
(2011) 01 DEL CK 0207

In the Delhi High Court

Case No : Writ Petition (Criminal) 967 of 2010

Naresh Kumar Jain

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 27-01-2011

Acts Referred:

Citation : (2011) 176 DLT 730

Hon'ble Judges : V.K. Jain, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : B. Kumar, Vikas Pahwa and Naveen Malhotra, for the Appellant; A.S. Chandhiok, ASG and Pawan Narang and Pratap, for the Respondent

Final Decision : Allowed

Judgement

Badar Durrez Ahmed, J.—The Petitioner seeks a writ of habeas corpus under Article 226 of the Constitution of India for setting the Petitioner at liberty after quashing the detention order dated 02.06.2010 bearing No. 673/06/2010-Cus.VIII passed by the Respondent No. 2 (Jt. Secy to Govt of India, Ministry of Finance, Dept of Revenue, CEIB, New Delhi) u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the COFEPOSA Act").

Points in issue:

2. Mr B. Kumar, the learned senior counsel appearing for the Petitioner, challenged the impugned detention order and continued detention of the Petitioner on the following five points:

1. The Petitioner was already in custody under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act") when the impugned detention order was passed;

2. Some documents which had allegedly been relied upon by the detaining authority had not been supplied to the Petitioner;

3. Despite a specific request having been made in the representation dated 17.06.2010, the documents had not been supplied;

4. There was inordinate and unexplained delay in the passing of the detention order; and

5. The grounds of detention did not indicate any prejudicial activities after the Petitioner, an Indian Citizen, who had been residing in Dubai, UAE for 14 years, returned to India on 24.05.2009.

3. Mr A.S. Chandhiok, the learned Additional Solicitor General of India, responding to the five points of challenge submitted that:

1. The detaining authority was well aware that the Petitioner was in custody under the NDPS Act and that there was a distinct possibility that, as the charge-sheet had not been filed, the Petitioner may get bail-on-default as the end of the period of 180 days was fast approaching and, if released on bail, there was imminent danger that the Petitioner would disappear;

2. The documents which the learned Counsel for the Petitioner referred to as having been relied upon by the detaining authority were merely part of the narration of incidents and did not enter into the subjective satisfaction of the detaining authority; 3. The so called request in the representation of 17.06.2010 was in connection with certain exports in 2002 and 2006 and which were referred to only on the basis of information contained in a note prepared by the Enforcement Directorate and the said note had been given to the Petitioner;

4. There was no delay as the proposal for detention was received from the Enforcement Directorate on 13.01.2010. The meeting of the screening committee was held on 05.02.1010 and the minutes were signed on 15.02.2010. The approval was accorded on 16.02.2010. Several meetings took place thereafter and the last statement of the Petitioner was recorded on 19.05.2010 and the detention order was passed shortly thereafter on 02.06.2010;

5. It is not correct that the grounds do not refer to any prejudicial activities after the Petitioner's return to India in May 2009. Paragraph 1 of the grounds of detention clearly states that even after his return to India in May, 2009, the Petitioner continued the activities he was involved in while he was in Dubai.

In addition to the above, Mr Chandhiok argued against the very maintainability of this petition. His submission was that once the Advisory Board gives its report indicating that it is of the opinion that there was sufficient cause for the detention of a person and the appropriate Government, thereafter, confirms the detention order and continues the detention of the person concerned u/s 8(f) of the COFEPOSA Act, the original detention order merges with the order under the said Section 8(f) and has no independent existence. He submitted that the original detention order is only an "interim order" which gets confirmed by the order u/s 8(f) of the COFEPOSA Act after the Advisory Board's opinion, which, according to him, amounts to an adjudication. Consequently, he submitted, after

the passing of the order u/s 8(f), the detention order cannot be challenged as it does not have an independent existence and while the only order that is amenable to challenge is the order u/s 8(f), which has not been challenged in this case, it can only be challenged with regard to the procedural elements embedded in Section 8 of the COFEPOSA Act. Hence, according to Mr Chandhiok, since the present petition is only directed against the detention order and not against the confirmatory order u/s 8(f) of the COFEPOSA Act, it is not maintainable.

4. Mr Kumar, arguing for the Petitioner, replied to the maintainability argument by submitting that the opinion of the Advisory Board is not an adjudication as there is no lis inter parties; there are no indicia of judicial proceedings - the proceedings are not open to public and the Petitioner has no right of cross-examination. He submitted that there is no merger of the detention order with the opinion of the Advisory Board or with the order of the Government u/s 8(f) of the COFEPOSA Act. The confirmation only confirms the detention order and only continues the detention under the original detention order. Therefore, according to Mr Kumar, it is the detention order itself which is to be challenged even after the Advisory Board's opinion and confirmatory order of the appropriate Government.

Sequence of events:

5. At this stage, it would be pertinent to set out the sequence of relevant events leading up to the filing of this petition. As mentioned above, the Petitioner returned to India on 24.05.2009 after 14 years in Dubai. It is alleged by the Respondents that the Petitioner came to India without valid documents. On or about 24.09.2009, search operations under the Foreign Exchange Management Act, 1999 (hereinafter referred to as "FEMA") were conducted in the premises of the Petitioner and his alleged associates and certain recoveries, including currency, were allegedly made. On 06.12.2009 the Petitioner was arrested for alleged violations of the NDPS Act and was remanded to judicial custody. Cases were registered against the Petitioner under the said NDPS Act as also the Prevention of Money-laundering Act, 2002 (hereinafter referred to as "the PML Act"). On 02.06.2010 the impugned detention order u/s 3(1) of the COFEPOSA Act was passed. It was served upon the Petitioner on 03.06.2010 and the grounds of detention were communicated to the Petitioner on 07.06.2010. On 17.06.2010, the Petitioner made a representation to the detaining authority which was rejected on 14.07.2010. In the meanwhile, on 18.06.2010, within the stipulated period of five weeks from the date of detention, the reference u/s 8(b) of the COFEPOSA Act was made to the Advisory Board. On 21.06.2010, the Petitioner also made a representation to the Central Government requesting it to revoke the detention order in exercise of its power u/s 11 of the COFEPOSA Act. The Central Government rejected the representation on 16.07.2010. On 20.08.2010, the Advisory Board gave its report that there was in its opinion sufficient cause for the detention of the Petitioner. Shortly thereafter, on

