
(1974) 12 BOM CK 0029
In the Bombay High Court

Ramesh Ramlal Narang

APPELLANT

Vs

M.G. Mugwe and Others

RESPONDENT

Date of Decision : 05-12-1974

Acts Referred:

Maintenance of Internal Security Act, 1971 — Section 3(1)(c)

Citation : (1976) CriLJ 135

Hon'ble Judges : Shah, J;Deshpande, J

Bench : Division Bench

Judgement

Deshpande, J.—One Ram Lal Narang is detained by the Commissioner of Police, Greater Bombay, under order dated 4th October, 1974, passed by him u/s 3 (1) "(c) of the Maintenance of Internal Security Act of 1971 (hereinafter referred to as "MISA") with a view to preventing him from smuggling goods and abetting other persons to smuggle goods. The said order was served on him on 5th October, 1974. Grounds for detention were served as required u/s 8 (1) of the said Act, on 11th October, 1974. The petitioner, the son of the detenu, challenges the validity of this detention order in this application dated 24th October, 1974, under Articles 226 and 227 of the Constitution.

2. The grounds served on the detenu go to indicate that the detenu has been indulging in smuggling goods and abetting other persons to smuggle goods since 1964. Three instances are detailed in these grounds and it is stated therein that "in all probability you will continue smuggling goods and abetting other persons to smuggle goods". Particulars of the first incident indicate that the detenu is the partner of Messrs. India Products, New Delhi. The said firm attempted to export 16 cases to General Imports Company at Dallas, Texas, U. S. A. The declaration indicated as though these cases were of brass trays worth Rs. 27,460. However, on the examination of the cases by the Customs Officers on 29-11-1965 the cases were found to contain valuable antique stone sculptures worth Rs. 3,83,950/- F. O. R. Adjudication proceedings with regard to the same were shown to be in progress under the Customs Act.

3. With regard to the second instance, it is alleged that two antique sculptures - one of Shiv Parvati (of the tenth century from Khajurao) and another standing Buddha of Gupta period were smuggled out of India from Bombay to New York by the detenu and his associates in the year 1964-65, Shiv Parvati antique sculpture, was worth Rs. 4 lacs approximately, while that of standing Buddha was found to be worth Rs. 6 lacs. On investigations, charge-sheets were filed against him and his associates in the Court of the Judicial Magistrate, First Class, New Delhi, in Court Cases Nos 111/2, 112/2 and 259/3 all of 1969.

4. In the particulars of the third instance, it is alleged that a bronze icon of Natraj - dancing Shiva-was smuggled out of India some time in 1968, The same was found to have been from the temple of Shivpuram, Tamil Nadu. It was discovered in the possession of one Mr. Martin Simon in U. S, A. Incriminating documents relating to this idol were recovered from the premises of Messrs, Narang Overseas (Private) Limited, New Delhi in the course of investigation by Tamil Nadu C. I. D. The detenu was found to be the Managing Director of the said concern at the material time.

5-13. After stating the contents of the petition and the affidavits filed by the parties, His Lordship proceeded.

14. This petition raised several constitutional questions as to the validity of Ordinance No. II of 1974 as also the Presidential order D/- 16th November, 1974, promulgated in exercise of the powers under Article 359 of the Constitution. Mr, Porus Mehta, the learned Counsel appearing for the petitioner, however, made it clear at the commencement of the arguments that he was not going to press these points in this petition.

15. Mr. Mehta drew our attention to several cases to emphasise the Court's duty to the citizen against the sweeping executive powers under the law of detention. The ratio of the leading cases can thus be summarised :

(1) Notwithstanding the guarantee of the fundamental rights, the Constitution recognises the need of the evil of detention law- sarcastically described as lawless law to meet the threat of internal security or analogous situations when the ordinary law is found to be inadequate to meet the same.

