before us is obviously at variance with the plea that decision in Sushila Maf atalal's case (supra) is per incuriam. In view of the reference, however, we have to notice in detail the law laid in that case by the Supreme Court. The challenge before that Court was to a judgment of the High Court of Bombay holding that a detenu had also a right to make a representation to the specially empowered officer seeking revocation of the detention order. The petition was filed on behalf of Bhadrash Mafatlal Shah, who had been detained on 15th February, 1987 u/s 3(1) of the Cofeposa Act by an order made by a specially empowered officer. The detenu was informed in the grounds of detention that "he had a right to make a representation to the State Government

as also to the Government of India against the order of detention". The grievance before the High Court was that the specially empowered officer had failed to communicate to the detenu that ""he had also a right to make a representation to the detaining authority himself." This plea which was accepted by the High Court was contained in the following ground : "as the order of detention had been passed by D.N. Capoor in his capacity as a person specially empowered by the Government of Maharashtra to issue the order of detention under S. 3(1) of the Cofeposa Act, the detenu had a right to make a representation to him at the first instance and only thereafter to make representation to the State Government or to the Central Government if need be in the grounds of detention the detenu had only been informed that he had a right to make a representation to the State Government Government as also to the of India against the order of detention, but he had not been communicated that he had also a right to make a representation to the detaining authority, ie., D.N. Kapoor himself Failure to notify the detenu of his right to make a representation to the detaining authority violated the constitutional provisions of Art. 22(5) inasmuch as the detenu had been deprived of his right to make a second representation to the State Government in the event of the Detaining Authority D.N. Capoor rejecting his representation."

(11) The High Court held that the constitutional safeguards and imperatives under Article 22(5) of the Constitution had been violated inasmuch as the detenu had been deprived of his right to make a representation to the detaining authority i.e. D N. Capoor himself. The main challenge before the Supreme Court was to this proposition of law formulated by the High Court. One of the arguments advanced by the appellant (the State) was that the theory that a detenu had a right to have his representation considered by the same officer, who had passed the order of detention had been exploded in Smt. Kavita Devidasani Vs. State of Maharashtra and Others, and Smt. Masuma Vs. State of Maharashtra and Another, and, Therefore, the High Court was wrong in holding that the detenu had such a right. It was argued that if the view taken by the High Court was not corrected it would lead to several anomalies and even to the defeasance of the Cofeposa Act itself in certain situations.

(12) On behalf of the respondent (the detenu) the plea before the Supreme Court was the same which is being urged before us by Mr. Dutt. In paragraph 9 of the reported judgment, that argument has been noticed in detail. It is useful to quote that paragraph : "Refuting Dr. Chitle's contentions Mr. U.R. Lalit, learned counsel appearing for the detenu stated that unlike in other Preventive Detention Acts such as the National Security Act, etc. there is no provision in the Cofeposa Act for confirmation by the Government of an order of detention passed by an officer specially empowered under S. 3(1) of the Cofeposa Act and as such the officer issuing an order of detention under the Act constitutes the Detaining Authority of the detenu and hence the Detaining Authority is under an obligation to afford opportunity to the detenu to make a representation to himself in the first instance before the detenu avails of his right to make representation to the

State Government and then to the Central Government. Mr. Lalit relied upon the decisions of this Court in *Santosh Anand v. Union of India*, (1981) 2 SCC 420 and *Smt. Pushpa Vs. Union of India (UOI) and Others*, for sustaining the judgment of the High Court. Yet another argument of Mr. Lalit was that since Art. 22(5) mandates the affording of opportunity at the earliest point of time to the detenu to make his representation, it must be interpretatively construed that the Detaining Authority is under an obligation to inform the detenu and afford him opportunity to make a representation to the very Authority concerned and failure to give such an opportunity would amount to a denial to the detenu of his constitutional rights".