23.08.2010, the Central Government confirmed the detention order and continued the detention of the Petitioner u/s 8(f) of the COFEPOSA Act.

Re: Maintainability

6. Mr Chandhiok had referred to Vijay Kumar Vs. Union of India (UOI) and Others, , wherein [at page 71] the Supreme Court observed that:

The order made u/s 3(1) is in the nature of an interim order. It is subject to the opinion of the Advisory Board u/s 8(f) of the COFEPOSA Act....

However, from this it cannot be inferred that detention order merges into the opinion of the Advisory Board. The Advisory Board does not sit in appeal or in the exercise of any revisionary jurisdiction in respect of the detention order. It is only a constitutional safeguard and it is to that extent the detention order is subject to the opinion of the Advisory Board. It may be regarded as "interim" only with regard to the continuance of the detention beyond the period of three months being predicated upon the Advisory Board reporting that there is in its opinion sufficient cause for such detention. The detention order passed u/s 3(1) of COFEPOSA does merge with the opinion of the Advisory Board or for that matter with the order of the government u/s 8(f). In State of Madras Vs. Madurai Mills Co., Ltd., , the Supreme Court held:

But the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior Tribunal and the other by a superior Tribunal, passed in an appeal on revision, there is a fusion of merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. In our opinion, the application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

With reference to an earlier decision in the case of Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co., , the Supreme Court, in Madurai Mills (supra), further observed:

For example in Amritlal Bhogilal and Co. case it was observed by this Court that the order of registration made by the Income Tax Officer did not merge in the appellate order of the Appellate Commissioner, because the order of registration was not the subject-matter of appeal before the Appellate Authority.

From this, it is clear that an order which is not the subject-matter before the appellate authority cannot be said to have merged with the appellate authority's order on some other aspects. The scope and ambit of the proceedings before the Advisory Board are entirely different from that of the detaining authority and, in any event, the Advisory Board does not sit in appeal over the order of detention. The doctrine of merger has been succinctly explained by the Supreme Court in Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh, as under:

11. The juristic justification of the doctrine of merger may be sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject-matter. Therefore the judgment of an inferior court, if subjected to an examination by the superior court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court.

Neither the detaining authority who passes the detention order nor the Advisory Board or the appropriate Government can be regarded as "courts" and, therefore, the question of their being inferior or superior courts, obviously, does not arise.

7. We would also like to refer to *Kunhayammed and Others Vs. State of Kerala and Another*, wherein the Supreme Court observed as under:

12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.

In the backdrop of these pronouncements, we fail to see as to how the detention order could be regarded as having merged with either the opinion of the Advisory Board or the confirmatory order of the government u/s 8(f) of the COFEPOSA Act. The nature of jurisdiction which is exercised by the Advisory Board is that of a Constitutional safeguard in respect of preventive detention. Its jurisdiction is not akin to either an appellate forum or a revisionary authority. The opinion of the Advisory Board is also not an adjudication. The logic underlying the doctrine of merger has no application in these circumstances. As regards the confirmatory order u/s 8(f), it must not be forgotten that it merely confirms and continues the original detention order which, by virtue of the confirmation, does not lose its efficacy or binding nature even after the 3-months period once it is confirmed. For all these reasons, we do not agree with Mr Chandhiok's submission that since the present petition is only directed against the detention order and not against the confirmatory order u/s 8(f) of the COFEPOSA Act, it is not maintainable.

8. The decision in Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, was also referred to by Mr Chandhiok, but that decision was concerned with a challenge to the detention order at the pre-execution stage. And, in any event there is nothing in the said decision which would support the contention that once the Advisory Board gives its opinion as regards the sufficiency of the cause for detention and the appropriate Government confirms the detention order, the same (ie., the detention order) cannot be challenged by way of a petition under Article 226 of the Constitution of India. On the contrary, in that decision itself the Supreme Court observed:

Lastly, it is always open for the detenu or anyone on his behalf to challenge the detention order by way of habeas corpus petition on any of the grounds available to him. It is not, therefore, correct to say that no judicial review of the detention order is available. In the view we are taking which applies also to the cases under other laws, the stage at which the judicial review is made by the Court only stands deferred till after the order is executed.

It was next contended that the opinion of the Advisory Board had a "judicial element" and, this obviated the need for "further" judicial review. For this proposition, Mr Chandhiok drew heavily on the Supreme Court decision in Supreme Court Advocates-on-Record Association and another Vs. Union of India, , where, with reference to the question of justiciability of the appointments and transfers of judges, it was observed as under [in para 480]:

The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judicial review of those decisions, which is ordinarily needed as a check against possible executive excess or arbitrariness. Plurality of judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias, even subconsciously, of any individual. The judicial element being predominant in the case of appointments, and decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated. The reduction of the area of discretion to the minimum, the element of plurality of judges in formation of the opinion of the Chief Justice of India, effective consultation in writing, and prevailing norms to regulate the area of discretion are sufficient checks against arbitrariness.

