

(1991) 11 RAJ CK 0008

In the Rajasthan High Court

Case No : Habeas Corpus Petition No"s. 5020 and 5174 of 1991

Mohd. Umar

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 20-11-1991

Acts Referred:

Constitution of India, 1950 — Article 22

Foreign Exchange Regulation Act, 1973 — Section 3, 35

Citation : (1991) 2 RLW 519 : (1991) 2 WLC 660 : (1991) 2 WLN 298

Hon'ble Judges : V.S. Dave, J; Mohini Kapur, J

Bench : Division Bench

Judgement

V.S. Dave, J.—These habeas corpus petitions have been filed challenging the order of detention dated 1st May, 1991 issued u/s 3(1) of the Foreign Exchange Regulations Act, 1974 (hereinafter referred to as "the FERA") passed by the Joint Secretary to the Government of India detaining the petitioners (the detenue). The aforesaid order of detention was served on the detenues on 19-5-91 and 9-5-91 respectively and as the order shows, the same had been issued with a view to prevent the detenues from acting in any manner prejudicial to the augmentation of the foreign exchange. The order of detention (Ann. A) was also accompanied with the grounds of detention running into eight pages and the documents which have been relied upon while preparing the grounds.

2. Officers of the Customs and Central Excise, Bikaner had searched the premises of one Bashir Khan s/o Shri Haju Noor Khan resident of Fatehpur, Sikar in pursuance of some information on 25th Jan., 1991 and in the said search they recovered and seized several documents relating to Hawala transactions of Shri Bashir Khan. His statement was also recorded by the Customs Authorities and then by the Enforcement Directorate on various dates, mentioned in the grounds, Annexure-B, wherein he deposed that he had been receiving and making Hawala payments in India under instructions from his brother Ishaq Khan, who is residing at Doha (Qatar) and one Galib of Oman. He also stated that for making payments in India, he used to receive payments from various persons including

one Gulam Murtaza of Fatehpur/Jaipur. Raids were carried out at plot No. 84, Laxmi Nagar, Jhotwada Road, Jaipur, which was in occupation of Mohd. Umar, his brothers and father wherefrom certain documents and currency notes of Indian currency were recovered and Panchnama prepared. Premises at Ward No. 13, behind Idgah, School, Fatehpur district Sikar were also searched wherefrom also certain documents and Indian currency amounting to Rs. 73,000/-were seized. After the aforesaid searches, on 4th Feb., 1991, on the same day, the petitioner was taken to the office of the Enforcement Directorate and as per his allegations, his statement was recorded, which was involuntary and incorrect, as he was forced to make such statement after being tortured. The petitioners were arrested u/s 35 of the FERA on 4-2-91 and were produced before the Chief Judicial Magistrate on 5-2-91, who remanded them to judicial custody. They, however, were ordered to be released on bail by the learned Sessions Judge, Jaipur vide order dated 8-2-91. It is, thereafter that the impugned order of detention was passed and consequence to same, the petitioners were detained and are in jail presently.

3. The petitioners have challenged the order of detention on various grounds. The First ground of challenge is that the Detaining Authority, while passing the order of detention, has made reference to certain documents concerning the bail application, which the petitioners had filed in the Court of District and Sessions Judge, Jaipur on 6th Feb., 1991 on which they were ordered to be released on bail and relied upon the aforesaid documents as is apparent from the ground of detention, yet the copies of the application and the order has not been furnished to the detinue along with the grounds of detention. As such, no proper and sufficient opportunity was provided to the detenues to make an effective representation. It is submitted that non-supply of the documents, referred to and relied upon by the Detaining Authority virtually amounts to non-supply of material relied upon and this is violative of Article 22(5) of Constitution of India and it renders order of detention illegal and void. The learned Counsel, in respect of this submission, has relied on Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, and M. Ahamedkutty Vs. Union of India (UOI) and Another,

4. Another contention of the learned Counsel for the petitioners is that the petitioners were arrested on 4-2-91. Thereafter, they were granted bail on 8-2-91 but it was not thought proper to detain them under the FERA and it was as late as 1st May, 1991 that the order of detention came to be passed, which clearly indicates that it is inordinately delayed, which has not been explained either in the grounds or in any other communication whatsoever. The submission of the learned Counsel is that no law warrants the circumvention of the normal law and passing of inordinately delayed order of detention. The learned Counsel has relied on Rabindra Kumar Ghosal v. The State of West Bengal 1975 Cr. L.J. 1235 and Md. Sahabuddin Vs. The District Magistrate, 24 Parganas and Others,