(2) The detention without trial constitutes a serious invasion of the well cherished liberty of citizens and provisions of any enactment authorising such detention have got to be strictly construed against the State and liberally in favour of citizens,

(3) Satisfaction of the detaining authority as to the existence of the grounds, i. e. alleged prejudicial activities contemplated u/s 3 of the MISA is the condition precedent for and the foundation for detention of any citizen. If this condition precedent is not proved to be in existence, the order of detention is liable to be impeached,

(4) The propriety and adequacy of the satisfaction of the detaining authority,

where some material supporting the grounds exists, as also the satisfactory character or the reasonableness thereof is not justiciable in the courts.

(5) However, sufficiency of the material or the particulars of the grounds required to be furnished to the detenu, in compliance with the statutory provision of S. 8 is justiciable in the limited sense to ensure that particulars" were such as could enable the detenu to make representation. Such particulars enable the detenu also to challenge the validity of the detention by demonstrating irrelevancy of the grounds or the non-application of the mind by the detaining authority and analogous features thereof indicating that the grounds were beyond the scope of the enactment or are otherwise ultra vires.

(6) Even though the Court has no power to probe into the truth or otherwise of the recitals made in the detention order, the Court has powers, nay a duty, to satisfy that all procedural safeguards provided by way of restraint on such sweeping detention powers are complied with and the detention is based on relevant grounds.

(7) Detaining authority has to satisfy the Court by affidavit that his satisfaction is based on relevant material and that he did apply his mind carefully and all the procedural safeguards were duly complied with. But recitals in the order and the affidavits will be presumed to be correct, unless demonstrated to be untrue by the detenu or the petitioner. It would be enough to refer to the leading cases of Supreme Court in the cases of *The State of Bombay Vs. Atma Ram Sridhar Vaidya*, ; *Rameshwar Shaw Vs. District Magistrate, Burdwan and Another*, and *Bhut Nath Mete Vs. The State of West Bengal*, in this behalf out of the many cited at the Bar.

16. Mr. Porus Mehta contends that this is a case of gross in application of the mind. The following particulars, according to Mr. Mehta in grounds are inaccurate and display casualness and in application of the mind :

(1) Detenu is referred to as a partner of India Products in the first incident, though he is not.

(2) Confiscation proceedings are shown to be "in progress" in this ground, though there is no progress during the nine years since the written statement was filed on 30th March, 1966,

(3) Averments that investigation was completed and charge-sheet was filed in Delhi Court about Buddha antique in ground No. 2 are incorrect.

(4) Reference to R. C. No. 21 of 1966 in the second ground is misleading. It does not concern any of the activities in ground No. 2, but pertains to ground No. 1.

(5) Averment that incriminating documents were seized from the office of Narang Overseas Ltd., New Delhi, is incorrect.

Mr. Mehta contends that these inaccuracies could not have entered in the

particulars, statutorily required to be furnished to the detenu, unless the detaining authority had treated this matter casually and mechanically signed the order without any application of the mind whatsoever to the material before him.

17. Strictly speaking, the description of the detenu as partner in incident No. 1 cannot be said to be that accurate. It, however, appears from the details given in the return that the minor sons of the detenu are the partners as also his mother and sister-in-law; and that mother and his sister-in-law have actually executed power of attorney in favour of the detenu. The fact that the detenu has signed all the documents affecting the transaction and further that in his affidavit before the adjudication authorities he claimed on oath to have been wholly in charge of the business of M/s. India Products, New Delhi, could have easily induced the belief in the mind of any person dealing with the firm that actually the detenu was one of the partners. The detenu does appear to be the de facto partner of the firm and brain moving behind its activities. Not much can be made out of this technical inaccuracy. The same is true of the description of the proceedings as being in progress instead of as pending. The fact that the proceedings have not since been concluded is admitted in the petition itself.