(Emphasis Supplied)

There is no parallel between appointments of Supreme Court and High Court Judges and transfers of High Court Judges on the one hand and the opinion of the Advisory Board, on the other. Apart from this, what is sought in the present petition is not a judicial review of the opinion of the Advisory Board but a judicial review of the order of detention. The reasoning of the Advisory Board is confidential and is not required to be looked into by this Court. Moreover, the "judicial element" spoken of by the Supreme Court in the said case was founded

on the premise of primacy of the judiciary in the matter of appointment of Supreme Court and High Court Judges. The appointments and transfers of judges originate from the judiciary and, hence, the "judicial element". Detention orders under COFEPOSA are not passed by the Advisory Board. Thus, the mere fact that the Advisory Board, as a constitutional safeguard, scrutinizes a detention order cannot preclude the High Court from examining the original detention order as also the continued detention.

9. Section 8 of COFEPOSA reads as under:

8. Advisory Boards.- For the purposes of Sub-clause (a) of Clause (4), and Sub-clause (c) of Clause (7), of Article 22 of the Constitution,-

(a) the Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards each of which shall consist of a Chairman and two other persons possessing the qualifications specified in Sub-clause (a) of Clause (4) of Article 22 of the Constitution;

(b) save as otherwise provided in Section 9, the appropriate Government shall, within five weeks from the date of detention of a person under a detention order make a reference in respect thereof to the Advisory Board constituted under Clause (a) to enable the Advisory Board to make report under Sub-clause (a) of Clause (4) of Article 22 of the Constitution; (c) the Advisory Board to which a reference is made under Clause (b) shall after considering the reference and the materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if in any particular case, it considers it essential so to do or if the person concerned desires to be heard in person, after hearing him in person, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned;

(d) when there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board;

(e) a person against whom an order of detention has been made under this Act shall not be entitled to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified shall be confidential;

(f) in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the

Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.

Mr Chandhiok, referring to the provisions of the said Section 8, submitted that the very wide amplitude of a hearing before the Advisory Board as delineated by Section 8(c) clearly indicates the "judicial element" in the hearing. The Advisory Board is required to consider the reference and materials placed before it and may even call for such further information as it may deem necessary from any person. It may even, if it considers it essential so to do or if the person concerned desires to be heard in person, hear such person before it prepares its report and give its opinion as to whether or not there is sufficient cause for the detention of the person concerned. Thus, according to Mr Chandhiok, once the Advisory Board has opined that there was sufficient cause for the detention of the person concerned, there is no further scope of judicial review of the detention except as to whether the elements of Section 8 have been fulfilled, such as - the constitution of the Board u/s 8(a); the making of the reference within five weeks as per Section 8(b); the question of grant of personal hearing when requested u/s 8(c); intervening circumstances which would render the continued detention to be unnecessary or bad. We cannot agree with Mr Chandhiok that the scope of judicial review under Article 226 of the Constitution, after the opinion of the Advisory Board, is restricted to the so-called "elements" of Section 8. If we were to agree with Mr Chandhiok, it would mean that the Advisory Board performs the function and role of a High Court in exercise of its extraordinary writ jurisdiction under Article 226 of the Constitution. The expanse of powers of a High Court under Article 226 goes far beyond the limited scope of the Advisory Board u/s 8 of COFEPOSA. Thus, the proceedings before an Advisory Board cannot, by any stretch of imagination be regarded as a substitute of a writ petition before the High Court.

10. In support of his contention, Mr Chandhiok had also referred to the Supreme Court decision in Haradhan Saha Vs. The State of West Bengal and Others, . But, the observations in that decision which are set out below were in a different context and do not support the view espoused by him. The Supreme Court, outlining the importance of the consideration to be given to the representation of a detenu and the power of the Advisory Board, observed as under:

24. The representation of a detenu is to be considered. There is an obligation on the State to consider the representation. The Advisory Board has adequate power to examine the entire material. The Board can also call for more materials. The Board may call the detenu at his request. The constitution of the Board shows that it is to consist of Judges or persons qualified to be Judges of the High Court. The constitution of the Board observes the fundamental of fair play and principles of natural justice. It is not the requirement of principles of natural justice that there must be an oral hearing. Section 8 of the Act which casts an obligation on the State to consider the representation affords the detenu all the

rights which are guaranteed by Article 22(5). The Government considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, considers whether in the light of the representation there is sufficient cause for detention.

25. The representation is to be considered by the Advisory Board by following the substance of natural justice as far as it is consistent with the nature of the impugned Act, the nature of the relative jurisdiction of the Government and of the Advisory Board. Procedural reasonableness for natural justice flows from Article 19. Article 22(5) speaks of liberty and making of representation. The combined result of Clauses (4), (5) and (6) of Article 22 is that a procedure which permits representation will give all the facts before the Board. Article 22(5) shows that law as to detention is necessary. The requirements of that law are to be found in Article 22. Article 22 gives the mandate as to what will happen in such circumstances.

26. The opinion of the Board as well as the order of the Government rejecting the representation of the detenu must be after proper consideration. There need not be a speaking order. There is also no failure of justice by the order not being a speaking order. All that is necessary is that there should be real and proper consideration by the Government and the Advisory Board.