5. The third argument of the learned Counsel for the petitioner is that the detinue submitted his representation on 15th May, 1991 to respondent No. 1

and it was on 21st June, 1991 that he received a reply regarding rejection of the same. His submission is that representation has not been dealt with day to day, which has rendered the impugned order illegal and void. The submission of the learned Counsel is that even from the reply filed on behalf of the respondents before this Court, each day's delay has not been explained. The record shows that representation dated 15-5-91 addressed to Secretary, Finance Department is shown to have been received on 29-5-91 which shows that 15 days' time has been consumed even in placing the matter before the Detaining Authority and from 29-5-91 to 1-6-91, it remained with the Head Quarter for seeking the legal opinion. His submission is that these 26 days' delay in consideration of detainees' representation by the Central Government is not properly explained. Learned Counsel in this respect has relied on *Harish Pahwa Vs. State of U. P. and Others*, and *Piara Singh v. State of Punjab* 1988 Cri. LJ 164. Relying on *Aslam Ahmed Zahire Ahmed Shaik Vs. Union of India and Others*, , it was contended that there was no need for calling for the details as it is apparent from para No. 12 of the order of detention that representation was required to be forwarded through the Superintendent, Jail, Jaipur, who was an authority appointed by the State and who had all the material available for being remitted to the Central Government. Reference has been made to *Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police and Others*, *Ahmed Raza v. Union of India and Ors.* 1988 (1) DelLaw 450, *Satish Bhardwaj v. Union of India and Ors.* 1988 (2) Del Law 30 and *Reena Mirchandani v. Union of India and Ors.* 1988 (2) DelLaw 204 . It is then submitted that the Detaining Authority has tried to confuse the detainee by sending them documents which are wholly irrelevant and are not germane to the main issue. They have neither been relied upon nor could be relied upon. There are several documents which even do not relate to the petitioner and it is submitted that this all has been done in order to misguide the petitioner. It is submitted that in para No. 11 of the detention order, the Detaining Authority has mentioned that, "I have relied upon the documents mentioned in the enclosed list," but a perusal of the document shows that most of them neither relate to the petitioners nor have any relevance with the order of detention. It is submitted that the documents running in more than 300 pages have been handed over so that the petitioner should grope in dark before making any effective representation with stipulated period and this action of the Detaining Authority also makes the order of detention illegal and void. In this respect, the learned Counsel has relied upon *Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others*, *Dhananjay Das Vs. District Magistrate, Darrang and Another*, and *Diwan Singh Verma v. Union of India and Ors.* 1988 (2) Del Law 197.

6. The last submission of the learned Counsel is that neither the material on record for coming to the subjective satisfaction about the detainee's involvement in smuggling or his indulgency in unauthorised transactions affecting the foreign exchange resource of this country adversely nor there is any occasion to come to a conclusion that the detainee was indulging in activities prejudicial to the augmentation of country's foreign exchange resources and that the copies which

have been supplied to the petitioner are so illegible that they cannot be deciphered and same has prejudiced the case of the petitioner. He has relied on *Smt. Dharmista Bhagat v. State of Kerala* 1990 5 SCC 39:1990 JT 192 and *Shri Rajinder Gautam v. Union of India* and Ors. 1988 (2) Del Law 318.

7. Mr. Praveen Balvada, appearing on behalf of the respondent, vehemently opposed the petition and submitted that no arguments advanced by the learned Counsel for the petitioners warrant any consideration in this case. Meeting the first submission of the learned Counsel for the detenues, it has been submitted that the objection raised by the detainee is not worthy of any consideration because firstly only a passing reference had been given to the documents concerning the grant of bail and the said papers had not been relied upon for passing the order of detention. It is submitted that once the documents are not relied upon and only passing reference is given, it is not all necessary under any law that the same is required to be furnished to the detainee. Besides this, the application for bail was moved by the petitioner himself and the order of bail passed was in his favour. He was expected to be in possession of the copies thereof and otherwise also nothing has been shown in the petition or in the oral submissions advanced that the detainee has come with a case of prejudice being caused to his case. He has relied on *Madan Lal Anand Vs. Union of India* and others, and *Ms. Mrignaini Kanwar v. State of T.N.* 1985 Cri. LJ 82.

8. Regarding second argument concerning delay in passing the order, it is submitted that there is no inordinate delay in passing the order. The orders are required to be passed only after all the documents are collected, perused and the Detaining Authority thereafter is satisfied that it is a fit case for detention. What is required to be seen only is that the documents of detention should not be stale or illusory and in this case there is no warrant for coming to such conclusion. Learned Counsel, in this respect, has relied upon *Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others*, , *Smt. K. Aruna Kumari Vs. Government of Andhra Pradesh and Others*, and *Rewalal and Another Vs. Smt. Kamlabai*, Relying on *D. John v. State of Kerala* and Anr. 182 Cri. LJ 471 it is submitted that there is no delay in disposal of the representation. The representation had been disposed of within the shortest period. It is submitted that the reply filed to the petition clearly explained the time taken. It is submitted that the Government of India was not to perform an ideal formality of rejecting the representation mechanically. It was expected to apply its mind and in doing so it was essential to get the comments on the documents for considering the representation objectively.