(13) Because of these divergent contentions, the questions which fell for consideration in that case were; - "(1) Does an order passed by the officer of the State Government or the Central Government, specially empowered for the purpose of S. 3(1) by the respective Government, make him the Detaining Authority and not State Government or the Central Government, as the case may be, and obligate him to inform the detenu that he has a three-fold opportunity make his representation i.e. the first to himself and the other two to the State Government. (2) Whether for the purposes of the Act, there is any difference between an order of detention passed by an officer of the State Government or the Central Government, solely in exercise of the powers conferred on him under S. 3 by the respective Government and an order of detention passed by the State Government or the Central Government as the case may be through an officer who in addition to conferment of powers under S. 3 is also empowered under the Standing Rules framed under the Rules of Business of the Government to act on behalf of the Government. (3) Whether by reason of the fact that an order of detention is passed by an officer of the State Government or the Central Government specially empowered to act u/s 3 of the Act, a detenu acquires a constitutional right to have his representation first considered by the very officer issuing the detention order before making a representation to the State Government and the Central Government.

(14) In the course of discussion the Supreme Court after noticing the provision of Section 21 of the General Clauses Act held that the reservation by virtue of that Section did not entitle the specially empowered officer to revoke the order of detention passed by him because the order of the specially empowered officer acquires "deemed approval of the appropriate Government". On this aspect, it was observed :- "We may further add that even though Section 11 specifies that the powers of revocation conferred on the Central Government/State Government are without prejudice to the provisions of Section 21 of the General Clauses Act, this reservation will not entitle a specially empowered officer to revoke an order of detention passed by him because the order of the specially empowered officer acquires "deemed approval" of the State or Central Government, as the case may be automatically and by reason of such deemed approval the powers of revocation, even in terms of Section 21 of the General Clauses Act will fall only within the domain of the State Government and/or

Central Government".

(15) Thus, it was held that the resultant position emerging from the Act is that even if an order of detention is made by a specially empowered officer of the Central Government or the State Government, as the case may be, the said order will give rise to obligations to be fulfilled by the Government to the same degree and extent to which it will stand obligated if the detention order had been made by the Government itself.

(16) The Supreme Court also noticed the provisions of those preventive Detention Acts where an order of detention passed by an officer specially empowered ceases to have force after the expiry of a number of days prescribed under the relevant Act unless the said order was approved by the Government within the period. As far as the Cofeposa Act is concerned, it was held: "On the contrary, the Cofeposa Act does not provide for the State Government or the Central Government passing an order of approving of a detention order made by one of its officers and Therefore the detention order will continue to be operative for the full period of detention unless the order is revoked by the State Government or the Central Government or is quashed by the Court for any reason. This is an additional factor to show that an order of detention passed by an officer has the same force and status as an order of detention passed by the Government itself and this could happen only if an order of detention made by an officer is treated as an order of detention made by the Government itself, although through the instrumentality of an officer empowered u/s 3".

(17) We are only referring to those observations which are necessary for the purpose of deciding questions No, 1,2 and 3 formulated by the learned Single Judge. In the final analysis their Lordships answered all the questions in the negative, holding thereby that the detenu had no right to make a representation to the specially empowered officer. Consequently, the judgment of the Bombay High Court was set aside.

(18) Thus under the scheme of the Cofeposa Act the detaining authority is the Central Government or the State Government, as the case may be, in spite of the fact that the detention order has been made through the instrumentality of an officer empowered u/s 3 thereof. This is the authoritative pronouncement of the Supreme Court on the three questions posed by it (quoted by us on pages 13 and 14 of this judgment (Para 18)). It completely surveys the case law on the subject. Now it has been finally settled that the detenu has no right to have his representation decided by the specially empowered officer even if that officer is additionally empowered to revoke the detention order u/s 11 of the Cofeposa Act.

(19) Further, Mr. Rajinder Dutt has not been able to point to us that the judgment in MafatLal Shah's case (supra) has been given in ignorance of any statutory provisions. In fact it notices in detail the preservation of powers of an authority u/s 21 of the General Clauses Act. The counsel has not been able to show us any authority by the Supreme Court wherein it has been directly held

that the specially empowered officer u/s 3 of the Cofeposa Act is the detaining authority. It is true that the law laid in Smt. Pushpa Vs. Union of India (UOI) and Others, was to the effect that the representation seeking revocation of the detention order was first to be made to the officer concerned. But that judgment has been held to be no longer good law.