The above observations were in the context of a challenge to the constitutional validity of the Maintenance of Internal Security Act, 1971, which the Supreme Court upheld. One of the contentions in aid of the challenge was that, as the said act did not provide for the supply of reasons by the Advisory Board for rejecting the representation of the detenu, it was unconstitutional. This argument was repelled by the Supreme Court by observing that the procedural safeguards to be found in Article 22 had been built into the act under challenge and that therefore it was not at all necessary that the reasons for the opinion of the Board should be made available to the person detained. In our view, the Supreme Court did not lay down in the said decision that if the Advisory Board finds sufficient cause for the detention, the detention cannot be questioned by way of a writ petition before the High Court. Similarly, in *Ram Bali Rajbhar Vs. The State of West Bengal and Others*, , another decision sought to be relied upon by Mr. Chandhiok, also, we find no proposition from which we could infer that once the Advisory Board has considered the matter, a writ petition challenging the detention order and the continued detention would not be maintainable.

11. In *Calcutta Dock Labour Board Vs. Jaffar Imam and Others*, , three dock workers had been detained u/s 3(1)(a)(ii) of the Preventive Detention Act, 1950. The Advisory Board's report was against the workers. Subsequently, after their release from detention, the services of the said dock workers were terminated on the understanding that the detention orders, in substance, amounted to orders of conviction. In support of the termination, it was urged that the Advisory Board consisted of persons of eminent status and undoubted impartiality and, so, the fact that the representations made by the Respondents were not accepted by the

Advisory Board and that their detention was confirmed by the State Government in consultation with the Advisory Board, was enough to justify the termination orders. Though the context is slightly different, the Supreme Court in the said decision did clearly spell out the nature of proceedings before the Advisory Board in the following words:

It is obvious that the Advisory Board does not try the question about the propriety or validity of the citizen's detention as a court of law would; indeed, its function is limited to consider the relevant material placed before it and the representation received from the detenu, and then submit its report, to the State Government within the time specified by Section 10(1) of the Act. It is not disputed that the Advisory Board considers evidence against the detenu which has not been tested in the normal way by cross-examination its decision is essentially different in character from a judicial or quasi-judicial decision. In some cases, a detenu may be given a hearing; but such a hearing is often, if not always, likely to be ineffective, because the detenu is deprived of an opportunity to cross-examine the evidence on which the detaining authorities rely and may not be able to adduce evidence before the Advisory Board to rebut the allegations made against him. Having regard to the nature of the enquiry which the Advisory Board is authorised or permitted to hold before expressing its approval to the detention of a detenu, it would, we think, be entirely erroneous and wholly unsafe to treat the opinion expressed by the Advisory Board as amounting to a judgment of a criminal court.

These observations make it clear that the opinion of the Advisory Board cannot be equated with a judgment of a court. That being the case, the detention order and the continued detention of the detenu, even after the opinion of the Advisory Board and the confirmatory order of the government, are open to judicial review by the High Court in exercise of its extraordinary jurisdiction under Article 226 of the constitution. The petition is therefore maintainable.

Re: Point No. 1 - The Petitioner was already in custody under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act") when the impugned detention order was passed

12. Let us first examine the law on this aspect of the matter. While it is well settled that even in a case where a person is in custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive detention, what exactly is the nature of those facts and circumstances, has been explained in *Dharmendra Suganchand Chelawat and another Vs. Union of India and others*, , where, the Supreme Court held:

21. 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 detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the

detenu 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 detenu 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.

Again, in *Kamarunnissa and Others Vs. Union of India and another*, it was held:

13. 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 (1) 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

This has been reiterated in *Sayed Abul Ala v. Union of India* (2007) 15 SCC 208 as follows:

26. No doubt antecedents of the detenu would be a relevant factor but the same by itself may not be sufficient to press an order of detention inasmuch as the principles which govern the field so as to enable the court to arrive at a decision that the order of detention can be validly passed despite the detenu being in custody are:

(1) if the authority passing the order is aware of the fact that he is actually in custody;

(2) if he had a 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 released, he would in all probability indulge in prejudicial activities; and

(3) it is felt essential to detain him to prevent him from so doing.

As mentioned in the above decisions, the detaining authority must be satisfied on the basis of cogent material before him that the detenu is likely to be released on bail. This aspect was further emphasized by the Supreme Court in *T.V. Saravanan @ S.A.R. Prasana Venkatachaariar Chaturvedi Vs. State through Secretary and Another*, in the following words:

14. We are satisfied that for the same reason the order of detention cannot be upheld in this case. The bail applications moved by the Appellant had been rejected by the courts and there was no material whatsoever to apprehend that he was likely to move a bail application or that there was imminent possibility of the prayer for bail being granted. The "imminent possibility" of the Appellant coming out on bail is merely the ipse dixit of the detaining authority unsupported by any material whatsoever. There was no cogent material before the detaining authority on the basis of which the detaining authority could be satisfied that the detenu was likely to be released on bail. The inference has to be drawn from the available material on record. In the absence of such material on record the mere ipse dixit of the detaining authority is not sufficient to sustain the order of detention. There was, therefore, no sufficient compliance with the requirements as laid down by this Court. These are the reasons for which while allowing the appeal we directed the release of the Appellant by order dated 13-12-2005.

13. In this light, let us examine the facts of the present case. The Petitioner was arrested on 06.12.2009 for alleged violations of the NDPS Act and was remanded to judicial custody. A case was also registered against the Petitioner under the PML Act on 08.12.2009, in which, the Petitioner got bail on 12.02.2010. The period of 180 days as referred to in Section 167(2) Code of Criminal Procedure read with Section 36A(4) of the NDPS Act was to expire on 04.06.2010. Since the investigation had not been completed, the Narcotics Control Bureau applied for extension under the proviso to Section 36A(4) of the NDPS Act on 25.05.2010. The Special Judge (NDPS), however, dismissed the application on 04.06.2010. In the meanwhile, on 02.06.2010, when the said application for extending the custody period was pending, the impugned detention order was passed and was served upon the Petitioner on 03.06.2010. The grounds of detention were supplied to the Petitioner on 07.06.2010. In the said grounds the NDPS case has been referred to in two places. At the end of paragraph 24 it is stated:

It was later intimated by the Narcotics Control Bureau, New Delhi that you had been arrested by them under NDPS Act, on 06.12.2009.