9. Coming to the arguments of irrelevant documents, it is submitted that it is a case of conspiracy hatched between the various persons and it was essential to place on record the various documents which could have connected the accused with the allegations levelled. It is submitted that there is not a single document which is irrelevant in as much as all of them have to be taken together for coming to the conclusion that it was essential to detain the petitioner under the

provisions of FERA. It is submitted that no grievance has been raised in the representation about the relevance of the illegibility of the documents. Even the grounds have not been raised while making a representation nor in the writ petition it has been said that any prejudice has been caused to the petitioner in doing so.

10. We have given our earnest consideration to the rival contentions and perused the record and studies the case laws.

11. We have carefully perused the grounds of detention dated 1-5-91, which has been served upon the detenus simultaneously with their detention. Para No. 5 of the order of detention of Mohd. Umar reads as under:

You were arrested u/s 35 of FERA on 4-2-91 and were produced before the Chief Judicial Magistrate on 5-2-91 who was pleased to remand you to Judicial custody till 18-2-91. You filed a bail application in the court of District & Sessions Judge, Jaipur on 6-2-91 and you were ordered to be released on bail on certain conditions. Shri Bashir Khan was also arrested and has since been released on bail.

Similarly, in Gulam Murtaza's case in Para No. 5, it was mentioned that Mohd. Umar was arrested u/s 35 of the FERA on 4-2-91 and was produced before the Chief Judicial Magistrate on 5-2-91, who was pleased to remand him to judicial custody till 18-2-91. He filed bail application in the Court of District and Sessions Judge, Jaipur on 6-2-91 and he was ordered to be released on bail on certain conditions. Shri Bashir Khan was also arrested and has since been released on bail. Thus, the fact regarding arrest, production before the Chief Judicial Magistrate, remand to judicial custody, bail application and bail order in respect of Mohd. Umar as well as fact of grant of release in respect of Bashir Khan were made the grounds of detention. It is thus apparent that the attention of the Detaining Authority was drawn to the documents referred to above. The grievance of the petitioner is that though the reference had been made to arrest, ground of remand and grant of bail yet documents concerning the same have not been made available to the detenu and the non-supply of these documents is violative of Article 22(5) of the Constitution of India. It is not disputed in the case that the list of document was sent along with the grounds of detention which were relied upon is furnished. This list contains the arrest memo in respect of Bashir Khan dated 3-2-91, application for grant of remand dated 4-2-91, copy of his bail application dated 4-2-91, order of Judicial Magistrate passed thereupon on 4-2-91, bail application filed before the District and Sessions Judge, Jaipur on 5-2-91 and the order of District Judge dated 8-2-91, In respect of Mohd. Umar's grounds of detention, the Detaining Authority also supplied the copy of the anticipatory bail application filed by Gulam Murtaza and the order dated 27-2-91 passed thereupon. Arrest Memo dated 4-2-91, remand application dated 5-2-91, bail application dated 5-2-91 and the order of Judicial Magistrate (Special Court) dated 5-2-91 were also sent. Similarly, in case of Gulam Murtaza only the copy of his anticipatory bail and arrest memo, remand application

besides copy of bail application and the order of the Judicial Magistrate in respect of Mohd. Umar were delivered. Thus, what has been left out to be delivered is the copy of the bail application filed by Mohd. Umar before the learned Sessions Judge, Jaipur and the order passed (hereupon and irrelevant to the bail application of petitioner & documents have been supplied. The petitioners' grievance, is, therefore, limited to the part of para No. 5. of the grounds which has mention of the bail application dated 6-2-90. In these circumstances, we have to consider as to whether the cases relied upon by the learned Counsel apply to the facts of this case or not.

12. In Smt. Icchu Devi Choraria's case (supra) their Lordships of the Supreme Court held as under:

The detaining authority was bound to supply copies of the documents, statements and other materials relied upon in the grounds of detention to the detainee within five days from the date of detention, that is, on or before 9th June, 1980 and in any event, even if there were exceptional circumstances and reasons for not supplying such copies within five days were recorded in writing. Such copies should have been supplied to the detainee not later than fifteen days from the date of detention, that is, on or before 19th June, 1980. There was unreasonable delay on the part of the detaining authority in supplying to the detainee copies of the documents, statements and other materials relied upon in the grounds of detention and the continued detention of the detainee after 19th June, 1980 was accordingly illegal and void and the detainee was entitled to be released forthwith from detention.

In this case, the detaining authority has based the order of detention on the basis of the statements which had been recorded, documents and other materials, the copies of which were asked for by the detainee but they had not been supplied and time was taken stating that copies of the documents are being prepared. There was unreasonable delay in supplying the material relied upon in the grounds of detention. Besides this, all the documents which were required to be supplied were such which had great relevance in making up the mind for passing the order of detention.