18. Now, it is true that on superficial reading of the second ground, the first impression created is as though the charge-sheet also has been filed with regard to the standing Buddha antique. Close perusal of the particulars, however, indicates that the statement under this heading falls into three parts. First part deals with the fact of smuggling out of India of these two antiques-Second part deals with the display thereof in New York, their prices and the third part deals with the pendency of the cases. That two of the three cases arise out of the smuggling out of India Shiv Parvati antique is not disputed before us. There is not a word to suggest that any of the pending cases related to the Buddha antique, It cannot, therefore, be said that there is any inaccurate recital under this head, though some wrong impression is liable to be created at the first blush, because of the association of the two antiques together. This association also is not without some explanation. The complaint with regard to the two was received together and F. I. R. with regard to the two antiques also was lodged together. It is true that there was no occasion for the reference of R. C. No. 21 of 1966 in these particulars, which has no connection whatsoever with the two antiques. Reference appropriately could have been made to it under the first head. It is, however, difficult to see how this by itself would amount to either a case of misdescription or casualness particularly when facts are themselves somewhat complex. The contention of Mr. Mehta that the description of the documents as incriminating in the third incident is inaccurate does not appear to us to be correct. The documents may not appear to be on the face of them incriminating and yet these may turn out to be so when considered along with the other material. The Commissioner in his affidavit asserts that the documents seized from the premises of Messrs. Narang Overseas (Private) Limited are, in fact incriminating. We cannot judge its correctness without ourselves appraising the material which we obviously cannot do. No material is placed before us by

the petitioner to conclude that, in fact, they are not so incriminating.

19. While considering the effect of the above contentions, it cannot be forgotten that what is required to be examined in such petitions is the legality of the detention and not the draughtsman ship of detaining authority. The substance alone, and not the form, should matter. Above errors, if the same are to be considered as errors, are too trivial, inconsequential and cover too unessential part to affect core or substance.

20. Now, in *Re Shoilen Dey*'s case AIR 1949 Bom 75 : 1949 Cri LJ 173 , the detenu was alleged to have been inciting a section of labourers to use violence against the officers of their employers, Tata Air India. It was, however, discovered that there was no concern in existence as Tata Air India, Bombay, at all, and reference indeed was intended to the labourers of Air India Ltd, Thus the incitement turned out to be to the workers of the non-existent employer. It was not merely a case of misdescription. It made nonsense if the entire ground of detention and so held as fatal In *Jagannath Misra Vs. State of Orissa*, the detenu was detained on six grounds. The Minister in his affidavit had sworn only to two grounds without any attempt to justify the detention on four other grounds. Use of the disjunctive "or" between various grounds indicated uncertainty as to the existence of all the grounds. It was this (-usualness, which was found to be fatal. In Criminal Application No. 799 of 1974 decided by *Vimadalal and Gandhi JJ.* on 30-10-1974 (Bom), one of the two inaccurate grounds in the grounds resulted in the finding that it was a nonexistent ground. Emeralds were alleged to have been imported from Switzerland and confiscated. It turned out that these were imported from Japan and there was no confiscation. Ratio of *Shoilen Dey*'s case was found to have been attracted on this ground. In the case of *Rameshwar Lai v. State of Bihar* AIR 1988 SC 1303 : 1968 Cri LJ 1490 , the detaining authority referred to a pending case, which in fact was tried long before the date of detention and the detenu was actually found to have been acquitted. All these cases are clearly distinguishable. In fact, the alleged accuracies in the instant case are all "so inconsequential in nature" within the ratio of the Supreme Court judgment in *Puranlal Lakhanpal Vs. Union of India (UOI)*, , that it cannot have any effect on the validity of the order. At best the language used can be said to have been "loose" within the ratio of another Supreme Court judgment in *Thakur Prasad Bania and Others Vs. The State of Bihar*, .