And, at the end of paragraph 52 of the said grounds of detention it is stated:

The cases had also been registered against you under PMLA, 02 and under NDPS Act. You were arrested on 6.12.2009 under NDPS Act and remanded to judicial custody.

14. From these facts, this much is established that the detaining authority was aware that the Petitioner had been arrested under the NDPS Act on 06.12.2009 and that he had been remanded to judicial custody. The detaining authority can be imputed with this much knowledge that if the charge-sheet was not filed within 180 days of the date of arrest, the Petitioner would get bail-on-default and would be released. It was contended that there was no material before the detaining authority to infer that the charge-sheet would not be filed within 180

days. But, the fact remains that when the detention order was passed on 02.06.2010, only 2 days remained for the period of 180 days to run out and, by then, the charge-sheet had not been filed. It would, therefore, not be unreasonable to infer that it would in all likelihood not be filed before the 180-days period was over. And, it so happened that it was not filed and even the application for extending the custody period beyond 180 days was rejected on 04.06.2010. Which means that if the detention order had not been passed and served upon the Petitioner he would have been released. Though this would not have been known to the detaining authority at the time the detention order was passed, it was certainly a distinct and real possibility.

15. Although it is not expressly stated in the grounds of detention by the detaining authority that there was a real possibility of the Petitioner being released on bail, it can be easily inferred that the detaining authority had it in mind that the release of the Petitioner on bail was imminent and that there was every likelihood that he would disappear. This can be discerned from paragraph 1 of the grounds of detention where the Petitioner is alleged to be the head of a syndicate which was continuously and actively involved in illegal foreign exchange transactions through a wide hawala network. It is also alleged that the Petitioner resided in Dubai from 1995 till May, 2009, when he returned to India without any valid documents. The Petitioner had also refused to give his statement to the enforcement directorate. So, it would be reasonable to assume that the detaining authority had it in mind that if released on bail, the Petitioner would disappear.

16. In these circumstances, we feel that the detention order cannot be faulted on the ground that the Petitioner was already in custody. It is not a case of non-application of mind on this aspect. The detaining authority was aware that the Petitioner was in custody and that his release on bail was imminent.

Point No. 2 - Some documents which had allegedly been relied upon by the detaining authority had not been supplied to the Petitioner

17. It was contended that several documents have been referred to and relied upon in paragraph 52 of the grounds of detention but they have not been supplied to the Petitioner and, as such, his right to make an effective representation has been seriously impaired and, the only consequence of which is, that his continued detention is illegal. The said paragraph 52 reads as under:

52. You (i.e. Shri Naresh Kumar Jain) were the mastermind of the syndicate and had a past criminal history. You were a noticee and an accused under the provisions of Customs Act in seizure of 462 Gold Biscuits and 50 Kg. Silver made by Delhi Customs in 1995. Directorate of Enforcement had also issued 3 show cause Notices in 2002 and 2006 under the Provisions of FERA and FEMA, 1999 to your brother, Shri Bimal Kumar Jain and others for the exports of chalk powder as bulk drug to your company i.e. M/s Kumar Trading Company in Dubai. You were arrested for money laundering by Dubai Police in 2007. In 2009, USA Court

for some contraventions, confiscated US\$ 4.3 million from your account. The cases had also been registered against you under PMLA, 02 and under NDPS Act. You were arrested on 6.12.2009 under NDPS Act and remanded to judicial custody.

The learned Counsel for the Petitioner submitted that it is apparent from the said paragraph 52 that the following circumstances have been taken into consideration by the detaining authority -

- (1) that the Petitioner was a noticee and an accused under the Customs Act in respect of a seizure of 462 gold biscuits and 50 kg. of silver made by the Delhi Customs in 1995;
- (2) the Directorate of Enforcement had issued 3 Show Cause Notices in 2002 and 2006 under FERA and FEMA to the Petitioner's brother and others for the exports of chalk powder as bulk drugs to the Petitioner's company - M/s Kumar Trading Company in Dubai;
- (3) that the Petitioner was arrested for money laundering by Dubai Police in 2007;
- (4) that in 2009 a USA Court confiscated US\$ 4.3 million from the Petitioner's account for some contraventions;
- (5) that cases under the PMLA and NDPS had been registered against the Petitioner; and
- (6) that the Petitioner was arrested on 06.12.2009 under the NDPS Act and was remanded to judicial custody.

However, not a single document has been communicated to the Petitioner regarding the facts mentioned Para 52. This plea was specifically taken in paragraph 15 of the writ petition. The response in the counter affidavit on the part of the Respondents is as under:

PARAS 14 to 16: That in reply to the contents of these para, it is humbly submitted that the detenu (Petitioner herein) has not denied the fact that in the past cases were instituted against him as referred to in these paras. Further, according to detenu own admission he is contesting the cases instituted against him.