13. In M. Ahamedkutty's case (supra), this question has been dealt with in great details. A mention was made in the grounds of detention that inter alia other documents the appellant's bail application and the bail order were also placed before the detaining authority and the mention made in the grounds was that, "He was remanded in Judicial custody and was subsequently released on bail." Their Lordships considered this phrase and the entire case law regarding non-supply of the documents. The court also considered the non-supply of the bail application and the bail order in great details. In this respect, their Lordships have held as under:

The next submission is that of non-supply of the bail application and the bail order. This Court, as was observed in Mangalbai Motiram Patel Vs. State of

Maharashtra and Others, , has "forged" certain procedural safeguards for citizen under preventive detention. The Constitutional imperatives in Article 22(5) are two-fold: (a) The detaining authority must, as soon as may be, i. e. as soon as practicable, after the detention communicate to the detainee the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detainee the earliest opportunity of making the representation against the order of detention. The right is to make an effective representation and when some documents are referred to or relied on in the grounds of detention, without copies of such documents, the grounds of detention would not be complete. The detainee has, therefore, the right to be furnished with the grounds of detention along with the documents so referred to or relied on. If there is failure or even delay in furnishing those documents it would amount to denial of the right to make an effective representation. This has been settled by a long line of decision: Ramchandra A. Kamat Vs. Union of India (UOI) and Others, , Frances Coralie Mullin Vs. W.C. Khambra and Others, , Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, , Pritam Nath Hoon Vs. Union of India (UOI) and Others, , Shri. Tushar Thakker Vs. Union of India (UOI) and Others, , Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others, , Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others, and Smt. Ana Carelina DeSouza v. Union of India (1981) Suppl. SCC 53.

14. It is immaterial whether the detainee already knew about their contents or not. In Mehrunissa Vs. State of Maharashtra, , it was held that the fact that the detainee was aware of the contents of the documents not furnished was immaterial and non-furnishing of the copy of the seizure list was held to be fatal. To appreciate this point one has to bear in mind that the detainee is in jail and has no access to his own documents. In Mohd. Zakir Vs. Delhi Administration and Others, it was reiterated that it being a Constitutional imperative for the detaining authority to give the documents relied on and referred to in the order of detention pari passu the grounds of detention, those should be furnished at the earliest so that the detainee could make an effective representation immediately instead of waiting for the document to be supplied with. The question of demanding the documents was wholly irrelevant and the infirmity in that regard was violative of Constitutional safeguards enshrined in Article 22(5).

15. It is also imperative that if the detainee was already in jail, the grounds of detention are to show the awareness of the fact on the part of the detaining authority, otherwise there would be non-application of mind and detention order vitiated thereby. In the instant case though the order of detention ex-facie did not mention of the detainee having been in jail, in paragraph 3 of the grounds of detention it was said that he was arrested by the Superintendent (Intelligence) Air Customs, Trivandrum on 31-1-1988 and he was produced before the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam the same day it was clearly said: "You were remanded to judicial custody and you were subsequently released on bail." From the Records it appears that the bail application and the bail order were furnished to the detaining authority on his

enquiry. It cannot therefore be said that the detaining authority did not consider or rely on them. It is difficult, therefore, to accept the submission of Mr. Kunhikannan that those were not relied on by the detaining authority. The bail application contained the grounds for bail including that he had been falsely implicated as an accused in the case at the instance of persons who were inimically disposed toward him, and the bail order contained the conditions subject to which the bail was granted including that the accused, if released on bail, would report to the Superintendent (Intelligence) Air Customs, Trivandrum on every Wednesday until further order, and that "he will not change his residence without prior permission of Court to 28-2-1988." This being the position in law, and non-supply of the bail application and the bail order having been apparent, the legal consequence is bound to follow.

16. In *Khudiram Das Vs. The State of West Bengal and Others*, , this Court held that where the liberty of the subject is involved it is the bounden duty of the court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and that the subject is not deprived of his personal liberty otherwise than in accordance with law. The Constitutional requirement of Article 22(5) is that all the basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to making the detention order must be communicated to the detainee so that the detainee 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 materials which actually and in fact weighed with the detaining authority in reaching the requisite satisfaction. The judicial scrutiny cannot be foreclosed by the mere statement of the detaining authority that it has taken into account only certain basic facts and materials and though other basic facts and materials were before it, it has not allowed them to influence its satisfaction. The Court is entitled to examine the correctness of this statement and determine for itself whether there were any other basic facts or materials, apart from those admitted by it, which could have reasonably influenced the decision of the detaining authority and for that purpose, the Court can certainly require the detaining authority to produce and make available to the court the entire record of the case which was before it. This is the least the Court can do to ensure observance of the requirements of law by the detaining authority."