21. Mr. Mehta then contends that at any rate all the three grounds can be said to be non-existent, He wants us to draw this inference from the admitted fact that adjudication proceedings and trial of criminal case has not concluded in spite of the several years from the incidents in 1964, 1965, 1968 and even the investigation in "standing Buddha" case and *Natraj Shiva* icon is not finalised, though offences were detected in 1966 and 1968. This, it must be conceded, is most disquieting and cannot but reflect adversely both on the competency of investigating agency and the judicial process. It may even give rise to an impression as though detention is being resorted to as punitive step where

administrative machinery failed to get the offences tried. This undoubtedly poses a threat to the liberty of the citizen. However, scope of further probe by us in this aspect, in each case, is extremely limited. The length of pendency by itself cannot be the proof of the falsehood of the allegations. Affidavits indicate that large scale smuggling activities remain undetected due to their mode of operations and normal machinery has proved unequal to face the growing menace. It is the special feature of these activities that has necessitated the amendment of MIS A to ensure the stoppage of these threats to the security. There are also no means of knowing how far manoeuvring by the detenu himself has contributed to the length of these proceedings. We have to trust the oath of the detaining authority. So looked at, grounds cannot be held to be nonexistent merely from the length of pendency. Explanation of the Commissioner shall have to be accepted in the absence of any contrary material.

22. While considering this aspect of the matter, it is not possible to ignore the fact that the detaining authority is not directly concerned with the investigation, institution or prosecution of these cases, adjudication proceedings having been instituted by the customs Officers and criminal cases having been instituted by the C. B. I. in the Delhi Court, investigation partly being carried on by Tamil Nadu C. I. D. No such conclusion can also be drawn merely from the circumstance that in the course of investigation, Tamil Nadu C. I. D. happened also to seize some papers connecting apparently, not the detenu, but his brother Manu Narang with the purchase of certain antiques. The averments in the detention order as also in the affidavit of the detaining authority indicate that he had applied his mind to all this material and concluded that, not the documents referred to in the petition and seized during the course of the investigation, but the other evidence, relied on by him, represents the truth. The truth or otherwise of such averments and the correctness of assessment of the material in possession of the detaining authority is indeed left to the subjective satisfaction of the detaining authorities under the laws dealing with the preventive detention and it is not open for us to go behind these averments and recitals, unless from the impeachable evidence produced before us the same can be held to be untrue. Mere reference to such documents or the production of the copies before us cannot have that effect.

23. Mr. Porus Mehta then contends that grounds supplied are vague and are far too inadequate to enable the detenu, in custody, to understand what precisely he was called upon to explain. Implicit in this contention is the grievance that essential material is withheld. Before we proceed to examine this contention, it shall have to be borne in mind that the word "vague" itself does not admit of any fixed connotation. Requirements of particulars may vary from case to case and what may appear to be vague to one person in one case may not appear to the same person or any other person in another context, We have already given the gist of the allegations contained in these grounds. Whatever could be said about the grounds Nos. 2 and 3, it is impossible to accede to the contention that particulars of ground No. 1 are, in any manner, vague. Details of the consignment intercepted and examined are given in all their particulars, and

clear indication is given as to how the detenu is assumed to have been connected therewith. Effect of his being described as the partner, in spite of his minor sons and mother, and not he being the partner, has already been discussed by us. Adjudication proceedings have already been instituted and the show cause notice has also been replied to by the detenu as before as 30th March, 1966. In the face of these details it should indeed be difficult for any one to hold that the ground is vague in any sense of the term. Now, it is true that with regard to the second incident, dates when the antiques have been smuggled out or the details through whom and the manner in which the same have been smuggled out have not been specified. With regard to the sculpture of standing Buddha, no details are given, excepting the bare statement that the same has been smuggled out by the detenu. It is also true that all such details with regard to incident No. 3 have not been given. However, the details of the articles smuggled out, the places of their origin, the port from which they were smuggled out, the place where actually they were displayed at New York in U. S. A., as also the approximate prices in New York are given out. The details of the pending cases about Shiv Parvati sculpture also have been given out. Similarly, the detailed description of the Bronze Icon of Nataraj referred to in ground No. 3 and the place from which it has been removed, the year in which it has been removed and the steps in investigation taken in connection therewith are given in as detailed manner as it has been possible and it is also indicated in what capacity the detenu is found to have been concerned in the said act. Though particulars cannot be said to be containing all the conceivable details, it still cannot be said to have been inadequate and cannot be said to have disabled the detenu from making representation against the said allegations. The grievance of vagueness thus is unfounded.