Thus, it appears that the plea of the Respondents is that, as the Petitioner was aware of the said circumstances mentioned in paragraph 52, there was no need to supply any documents in relation thereto. It is also clear that the said documents, as a fact, were not supplied to the Petitioner. It has not been denied in the counter-affidavit that circumstances and documents in relation thereto mentioned in para 52 of the grounds of detention were not taken into consideration. Although these documents are not to be found in the list of relied upon documents, they have, in fact, been referred to and taken into consideration by the detaining authority. We do not agree with the submission of

Mr Chandhiok that these documents, which the learned Counsel for the Petitioner referred to as having been relied upon by the detaining authority, were merely part of the narration of incidents and did not enter into the subjective satisfaction of the detaining authority. Preventive detention is based on the extrapolation of past events. It is upon a consideration of those events, that the detaining authority draws up a satisfaction with regard to the future propensity of the proposed detenu. It is this satisfaction which leads to the passing of the detention order and consequent detention of the detenu in order to prevent him from continuing with his prejudicial activities.

18. In *M. Ahamedkutty Vs. Union of India (UOI) and Another*, it was held that:

...The constitutional imperatives in Article 22(5) are twofold: (1) The detaining authority must, as soon as may be, i.e. as soon as practicable, after the detention communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detenu 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 detenu 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.

(Emphasis Supplied)

Thus, failure to furnish documents relied upon by the detaining authority amounts to a denial of the right to make an effective representation. And, such failure cannot be sought to be wished away by saying that the detenu already knew the contents of the documents. This, also, has been clarified in *Ahamedkutty* (supra) as follows:

20. It is immaterial whether the detenu already knew about their contents or not. In *Mehrunissa Vs. State of Maharashtra*, it was held that the fact that the detenu 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 detenu 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 detenu could make an effective representation immediately instead of waiting for the documents 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).

Of course, it is not any and every document which is mentioned in the grounds of

detention which has to be supplied to the detenu. Only those documents as are relied upon by the detaining authority have to be furnished and their non-supply would be fatal to the continued detention. However, documents which are merely referred to by the detaining authority in passing or as a mere narrative need not be supplied to the detenu. And, their non-supply would not be fatal to the detention unless the detenu can spell out some prejudice having been caused to him on account of their non-supply. This position in law is evident from the following observations of the Supreme Court in *Powanammal Vs. State of Tamil Nadu and Another*, :

9. However, this Court has maintained a distinction between a document which has been relied upon by the detaining authority in the grounds of detention and a document which finds a mere reference in the grounds of detention. Whereas the non-supply of a copy of the document relied upon in the grounds of detention has been held to be fatal to continued detention, the detenu need not show that any prejudice is caused to him. This is because the non-supply of such a document would amount to denial of the right of being communicated the grounds and of being afforded the opportunity of making an effective representation against the order. But it would not be so where the document merely finds a reference in the order of detention or among the grounds thereof. In such a case, the detenu's complaint of non-supply of document has to be supported by prejudice caused to him in making an effective representation.

It would also be pertinent to note the observations of the Supreme Court in *State of Tamil Nadu and Another Vs. Abdullah Kadher Batcha and Another*, , to the following effect:

7. The court has a duty to see whether the non-supply of any document is in any way prejudicial to the case of the detenu. The High Court has not examined as to how the non-supply of the documents called for had any effect on the detenu and/or whether the non-supply was prejudicial to the detenu. Merely because copies of some documents have (sic not) been supplied, they cannot by any stretch of imagination be called as relied upon documents. While examining whether non-supply of a document would prejudice a detenu, the court has to examine whether the detenu would be deprived of making an effective representation in the absence of a document. Primarily, the copies which form the ground for detention are to be supplied and non-supply thereof would prejudice the detenu. But documents which are merely referred to for the purpose of narration of facts in that sense cannot be termed to be documents without the supply of which the detenu is prejudiced.

19. Mr Chandhiok, of course, argued that the documents mentioned in paragraph 52 of the grounds of detention were merely part of the narration of incidents and did not enter into the subjective satisfaction of the detaining authority. But, this is not what is said in the counter-affidavit. We have already indicated above that the specific plea was taken in the writ petition in paragraph 15 thereof that the facts mentioned in paragraph 52 of the grounds of detention were taken into

consideration by the detaining authority yet, not a single document had been communicated to the Petitioner. In response, the detaining authority, has not denied specifically or even by implication that the facts and documents mentioned in paragraph 52 of the grounds of detention were not considered or relied upon by her. On the contrary, she suggests, in the counter-affidavit, that the references to past cases are reinforced by the alleged non-denial by the Petitioner that those cases had been instituted against him and that he was contesting those cases. It is evident that the reference to the alleged past incidents in paragraph 52 of the grounds of detention was not merely casual, en passant or as part of a mere narration of events. In our view, those events entered the mind of the detaining authority and shaped her subjective satisfaction. The documents relating thereto were not shown in the list of relied upon documents but, that does not alter the position. If they were in fact relied upon for the purposes of forming the satisfaction, they ought to have been supplied to the detenu irrespective of their not being shown in the list of relied upon documents.

20. Since, the documents were not supplied, the detenu's right to make an effective representation was seriously impaired and this, in itself, would be fatal to the continued detention.

Point No. 3 - Despite a specific request having been made in the representation dated 17.06.2010, the documents had not been supplied

21. As an adjunct to Point No. 2, the learned Counsel for the Petitioner submitted that documents which had been relied upon by the detaining authority were not supplied to the Petitioner despite his written request contained in his representation dated 17.06.2010 to the detaining authority. The representation, as mentioned above, was rejected by the detaining authority on 14.07.2010 by a non-speaking order. The requested documents were not supplied either. A similar request and representation to the central government on 21.06.2010 met with the same fate by virtue of the order dated 16.07.2010.