17. From the decision in *Ramesh Yadav Vs. District Magistrate, Etah and Others*, , it can be said that the facts of the detainee having been in jail and his being granted bail are by themselves not enough to justify the passing of the detention order. In that case, it was mentioned in the grounds of detention:

At this time you were detained in the District Jail, Mainpuri and you have filed an application for bail in the court of law which is fixed for hearing on September 17, 1984, and there is positive apprehension that after having bail you will come out of the jail and am convinced that after being released on bail you will indulge

in activities prejudicial to the maintenance of public order.

It was observed that the detention order was passed as the detaining authority was apprehensive that in case the detainee was released on bail, he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under-trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed. The detention order was accordingly quashed.

18. In *State of U.P. Vs. Kamal Kishore Saini*, , the application of a co-accused as well as statement made in the bail application filed on behalf of the detainee alleging that the detainee was falsely implicated and the Police report thereon were not produced before the detaining authority before passing the detention order. Holding that the detention order was invalid on that ground, it was observed:

Similarly with regard to ground No. 3, the application of the co-accused as well as the statement made in the bail application filed on behalf of the detenus challenging that they had been falsely implicated in the same case and the police report thereon, were not produced before the detaining authority before passing of the detention order. It is incumbent to place all the vital materials before the detaining authority to enable him to come to a subjective satisfaction as to the passing of the order of detention as mandatorily required under the Act.

19. Non-consideration of the bail order would have, therefore, in this case amounted to non-application of mind. In *Union of India (UOI) and Others Vs. Manoharlal Narang*, the Supreme Court's interim order in pending appeal against High Court quashing of a previous order of detention against the same detainee was not considered by the detaining authority while making the impugned subsequent order against him. By the interim order Supreme Court had permitted the detainee to be at large on condition of his reporting to the police station daily. It was held that non-consideration of the interim order which constituted a relevant and important material was fatal to the subsequent detention order on ground of non-application of mind. If the detaining authority considered that order one could not state with definiteness which way his subjective satisfaction would have reacted and it could have persuaded the detaining authority to desist from passing the order of detention. If in the instant case the bail order on condition of the detenu's reporting to the Customs authorities was not considered (then detention order itself would have been affected. Therefore, it cannot be held that while passing the detention order the bail order was not relied on by the detaining authority. In *S. Gurdip Singh Vs. Union of India (UOI) and Others*, , following *Ichhu Devi Choraria v. Union of India*, (supra) and *Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others*, it was reiterated that if the documents which formed the basis of the order of detention were not served on the detainee along with the ground of

detention, in the eye of law there would be no service of the grounds of detention and that circumstance would vitiate his detention and make it void ab initio.

20. Mr. Kunhikannan relies on Haridas Amarchand Shah of Bombay Vs. K.L. Verma and Others, , wherein the application for bail and the order dated September 15, 1987 passed by the Metropolitan Magistrate granting conditional bail were placed before the detailing authority, but the application dated September 21, 1987 for variation of the conditions and the order made by the Metropolitan Magistrate thereon were not placed before the pertaining authority, this Court held that the application for variation of conditions of bail and the order passed by the Metropolitan Magistrate varying the conditions of bail were, in its opinion, not vital and material documents in as much as the granting of bail by the Magistrate enabled the detenu to come out and carry on his business as before and variation of the conditions were not considered vital for the satisfaction as to need for detention. That case is, therefore, distinguishable on facts.

21. Considering the facts in the instant case, the bail application and the bail order were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired, and if those had been considered, they would be documents relied on by the detaining authority though not specifically mentioned in the annexure to the order of detention and those ought to have formed part of the documents supplied to the detenu with the grounds of detention and without them the grounds themselves could not be said to have been complete. We have, therefore, no alternative but to hold that it amounted to denial of the detenu's right to make an effective representation and that it resulted in violation of Article 22(5) of the Constitution of India rendering the continued detention of the detenu illegal and entitling the detenu to be set at liberty in this case."

Subsequent to hearing the arguments in the instant cases and while we were in midst of dictating this order, yet another judgment of their Lordships of the Supreme Court has come to our notice which has been reported as Abdul Sathar Ibrahim Manik v. Union of India and Ors. 1991 4 SVLR . 7. In this case, the judgment in Ahmedkutty's case has been considered and distinguished. Several other cases wherein similar points had been dealt with, have been considered in Abdul Sathar Ibrahim Manik's case. Their Lordships, while dealing with Ahmedkutty's case and the cases relied upon therein, discussed at length the question of non-supply of the bail application and the orders passed on them and in our opinion, it would be proper to reproduce the judgment in extenso here in below:

In M. Ahamedkutty Vs. Union of India (UOI) and Another, the contention was that the bail application and the order granting bail which were relied upon by the detaining authority were not supplied to the detenu and therefore the detention was illegal. A Division Bench of this Court noticed that in the grounds it

was clearly mentioned that the detainee was remanded to judicial custody and was subsequently released on bail. Therefore, these documents were in fact placed before the detaining authority and were relied upon by it and therefore the non-supply of these relevant documents to the detainee disabled him to make an effective representation. Therefore, there was violation of Article 22(5) of the Constitution. In arriving at this conclusion, the Division Bench relied on several other decisions and observed that all the documents relied upon by the detaining authority must be *pari-passu* supplied to the detenu. In the instant case, the facts are different. In the counter affidavit it is clearly stated that the bail application and the order refusing bail were not there before the sponsoring authority. Therefore, they were not placed before the detaining authority. The grounds do not disclose that the detaining authority has relied upon any of these two documents. On the other hand as already noted the detaining authority mentioned in the grounds that it was aware that the detainee was in custody but there is every likelihood of his being released on bail. This itself shows that these documents were not before the authority. Therefore, it cannot be said that the documents referred to and relied upon in the grounds were not supplied to the detainee and the ratio in Ahmedkutty's case (*Supra*) on this aspect does not apply to the facts in the instant case. It is not necessary to refer to in detail various decisions of this court wherein it has been clearly laid down that the documents referred to or relied upon in the grounds of detention only are to be supplied. This has been settled by a long line of decisions: *Ramchandra A. Kamat Vs. Union of India (UOI) and Others*, , *Frances Coralie Mullin Vs. W.C. Khambra and Others*, , *Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others*, , *Pritam Nath Hoon Vs. Union of India (UOI) and Others*, , *Shri. Tushar Thakker Vs. Union of India (UOI) and Others*, , *Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others*, , *AIR 1981 1620 (SC)* and *Mst. L.M.S. Ummu Saleema Vs. Shri B.B. Gujaral and Anr*, .

At this juncture it is also necessary to note that such of those documents which are not material and of which a casual or passing reference is made in the grounds, need not be supplied. In *Mst. L.M.S. Ummu Saleema Vs. Shri B.B. Gujaral and Anr*, after referring to some of the earlier decisions of this court, it was held thus:

It is, therefore, clear that every failure to furnish copy of document to which reference is made in the grounds of detention is not an infringement of Article 22(5), fatal to the order of detention. It is only failure to furnish copies, of such documents as were relied upon by the detaining authority, making it difficult for the detainee to make an effective representation, that amounts to a violation of the fundamental rights guaranteed by Article 22(5). In our view it is unnecessary to furnish copies of documents to which casual or passing reference may be made in the course of narration of facts and which are not relied upon by the detaining authority in making the order of detention."

It will, therefore, be seen that failure to supply each and every documents

merely referred to and not relied upon will not amount to infringement of the rights guaranteed under Article 22(5) of the Constitution. We may of course add that whether the document is casually or passingly referred to or whether it has also formed the material for arriving at the subjective satisfaction, depends upon the facts and grounds in each case. In the instant case we are satisfied that these two documents were not placed before the detaining authority nor they were referred to or relied upon.

The learned Counsel, however, proceeded to submit that even assuming that these documents were not relied upon or referred to by the detaining authority yet the failure to place these relevant documents before the detaining authority amounted to suppression and therefore there was non-application of mind and that the detention order passed without looking into such relevant material is invalid. In Ahmedkutti's case no doubt there is an observation having regard to the facts therein that non-consideration of the bail application and the order of releasing would amount to non application of mind and that would affect the detention order. The Division Bench made these observations while considering the contention that the order granting bail and the bail application, though referred to, were not relied upon. It is not laid down clearly as principle that in all cases non consideration of the bail application and the order refusing bail would automatically affect the detention. The relevant observations in this context made by this Court in Ahmedkutti's case may be noted:

If in the instant case the bail order on condition of the detenu's reporting to the customs authorities was not considered the detention order itself would have been affected. Therefore, it cannot be held that while passing the detention order the bail order was not relied on by the detaining authority.

In *S. Gurdip Singh Vs. Union of India (UOI) and Others*, , following *Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others*, , *Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others*, , it was reiterated that if the documents which it was reiterated that if the documents which formed the basis of the order of detention were not served on the detenu along with the grounds of detention, in the eye of law there would be no service of the grounds of detention and that circumstance would vitiate his detention and make it void ab initio.

It is further observed in this case that:

Considering the facts in the instant case, the bail application and the bail order were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired, and if those had been considered, they would be documents relied on by the detaining authority though not specifically mentioned in the annexure to the order of detention and those ought to have formed part of the documents supplied to the detenu with the grounds of detention and without them the grounds themselves could not be said to have been completed. We have, therefore, no alternative but

to hold that it amounted to denial of the detenu's right to make an effective representation and that it resulted in violation of Article 22(5) of the Constitution of India rendering the continued detention of the detenu illegal and entitling the detenu to the set at liberty in this case.