24. While considering the question of what precisely is required to be communicated to the detenu in such cases all that Section 8 requires is the communication of the grounds on which the detention order was passed. Identical phraseology in earlier enactments has been construed by the Supreme Court by special reference to Article 22 (5) of the Constitution. Mr. Sorabjee, the learned Counsel for the Union of India, did contend before us that with the suspension of Article 22 (5) of the Constitution, qua the detention order, by the Presidential Order under Article 359 of the Constitution, corresponding statutory rights u/s 8 also stand suspended. Prima facie the contention seems to us to be unsound. But we do not think it necessary to decide this question in this case and propose to proceed on the basis that the detaining authority is not relieved of its obligation u/s 8 of the MISA. In the case of *The State of Bombay Vs. Atma Ram Sridhar Vaidya*, , it has been held :

If the representation has to be intelligible to meet the charges contained in the grounds, the information conveyed to the detained person must be sufficient to attain that object. Ordinarily, the "grounds" in the sense or conclusions drawn by the authorities will indicate the kind of prejudicial act the detenu is suspected of being engaged in and that will be sufficient to enable him to make a

representation setting out his innocent activities to dispel the suspicion against him. Of course, if the detenu is told about the details of facts besides the grounds, he will certainly be in a better position to deal with the same. It is significant that the clause does not say that the "grounds" as well as details of facts on which they are based must be furnished.

(Underlining supplied).

It is thus clear that to give the detenu an effective opportunity to make representation, all that is obligatory, is to convey such conclusions of facts which will enable the detenu to have his say in the matter. There is no obligation to supply the entire evidence in support of these conclusions. Our attention was not drawn to any authority laying down law to that effect. Reference to the "material in possession of the authority" and the "as full particulars as possible" in some of the cases if found to have been based, on scrutiny, only on the ratio of this *Atmaram Vai dya's* case. It is open to the detenu to ask for more particulars, if at all, the information supplied is found by him to be deficient. This obligation of the detaining authority, however, again is subject to the claim of privilege available to him u/s 8 (2) corresponding to Article 22 (6) of the Constitution. That the entire evidence in support of the allegation is not required to be furnished is also clear from the view taken by the Supreme Court in other judgments. Thus in the case of *Dr. Ram Krishan Bhardwaj Vs. The State of Delhi and Others*, , it has been held that even where speeches made by the detenu are considered to be the prejudicial activities of the detenu, there is no obligation to furnish copies of such speeches or even the gist thereof. In the cases of *Thakur Prasad Bania and Others Vs. The State of Bihar*, , it has been held that there is no obligation to furnish every meticulous details of the grounds and in the case of *Lawrence Joachim Joseph D'souza Vs. The State of Bombay*, , "it has been held that the fact that the detenu himself does not ask for particulars itself will indicate that grievance of the ground being vague is unfounded. It is difficult thus to hold either that grounds are vague or that essential available material was withheld or not communicated.

25. The detaining authority also has claimed privilege indicating that if more facts about the second and third sub-heads of the grounds have not been supplied, it was because the detaining authority considered that, disclosure to be not in the public interest. We propose to deal with the question of validity of this claim of privilege separately, while dealing with another contention of the learned advocate. Suffice it to observe at this stage that the claim of privilege does not appear to us to be baseless or unfounded in the facts and circumstances of this wise.- This apart, having regard to the nature of the activities alleged against the detenu, the possibility of some such details having not been detected also cannot be ruled out. We are not prepared to go to the length of characterising (he entire allegation as untrue merely because the investigating agency has not been able to detect all such details. Even grounds under the second and third heads compare more favourably with the kind of grounds quoted in *Lawrence*

D'Souza's case 56 Cri LJ 935.