22. On examining the contents of the representation dated 17.06.2010 we find that in paragraph 15 thereof a specific plea with regard to non-supply of relied upon documents was, inter alia, raised as follows:

15. ...In sub-para (c) the nexus between me and my brother Bimal Kumar Jain has been taken into consideration. It is pertinent to mention here that a case of the year 2002 and 2006 has been taken into consideration at sub-para (iv) not a single document concerning case have been communicated to me or placed before the detaining authority....

This plea was made in the context of paragraph 50(c)(iv) of the grounds of detention which was in the following terms:

(iv) Exports of Chalk Powder in the guise of a drug named NEPROXEN were made by your brother, Shri Bimal Jam and his counter-part in Hyderabad to your

company in Dubai (M/s. Kumar Trading Company, LLC, Dubai) in 2002 and 2006 in contraventions of the provisions of FERA and FEMA, 1999.

23. The learned Counsel for the Petitioner submitted that though this is mentioned in the grounds of detention, there is no reference to this in any of the statements nor are there any documents referring to the same in the panchnamas. On behalf of the Respondents, it was contended that paragraph 50(c)(iv) of the grounds is on the basis of a note dated 26.04.2007 prepared by the Enforcement Directorate and the note has been supplied to the Petitioner as it finds mention at serial number 31 of the relied upon documents in the following manner:

31. Note dated 26.04.2007 in regard to 3 Show Cause Notices under FERA and FEMA, issued to Shri Bimal Kumar Jain and Ors. in connection with the export of chalk powder declaring as bulk drug made to M/s Kumar Trading Company, Dubai owned by Shri Naresh Kumar Jain and Discovery General Trading LLC, UAE.

24. It was, therefore, contended that only the said note was relied upon for the observations in the grounds of detention and, since, the said note was supplied to the Petitioner, he could not make any grievance about the non-supply of requested documents. The learned Counsel for the Petitioner rejoined by submitting that in paragraph 50(c)(iv) of the grounds of detention there is a specific mention of "NEPROXEN", whereas, the note dated 26.04.2007 does not bear any reference to NEPROXEN. Then, he asked, how did the detaining authority have knowledge about NEPROXEN

25. It is true that the said note dated 26.04.2007, does not mention NEPROXEN. Clearly, if the detaining authority suggests that her knowledge qua NEPROXEN is derived from the said note dated 26.04.2007, then that is not correct. One possibility is that she could have derived that information from some other document. But, if so, that document has not been supplied to the Petitioner. The only other possibility is that the detaining authority had received some other information which, again, has not been disclosed to the Petitioner. In either eventuality, the right of the detenu in making an effective representation has been impaired.

26. With reference to the request for information contained in paragraph 28 of the representation dated 17.06.2010, it was sought to be contended on the part of the Respondents that it was only information which the Petitioner sought and not the supply of documents. We cannot agree with this. Specific pleas of non-supply of documents were made by the Petitioner throughout the representation; examples of which are to be found in paragraphs 15 (already referred to above), 16 and 27 of the representation. It is also clear that even documents relating to the other alleged circumstances mentioned in paragraph 52 of the grounds of detention have not been supplied to the Petitioner despite a specific request in paragraph 16 of the representation dated 17.06.2010 as under:

16. At Para 52 of the ground of detention, old case of Custom Act and Show

Cause Notices issued by the Enforcement Directorate in 2002 and 2006 have been taken into consideration. The fact has been considered that I was arrested in Dubai in 2007 and US\$ 4.3 million have been seized by the USA Government and case under the PMLA and NDPS has been registered against me. Not a single documents has been communicated to me regarding the facts mentioned Para 52....

Thus, as an adjunct to our decision on Point No. 2, we find that the non-supply of relied upon documents despite the request made by the Petitioner impaired the Petitioner's right to make a representation and, as such, his continued detention would be illegal.

Point No. 4 - There was inordinate and unexplained delay in the passing of the detention order

27. Delay in the passing of a detention order is sometimes fatal to the consequent detention if it is shown that the nexus or connection between the prejudicial activity and the purpose of detention has snapped. It is logical that if the prejudicial activity which triggered the need for preventive detention has itself died down, there would be no reason to detain anybody. If the time-gap between the past prejudicial activity and the detention is too large, it could be inferred that the nexus has disappeared.

28. According to the learned Counsel for the Petitioner there was inordinate delay in the passing of the detention order. He submitted that search and seizure operations were conducted in September, 2009 and the statements were recorded in October, 2009 but, the detention order was passed after a delay on 02.06.2010. It was submitted that even processing of the detention order took over 5 months from January to June, 2010.

29. In order to take a view with regard to the plea of delay in passing the order of detention it would be necessary to examine the steps taken by the Respondents during the alleged period of delay. From the counter-affidavit it is apparent that a composite detention proposal for detaining the Petitioner and his four other alleged associates was received from the Directorate of Enforcement, New Delhi (the sponsoring authority) on 13.10.2010. The meeting of the Screening Committee was held on 05.02.2010. The final draft of the minutes of the meeting were approved by all the members and signed on 15.02.2010. The minutes were put up before the detaining authority on 16.02.2010 who directed that the proposal be processed. Thereafter, several rounds of meetings were said to have been held between the officials of the Sponsoring Authority and the Under Secretary, (COFEPOSA) on different dates including on 16.03.10, 22.03.10, 12.04.10, 20.05.10. It is further stated in the counter-affidavit that considering the magnitude of the prejudicial activities and gravity of the case, discussions were also held with the Joint Secretary (COFEPOSA) [the detaining authority] on 05.03.10, 22.03.10, 07.04.10, 19.04.10, 03.05.10, 11.05.10 and 31.05.10. It is also stated that the last statement of the Petitioner was recorded

by the officers of the Enforcement Directorate in Central Jail, Tihar, New Delhi on 19.05.10. Based on the above meetings and discussions, relied upon documents, various informations and clarifications were obtained from the Sponsoring Authority and the final set of relied upon documents were received on 24.05.10. The material in support of the justification for the detention proposals, collected and compiled as a result of the above exercise was shown to and discussed with the detaining authority and, ultimately, on 02.06.2010 the impugned detention order was passed. It was submitted on behalf of the Respondents that the detention orders were also passed in respect of the other four alleged associates of the Petitioner on the same day and which involved an exhaustive exercise involving thousands of pages of documents. It was also pointed out that while the Petitioner has been detained, the other four persons are absconding. In this backdrop, it was urged on behalf of the Respondents that there has been no unexplained delay.