Placing considerable reliance on this passage, the learned Counsel contended inter alia that in the instant case from either point of view namely (i) if the bail application and the order refusing bail were not considered or (ii) if considered the non-supply of the copies of the same to the detenu would affect the detention order. In other words, according to him, non-consideration of these two documents by the detaining authority would itself affect the satisfaction of the detaining authority. If on the other hand they are taken into consideration and relied upon the non-supply of the same to the detenu would result in violation of Article 22(5) of the Constitution rendering the detention invalid. We are unable to agree with the learned Counsel. We are satisfied that the above observations made by the Division Bench of this Court do not lay down such legal principle in general and a careful examination of the entire discussion would go to show that these observations were made while rejecting the contention that the bail application and the order granting bail though referred to in the grounds were not relied upon and therefore need not be supplied. The case is distinguishable for the reason that the Division Bench had particularly taken care to mention that "Considering the facts the bail application and the bail order were vital materials." In that view these observations were made. Further that was a case where the detenu was released on bail and was not in custody. This was a vital circumstance which the authority had to consider and rely before passing the detention order and therefore they had to be supplied.

22. Now we shall consider the other submission regarding the non-supply of the bail application and the order refusing bail to the detenu and its effect. According to the learned Counsel these two documents formed relevant material and irrespective of the fact whether they were placed before the detaining authority or not they ought to have been supplied to the detenu and failure to do so has caused prejudice in making an effective representation. We are unable to agree. In *Abdul Sattar Abdul Kadar Shaikh Vs. Union of India (UOI) and Others*, , it is observed thus:

23. In fact that bail application were filed by the detenu himself and he was very much aware of the contents of those bail application and the orders made thereon. These documents were not relied upon by the detaining authority. When a request is made by the detenu for supply of these bail applications and orders refusing thereon are made, the court inter alia has to look into the question whether the detenu is in any way handicapped in making an effective representation by such refusal. No authority has been placed before us which goes to the extent of holding that a mere non-supply of any document whatever its nature may be, to the detenu whatever, its nature may be, to the detenu per se amounts to the denial of an opportunity under Article 22(5).

In Syed Farooq Mohammad Vs. Union of India and another, this Court considered precisely the same question and it was observed thus:

24. The third ground of challenge is that the relevant documents i. e. bail application of the petitioner and order made there on which might have been considered by the detaining authority were not supplied to the petitioner and as such his right of making effective representation guaranteed under Article 22(5) of the Constitution of India has been seriously prejudiced. This ground is without any substance because firstly there is nothing to show from the grounds of detention that the rejection of this bail application by the Sessions Judge, Greater Bombay on January 5, 1990 was considered by the detaining authority before passing the impugned order of detention and as such this being not referred to in the grounds of detention, the documents had not been supplied to the petitioner and it, therefore, cannot be urged that non-supply of this document prejudiced the petitioner in making effective representation against the order of detention. Article 22(5) of the Constitution, undoubtedly, mandates that all the relevant documents referred to in the grounds of detention and which are considered by the detaining authority in coming to his subjective satisfaction for clamping an order of detention are to be supplied to the detenu. The said document was not considered by the detaining authority in coming to his subjective satisfaction and in making the impugned order of detention. The non-furnishing to the detenu of the said document i. e. the bail application and the order passed thereon, does not affect in any manner whatsoever the detenu's right to make an effective representation in compliance with the provisions of Article 22(5) of the Constitution of India. This ground, therefore, is wholly untenable."

From the above discussion, it emerges that even if the bail application and the order refusing bail are not placed before the detaining authority or even if placed, if the detaining authority does not refer to or rely upon or has failed to take them into consideration, that by itself does not lead to an inference that there was suppression of relevant material or in the alternative that there was non-application of mind or that subjective satisfaction was impaired. When these documents are neither referred to nor relied upon, there is no need to supply the same to the detenu.

25. As already noted, in all such cases where the detenu was in custody at the time of passing an order of detention what is strictly required is whether the detaining authority was aware of the fact that the detenu was in custody and if so was there any material to show that there were compelling reasons to order detention inspite of his being in custody. These aspects assume importance because of the fact that a person who is already in custody is disabled from indulging in any prejudicial activities and as such the detention order may not normally be necessary. Therefore the law requires that these two tests have to be satisfied in the case of such detention of a person in custody.

The Constitution Bench in Rameshwar Shaw's case held thus:

Whether the detention of the said person would be necessary after he is released from jail, and if the authority is bonafide 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.

XX XX XX

Therefore, we are satisfied that the question as to whether an order of detention can be passed against a person who is in detention or in jail will always have to be determined in the circumstances of each case.

26. Following the above principles, another Bench of three Judges of this Court in *N. Meera Rani Vs. Government of Tamil Nadu and Another*, after reviewing the various other decisions, it was observed that "A review of the above decisions reaffirms the position which was settled by the decision of a Constitution Bench in *Rameshwar Shaw's* case and that none of the observations made in any subsequent case can be construed at variance with the principle indicated in *Rameshwar Shaw's* case.