(20) The specially empowered officer is not obliged under law to decide the representation of a detenu, which even if made to him, has to be placed by him before the appropriate Government. We have to note that we are unable to appreciate the sustained plea of the Government counsel to have an additional right conferred on the detenus regarding this matter. He did, however, inform us that he had taken up this plea before the learned Single Judge as well as before us on his own initiative and not on instructions.

(21) Another argument of Mr. Mehta, which appears to be well founded, may also be noticed. According to him a plain reading of Section 21 of the General Clauses Act shows that this provision does not preserve the powers of an officer specially empowered u/s 3(1) of the Cofeposa Act to revoke the order of detention made by him.

(22) Mr. Mehta's argument is that the authority which comes within the purview of the said section is the one on whom power is conferred by any Central Act or by a Regulation. It is pointed out that an officer by virtue of his appointment as a Joint Secretary to the Central Government, or the State Government as the case may be, is not empowered under the Act to pass a detention order unless he is specially empowered to do so by issuance of a memorandum. It is urged that the memorandum empowering the Joint Secretary does not fall within the ambit of the definition "Regulation", as given in sub-section (50) of Section 3 of the General Clauses Act.

(23) In reply Mr. Dutt admits that the memorandum empowering Shri K L. Verma, Joint Secretary to the Government of India is not covered by the said definition. His plea, however, is that since Section 3(1) of the Cofeposa Act authorises the appropriate Government to empower an officer not below the rank of Joint Secretary to the Government to make a detention order, that specially empowered officer thus becomes the detaining authority. It is in that capacity, ie., the detaining authority that his power to revoke the order is preserved within the purview of Section 21 of the General Clauses Act. As discussed above, this argument has been categorically negated by the Supreme Court in Sushila Mafatlal Shah's case (supra).

(24) Now we advert to the second aspect of the reference, which is the subject matter of the last two questions (quoted in para 1).

(25) As noticed by us earlier, one of the contentions urged before the learned Single Judge was that the detenu's passport having been seized by the customs authorities, he had been effectively prevented from indulging in "smuggling" and, Therefore, the impugned order passed by the detaining authority was

without application of mind. In support of this contention, a number of judgments of this court were cited. The learned Single Judge has noticed that all the cases relied upon, decided by different learned Single Judges of this court, support the plea of the detenu. The rival plea by the respondents is that in spite of seizure of the passport, it was possible for the petitioner to smuggle goods from Nepal, In the grounds of detention, such an apprehension has not been mentioned but the learned Single Judge has taken judicial notice of the fact that an Indian does not need passport to visit that country. The further argument of the respondents that it was within the realm of the subjective satisfaction of the detaining authority to detain or not a person whose passport had been seized, is the basis of this question in the reference order.

(26) In this case it has been found that the detaining authority was aware that the passport of the detune had been seized. Thus it ha sheen observed that the detaining authority reached the subjective satisfaction after taking into consideration this fact. In the course of discussion, the learned Judge observed that : "After all, it is not an impossibility that a person whose passport stands seized, cannot, infact, indulge in smuggling in future. The court is not to substitute its own subjective satisfaction with that of the detaining authority arrived at by the said authority on the relevant material placed before it."

(27) We entirely agree with the learned Single Judge that it is well settled that the court is not entitled to substitute its satisfaction. The learned Judge has correctly pointed out that the principle of adequacy or sufficiency is no ground for a challenge to a detention order. However, the subjective satisfaction of the detaining authority is not wholly immune from judicial reviewability.

(28) Apart from examining whether or not the requisite satisfaction was arrived at by the detaining authority, if at all, the Court has a duty while scrutinising the validity of the subjective satisfaction to examine the basic facts and material which influenced it in arriving at its satisfaction, Whether those facts and particulars were communicated to the detenu is also open to judicial scrutiny. These are the requirements of Article 22(5) of the Constitution. The two passages laying down the basic postulate and the duty cast on the court to examine "the basic, facts and material" and the purpose requiring it. may be quoted from the judgment of the Supreme Court in Khudiram Das Vs. The State of West Bengal and Others, : "The Courts have by judicial decisions carved out an area, limited though it be, within which the validity of the subjective satisfaction can yet be subjected to judicial scrutiny. The basic postulate on which the courts have proceeded is that the subjective satisfaction being a condition precedent for exercise of the power conferred on the executive, the court can always examine whether the requisite satisfaction is arrived at by the authority; if it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad." "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 is, Therefore, not only the right of the court, but also its duty as well, to examine what are the basic facts and material which actually and in fact weighed with the detaining authority in reaching the requisite satisfaction."