30. We find ourselves to be in agreement with the submissions of the Respondents. The series of steps taken by the Respondents have been clearly outlined in the counter-affidavit. It is also apparent that it was a case of a group of persons and voluminous documentation in respect of each had to be processed and the inter-linking had to be scrutinized. All this took some time. But, not beyond what is reasonable. In any event, there is nothing to suggest that the time spent in passing the detention order was of such a magnitude that the link between the alleged prejudicial activity and the detention had been snapped. We must also remember that the delay in passing a detention order has not to be judged on the same standard as a delay in complying with procedural safeguards such as supply of grounds and documents, consideration of the representation etc.,. While there is no scope for any laxity in the latter case, there can be some "play-in-the-joints", as it were, in the former. This distinction is well settled as would be apparent from the Supreme Court decision in *Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others*, , wherein it was observed as under:

10. Viewed from this perspective, we wish to emphasise and make it clear for the guidance of the different High Courts that a distinction must be drawn between the delay in making of an order of detention under a law relating to preventive detention like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the delay in complying with the procedural safeguards of Article 22(5) of the Constitution. It has been laid down by this Court in a series of decisions that the rule as to unexplained delay in taking action is not inflexible. Quite obviously, in cases of mere delay in making of an order of detention under a law like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 enacted for the purpose of dealing effectively with persons engaged in smuggling and foreign exchange racketeering who, owing to their large resources and influence have been posing a serious threat to the economy and thereby to the security of the nation, the courts should not merely on account of delay in making of an order of detention assume that such delay, if not satisfactorily explained, must necessarily give rise to an inference

that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. Taking of such a view would not be warranted unless the court finds that the grounds are "stale" or illusory or that there is no real nexus between the grounds and the impugned order of detention.

(Emphasis Supplied)

This view was reiterated in *Ahamedkutty (supra)*. The Supreme Court held:

7. Where the seemingly long time taken for passing the detention order after the prejudicial act is the result of full and detailed investigation and consideration of the facts of the case, the ground cannot be held to be remote and the detention cannot be held to be bad on that ground.

It was further observed in *Ahmedkutty (supra)*, following *Rekhaben Smt. Rekhaben Virendra Kapadia Vs. State of Gujarat and Others*, , that:

whether the time lag between the commission of the offence and the detention was enough to snap the reasonable nexus between the prejudicial activity and the purpose of detention would depend upon the facts of each case. The test of proximity is not a rigid or mechanical calendar test to be blindly applied by merely counting the number of months and days between the offending act and the order of detention. The question is whether the past activities of the detenu were such that the detaining authority could reasonably come to the conclusion that the detenu was likely to continue in his unlawful activities.

Finally, in *Sheetal Manoj Gore Vs. State of Maharashtra and Others*, , the Supreme Court held:

The norms and standards laid down by this Court in the matter of consideration of the representation of a detenu, cannot be strictly applied to the case of processing of a proposal for detention of a person under the Act. No doubt, if there is inordinate delay in issuing the order of detention, it may well be argued that the live link between the prejudicial activity of the detenu and the purpose for which the order of detention is issued is snapped, and being stale there was no justification for issuance of an order of detention. In the facts and circumstances of this case, we are satisfied that the details furnished by the detaining authority provide sufficient explanation for the time taken in issuing the order of detention. We are also satisfied that the detaining authority was conscious of the fact that the matter required immediate attention, but in view of the voluminous record which had to be scanned and scrutinised before issuance of the order of detention, the order could not be issued earlier.

31. In the light of the foregoing discussion, we are of the view that there was no inordinate or unexplained delay in the passing of the detention order in this case. In any event, there is nothing to suggest that the time spent in the above exercise was such that it resulted in the detention becoming "stale" or in the snapping of the link between the alleged prejudicial activity and the

detention.

Point No. 5 - The grounds of detention did not indicate any prejudicial activities after the Petitioner, an Indian Citizen, who had been residing in Dubai, UAE for 14 years, returned to India on 24.05.2009

32. The learned Counsel for the Petitioner also raised the plea that the detention order is bad because the grounds of detention do not disclose any prejudicial activities of the Petitioner after his return to India in 2009. But, this is not correct. The very first paragraph of the grounds of detention makes a clear reference to the Petitioner's activities post May 2009 in the following manner:

...Even after his return to India in May, 2009, he continued to engage in the same businesses which he was doing during his stay at Dubai including arranging foreign exchange for Indian parties. S/Shri Manoj Garg, Pooran Chand Sharma, Bimal Jain and Satpal Jain were other members of syndicate actively associated with Shri Naresh Kumar Jain and assisting him in carrying out his illegal activities in/from India....

Hence, this plea of the Petitioner is untenable.

Conclusion:

33. In view of our decision on Point Nos. 2 and 3 above, the continued detention of the Petitioner would be illegal. Hence, this petition is allowed to that extent and the Respondents are directed to set the Petitioner at liberty forthwith unless he is required to be in custody in some other case.