26. Mr. Mehta, however, contends that, for the first time, the return of the Commissioner discloses that the papers and the letters enclosed (copies) along with the petition indicating the connection of Manu Narang with the transactions of antiques were found by the Commissioner to have been got up and fabricated, The Commissioner ought to have communicated this in the grounds to the detenu when this, on his admission had weighed on his mind. Mr. Mehta contends that non-communication of such important ground or material to the detenu by itself should be sufficient to vitiate the detention order. We are unable to agree with this contention of the learned Counsel. The contention is attractive, no doubt. It is enough to observe that the detenu is not being detained for any act of forgery or for manoeuvring such documents into existence, but for smuggling out the icon referred to therein. These, no doubt, appear to be the documents seized by Tamil Nadu C. I. D. in the course of the investigation of the offence mentioned under the third head. Seizure of such documents or examination of any person in the course of such investigation by itself does not and cannot lead to the conclusion, either that documents are genuine or that their versions are correct. While satisfying himself as to the truth of the allegations under the sub-head (iii), the Commissioner seems to have considered the probative value of these documents. This indeed is what it should have been. The conclusion so drawn by the Commissioner, after-all is a conclusion of fact beyond the scope of judicial review. When a reference to the same is made by the petitioner in his petition, the detaining authority was required to explain what his assessment with regard to these documents was. It should be impossible to hold on these facts that this material or the opinion of the detaining authority as to the falsity of this material is the ground of the detention. The basis of the detention is his conclusion that allegation as to the detenu having been instrumental in smuggling out the Bronze Icon of Nataraj is true, notwithstanding this or any other material collected in the course of investigation. If we are right in holding that the entire evidence with regard to any ground is not required to be communicated to the detenu in compliance with the provisions of Section 8 (1) of the MISA, the non-communication of any such material to the detenu can have no adverse effect whatsoever on the legality of detention.

27. Mr. Mehta then contends that the three instances of 1961 to 1968 are too stale to warrant detention in October, 1974. These fail, contends Mr. Mehta, to stand the test of "proximity" and the "live link" conceived by the Supreme Court in the cases of Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, ; Sri Nagen Murmu Vs. The State of West Bengal, ; Lakshman Khatik Vs. The State of West Bengal, , Golam Hussain alias Gama Vs. The Commissioner of Police Calcutta and Others, and also two unreported judgments of our Court and one judgment of Gujarat High Court. Contention, no doubt, is attractive and reliance on more than six years old antecedent is apparently absurd.

28. Now, it is permissible for the authority to rely on the present and past

activities of the proposed detenu to make estimate of his probable future prejudicial activities. The above cases lay down that, where proof of present activities is not available, even the antecedents can be relied on so ascertain his tendencies and their potentialities provided the same are, proximate in time, and can have rational connection with the object of detention. These cases do refer to periods of years and even seven months, which were found insufficient to indicate continuation of the "live link". It would, however, amount to miss the grain for the chaff, if such proximity is assumed to have been held measurable only in terms of months and years without regard to complexities and requirements of a given situation. Almost each one of these cases goes to emphasise how inadvisable it is to count the period mechanically in terms of months and to lay down any inflexible standard for tracing such "live link".