(29) Whether the subjective satisfaction in a given case is vitiated or that there has been no subjective satisfaction by the detaining authority because of non-application of mind, would depend on the facts and circumstances of each case. The limited area of judicial scrutiny within which the subjective satisfaction of the detaining authority can be reviewed, has been demarcated by judicial decisions. Although the validity of its subjective satisfaction is open to judicial scrutiny, yet the requisite satisfaction cannot be substituted.

(30) So far as the last question is concerned, we have noticed at the outset the petitioner's case. According to him he had been effectively prevented from indulging in smuggling activities because of two grounds, first that he continued to be in judicial custody after his arrest and secondly that his passport had been seized. The argument based on these two grounds is contained in paragraph 8 of the petition; which reads : "8. That the petitioner submits that his bail application had already been rejected and hence there was no likelihood of the petitioner being released on bail. Since the petitioner was already in detention, his activities were already controlled and there was no propensity or prognosis of his indulging in any nefarious activities or smuggling. The petitioner submits that this is a case of double detention. The petitioner also submits that his passport had already been seized by the customs officers on the date of the alleged incident and hence there was no question of the petitioner traveling abroad and indulging in any nefarious activity of smuggling. The petitioner also submits that in the facts and circumstances of the case, the passing of the detention order is punitive and not preventive, and there is complete non-application of mind on the part of the detaining authority in passing the detention order with a view to preventing the petitioner from smuggling goods..."

(31) A reading of the grounds of detention dated the 11th July, 1988 shows that the detaining authority was aware of the fact that the application dated the 26th June, 1988 moved on behalf of the petitioner before the Addl. Sessions Judge for grant of bail, had been dismissed as withdrawn on 2nd July, 1988. However, in ground No. 9 it was stated that although he was still in jail, yet there was every likelihood of his being released on bail. In the counter-affidavit sworn on 31st October, 1988 by the specially empowered officer himself, it is admitted that the petitioner was in judicial custody as he was not admitted to bail. Further, the apprehension stated in the grounds of detention has been re-affirmed. That paragraph of the counter affidavit reads as under : "8. Para No. 8 is incorrect and denied. The petitioner claims that the order was issued when he was in the custody. There are possibilities of him (his) being released on bail cannot be ruled out. Through the passport which was recovered and (is) in the custody of

Customs, the detention order was issued to him to prevent him from indulging in smuggling activities and not as punitive measure. The prosecution proceedings have already been initiated by the Department, thus the detention is legal."

(32) In view of the pleadings it cannot be said that the petitioner was at large or that he could visit Nepal for purposes of smuggling or travel abroad on a forged passport, as has been urged by the respondents.

(33) Thus the question formulated does not directly arise in the present case although it is likely to arise in a number of cases.

(34) The question formulated is in broad terms but has to be read in the context of discussion in the reference order. It relates to a case wherein detention order has been passed with a view to preventing the detenu, whose passport has been seized, from smuggling goods. The learned Single Judge has noticed the difference between "smuggling goods" and other smuggling activities mentioned in Section 3(1) of the Cofeposa Act. The cases in which it was held that the passport of a detenu having been seized earlier to the making of detention order, he had been effectively prevented from smuggling and thus there was non-application of mind by the detaining authority, have also been taken note of in the reference order. In some of those cases in support of the plea of non-application of mind by the authority concerned, there were other pleas put forth on behalf of the petitioners such as that the detaining authority was not aware of the strict conditions imposed on the petitioners in the orders granting bail.

(35) The argument by the counsel for the respondent in the present case that the detenu if not prevented by making of the impugned order would have or was likely to (assuming that there was possibility of his being released on bail) go abroad on a forged passport or without a passport for the purpose of smuggling goods into India, it appears, was neither pleaded nor urged in those cases. Therefore, such a plea on behalf of the respondents did not fall for consideration therein. As noticed earlier, in the present petition such a ground has not been mentioned in the grounds of detention. We find that it is not even pleaded in the counter-affidavit of the respondents.