Having so observed the Bench summarised the principle thus:

27. "Subsisting custody of the detainee by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case; preventive detention being necessary to prevent the detainee from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc. ordinarily it is not needed when the detainee is already in custody; the detaining authority must show its awareness to the fact or subsisting custody of the detainee and take that factor into account while making the order; but even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made even in anticipation to operate on his release. This appears to us to be the correct legal position."

In *Chelawat's* case after examining the various decision of this court dealing with preventive detention of a person in custody, it is held thus:

The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detainee is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact the detainee is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detainee is likely to be released from custody in the near future, and (b) taking into account the nature of the

antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

In *Sanjay Kumar Aggarwal v. Union of India and Ors.* (1900) 3 SCC 300 after reviewing all the relevant cases including *Chelawat's* case, this Court observed as under:

It could thus be seen that no decision of this Court has gone to the extent of holding that no order of detention can validly be passed against a person in custody under any circumstances. Therefore, the facts and circumstances of each case have to be taken into consideration in the context of considering the order of detention passed in the case of a detenu who is already in jail. We have already, in the instant case, referred to the grounds and the various circumstances noted by the detaining authority and we are satisfied that the detention order cannot be quashed on this ground.

In a very recent judgment of this Court in *Kumarunissa etc. v. Union of India and Anr.* 1991 SC 1640 all the above mentioned decisions dealing with the detention of a person in custody have been reviewed and it is finally held as under:

From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly be passed if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question it before a higher Court.

28. After discussing the aforesaid cases, their Lordships drew the following conclusions:

(1) A detention order can validly be passed even in the case of a person who is already in custody. In such a case, it must appear from the grounds that the authority was aware that the detenu was already in custody.

(2) When such awareness is there then it should further appear from the grounds that there was enough material necessitating the detention of the person in custody. This aspect depends upon various considerations and facts and circumstances of each case. If there is a possibility of his being released and on being so released he is likely to indulge in prejudicial activity then that would be one such compelling necessity to pass the detention order. The order cannot be quashed on the ground that the proper course for the authority was to oppose the bail and that if bail is granted notwithstanding such opposition the same can

be questioned before a higher Court.

(3) If the detenue has moved for bail then the application and the order thereon refusing bail even if not placed before the detaining authority it does not amount to suppression of relevant material. The question of non-application of mind and satisfaction being impaired does not arise as long as the detaining authority was aware of the fact that the detenue was in actual custody.

(A) Accordingly the non-supply of the copies of bail application or the order refusing bail to the detenue cannot affect the detenu's right of being afforded a reasonable opportunity guaranteed under Article 22(5) when it is clear that the authority has not relied or referred to the same.

(5) When the detaining authority has merely referred to them in the narration of events and has not relied upon them, failure to supply bail application and order refusing bail will not cause any prejudice to the detenue in making an effective representation. Only when the detaining authority has not only referred to but also relied upon them in arriving at the necessary satisfaction then failure to supply these documents, may, in certain cases depending upon the facts and circumstances amount to violation of Article 22(5) of the Constitution of India. Whether in a given case the detaining authority has casually or passingy referred to these documents or also relied upon them depends upon the facts and the grounds, which aspect can be examined by the Court.

(6) In a case where detenue is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu.

29. In light of the aforesaid conclusions, the facts of the present cases have to be looked into. In both the aforesaid petitions, the petitioners had been released on bail by the Court of competent jurisdiction as have been mentioned above while dealing with the facts leading to detention. The fact grant of release on bail of Bashir Khan was also mentioned in the grounds. It is not denied that all the documents concerning the facts mentioned in para No. 5 of both the petitions have not been supplied to the petitioners. It is also clear that both the petitioners had been arrested and were released on bail and were at liberty at the time of passing the order of detention. It has further been mentioned therein that certain conditions were imposed while granting the bail. In such circumstances, it was essential for the detaining authority to have supplied all the papers concerning the bail application and the orders made thereupon to the detenu. The case is squarely covered by the conclusion No. 6 concluded in the latest decision of their Lordships of the Supreme Court in the case of Abdul Sathar Ibrahim Manik (supra) and is also covered by the earlier judgment in Ahmedkutti's case (supra). In view of our aforesaid findings, we need not go to the other questions in these habeas corpus petitions.

30. In view of the aforesaid discussions, we are of the opinion that detenus' right of being afforded a reasonable opportunity guaranteed under Article 22(5) of the Constitution of India is violated and they are entitled to be released.

31. The result of the aforesaid discussions is that the habeas corpus petitions are allowed and rules are made absolute. The orders of detention in respect of Mohd. Umar and Gulam Murtaza are quashed and it is directed that the detenus shall be released forthwith unless required in some other case.