29. Now, live link merely presupposes existence of chain of prejudicial activities and not the literal continuation thereof till the date of detention. Solitary instance of indulging in arson or loot by any person by itself may not disclose his discernible tendencies ordinarily, but in a given set of facts, may afford sure indication thereof. Passage of a few months without repetition may afford indication of abatement, if not elimination, of such tendencies. Repetition of such instances may indicate a chain and a link as also the strength and durability thereof and inference of their elimination may not be even rationally possible without the lapse of longer time, length depending on the nature of activity and frequency with which the incidents are liable to recur. Proximity in point of time is thus a relative term. Frequency with which each category of prejudicial activities recurs is also one of the determining factors. Frequencies in prejudicial activities engineered by political, parochial and communal motivations are regulated by yet different factors. Threats posed by the citizens to their own nation, having religious, ideological, ethnic and cultural affinities with enemy nations in times of war call for yet different standards of measurements of proximity. Frequencies are longer but live link remains dormant, Activation and enlivening of such tendencies depend on outbursts of violence, and disorders, or eruption of hostilities and these continue to be dormant during the period of peace extending over years. Proximity in such cases has to be determined more by their connection of the antecedents with the purpose of detention, rather than by reference to months or years.

30. While making such assessment of any suspected smugglers, special feature of their activities shall have to be taken into account. These cannot ordinarily be carried on with the same ease and frequency as other prejudicial activities; frequencies depending on availability of the articles, market, opportunities, capital, and arrangements for substitutes for exchange. Larger the scale, the longer the frequencies. It needs a network of experienced assistants, and contacts, here and abroad. The difficulties implicit in their set up themselves offer temptations to continue the same once so set up, and reap the rewarding profits by all possible evasive methods. Absence of exchange facilities involves long term commitments making it difficult to avoid further involvement. It

proves to be a vicious circle. Secret modes of" operations make it difficult to detect not only their existence, but their extinction as well.

31. Then while no one can be presumed to be criminal merely because once he was found to be so, no authority, dealing with detention for economic offences can afford to ignore two practical considerations. Restriction on commercial activities is generally resented to by all and concerned persons ordinarily do not understand the logic and philosophy behind such restrictive laws. Such offenders do not suffer with any guilt-mania as such activities are not believed by them to be criminal or immoral as their victims are never visible. This is one explanation of the expert for this phenomenon. Secondly, temptation to continue the activities is irresistible with easy prospects of evasion with rewarding results,

32. While considering the question of rational connection of the antecedents with the object of detention, authority could not have afforded to ignore yet another important factor. The MISA originally did not contemplate detention of smugglers. It is only by Ordinance No. II promulgated on 17th September, 1974, that their detention also has been authorised. This amendment of the Act under the Ordinance was necessitated, as per the affidavit of the Finance Secretary, by the economic chaos created, and setting up of the parallel economy, among others, as per the Expert opinion given in 1971 by the engulfing undetected smuggling activities. Thus the detaining authority could not have declined to act merely because no direct instance of the detenu's recent involvement of a few earlier years was traceable, as the Ordinance is passed on the hypothesis that recent instances have remained undetected. If he were to insist on any such material, when none is found to have been detected, he would not have been able to detain any one, and implement the legislative mandate, to prevent the apprehended threat to the security. It would, therefore, be unrealistic and illogical to apply such tests of "live link" in the same rigid manner in which it could be applied to other categories of prejudicial activities. To insist on any material of such recent instances for the satisfaction of the authority is practically to insist on the impossible feat and would turn the MISA into a dead letter. It would amount to turn a deaf ear to what the legislature loudly proclaims. Question thus is could the detaining authority have ignored the chain of these instances of 1964 to 1968 and the "live link" reflected therein merely because the same are removed in distance by 6 years? Could not stakes, magnitudes and nature of activities, as detailed earlier, also have reflected the durability and the strength of the said "Live Link"? In the absence of any material to the contrary, could the authority have assumed the discontinuance erf so felt "live link" merely from failure to detect any subsequent instance? Could the authority turn his blind eye to the inherent detection difficulties in such cases as also to the discovery of large scale undetected growing smuggling since 1971 by the experts and insist on proof of recent instances, officially declared to have remained undetected? Could he not have measured the proximity of the antecedent by reference to the object, rather than by passage of time? With all our concern for the liberty of the citizen, we find it difficult to answer these questions against the authority. We are

not oblivious of the possibility of misuse of such powers and the threat, it is likely to pose to the liberty of innocent citizen. But indifference to the security of Society is as much a matter of concern, as the callous disregard to such liberties. Inability to detect such activities for long, deplorable as it is, and indignation therefor, cannot afford any answer to the claim of the administration to act and strike, to meet the threat, with available material, weapons, and methods,