(36) There can be no doubt that in a given case on awareness of such a ground, as is pleaded before us, requisite satisfaction formed in making the detention order with a view to preventing the detenu from smuggling goods cannot be said to be vitiated. The duty of the court is to examine only whether the facts and material which influenced the mind of the detaining authority were communicated to the detenu. Necessarily, Therefore, those facts and material on which the order is based have to find mention in the grounds of detention. As per the mandate of Article 22(5) of the Constitution, the detenu must be informed of all the grounds of detention. A basic postulate of that provision is that the "grounds" meaning all the basic facts and material, have to be communicated to the detenu. If in a case that mandate has not been complied with, the detention order is liable to be set aside.

(37) A reasonable person's subjective satisfaction that a detenu whose passport has been seized is likely to travel abroad clandestinely to smuggle goods cannot be objectively examined, but whether the material on which such a satisfaction has been arrived at was communicated to the detenu, is open to judicial scrutiny. A detention made on un-disclosed grounds to the detenu, is not permissible.

(38) We have now to deal with the submission of Mr. Dutt that at any rate the petitioner has exhausted his fundamental right of having his representation decided by the appropriate Government and thus the representation addressed to the specially empowered officer on 29th July, 1988 by him is not required to be dealt with or decided at all. This submission we have noticed at page 9 of this judgment. A copy of the representation addressed to the specially empowered officer is on record (Annexure D to the petition). His other representation dated the 5th September, 1988 to the President of India seeking revocation of the detention order, is also on record (Annexure X-1 to the petition). Both these representations have since been dealt with and rejected, the first by the officer concerned and the other by the Central Government. The argument of Mr. Herjinder Singh, learned counsel for the petitioner, is that it is incumbent on the specially empowered officer, in view of the law laid in Sushila Mafatlal Shah's case (supra) to forward the representation addressed to him to the Central Government for disposal although that Government has rejected the representation seeking revocation of the detention order.

(39) It is settled now that the detenu detained by an order of the State Government has a right of two representations, first to that Government and second to the Central Government. In case of a detenu against whom the detention order has been made by the Central Government, there is only one right of representation. Admittedly that right has been availed of in the present case. The petitioner thus cannot demand that his representation dated the 29th July 1988 is required under law to be placed by the specially empowered officer before the appropriate Government, i.e., the Central Government. We agree with Mr. Dutt's contention that the petitioner has no further right of having his earlier representation considered.

(40) However, it is open to the petitioner to contend that his representation was not expeditiously decided, as required under law. In those petitions in which the representation was addressed only to the specially empowered officer and was decided by him at his own level, the plea has to be decided in accordance with the law laid in Sushila Mafatlal Shah's case (supra).

(41) In conclusion the questions referred to us are answered as follow?: 1. The Supreme Court's decision in Ibrahim Bachhu Bafan's case (supra) is binding on the point that on quashing of a detention order by a High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution, the detaining authority is not empowered under law to pass another detention order on the same grounds. The point whether the specially empowered officer is the detaining authority did not fall for consideration in that case. In view of the

decision in Sushila Mafatlal Shah's case (supra), the specially empowered officer u/s 3(1) of the Cofeposa Act, has no power to revoke or rescind the detention order. 2. The Supreme Court's judgment in State of Maharashtra and another v. Sushila Mafatlal Shah (supra) is not per incuriam and is. Therefore, binding. 3 In view of the law laid in Sushila Mafatlal Shah's case (supra), it is not incumbent upon the specially empowered officer u/s 3(1) of the Cofeposa Act to decide the representation made to him seeking revocation of the detention order. As held by the Supreme Court, his only duty is to place it before the appropriate Government. 4. It is not open to the Court to substitute its own satisfaction for the subjective satisfaction of the detaining authority. 5. Although the subjective satisfaction arrived at by the detaining authority cannot be substituted by the Court, yet the court is empowered to scrutinise it to a limited extent as laid in Khudi Ram Das's case (supra). As long as the fact that a detenu, whose passport has been seized, is likely to travel abroad clandestinely for purposes of smuggling is reflected in the grounds of detention and communicated to the detenu, the subjective satisfaction arrived at cannot be substituted.

(42) The petition may now be listed before the learned Single Judge for disposal in accordance with law.