33. Then, as discussed earlier there being no hard and fast rule, or inflexible formula to determine the question of proximity or rationality, there is undoubtedly room for two opinions. Subjectivity of the satisfaction necessarily puts it beyond the reach of judicial review, unless such satisfaction is liable to be dubbed as perverse, capricious, arbitrary or malicious. Question thus essentially is not so much of irrelevancy and law as of perversity or arbitrariness of the conclusions on facts. It is in this context that the observations of the Supreme Court, at page 901 second column in Para 6 in the case of Masood Alam etc. Vs. Union of India (UOI) and Others, to which our attention was drawn by Mr. Sorabjee, the learned Counsel for the Union of India, become relevant. In the circumstances in this case, not the satisfaction of the authority, but one of refusal to accept his conclusion would be arbitrary.

34. To deal separately with the cases cited by Mr. Mehta, question of measuring "proximity" in terms of months or years had not arisen directly in Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, Detention of the persons already in jail pending trial without ascertaining when he was likely to be out to indulge in prejudicial activity was held to be invalid. This case demonstrates the error of assuming the Supreme Court to have laid down any rule of measuring the proximity in terms of years. Cases of Sushanta Goswami (AIR 1969 SC 1004) and Sri Nagen Murmu Vs. The State of West Bengal, , on ultimate findings are not even cases of chain of instances to be illustrative of any live link". Cases of solitary instances raise different considerations altogether. The delay of six or seven months in passing de- tention order in the cases of Lakshman Khatik Vs. The State of West Bengal, and Golam Hussain alias Gama Vs. The Commissioner of Police Calcutta and Others, created doubts as to the warrant for detention. Absence of the explanation was found to be fatal in the first case, while pendency of criminal proceedings was found sufficient to explain "Snap" of the "live link" in the other. It needs be emphasised that detention order in this case was passed immediately after the law to that effect was enacted.

35. Factual position in the cases decided by another Division Bench of our High Court in Criminal Application No. 799 of 1974 decided on 30-10-74 (Bom) and Criminal Application No. 800 of 1974 decided on 1-11-1974 (Bom), is clearly distinguishable. Vimadalal,) speaking for the Bench observed in the former as follows:

If, however, the detaining authority was able to show that the ground stated in Paragraph II, taken along with the other grounds disclosed to the detenu, manifested a chain of activities with a certain amount continuity, the position

might, of course, be different.

The view expressed by Gandhi, J., speaking for the Court, in the latter case on the second day is obviously coloured by the same approach, though not expressly stated. We con-less, our approach to the factual aspect apparently is different and Mr. Mehta strongly urged that this would not be permissible. We have, however, not been able to see how decision on a factual aspect in one case can afford any precedent to the decision on facts in another case. Set up of facts of each case invariably has its over-all impact, leaving many inarticulate impressions on the mind of the Court. As discussed earlier, the question essentially is whether on the facts and circumstances of the present case satisfaction of the detaining authority can be struck down as perverse or arbitrary? Our answer in the present case is in the negative for the reasons discussed.

36. The learned Advocate General then contends that certain undisclosed intelligence reports also show that the detenu is even currently engaged in the smuggling activities. Reliance was placed on Para 9 of the return already adverted to by us. It is obvious that if this averment can be relied on, the question of the absence of proximity or "live link" cannot arise in this case, Mr. Mehta however, strongly objects to our reliance on this affidavit and contends, that this implied admission of authority having relied on some uncommunicated material and new grounds itself is enough to vitiate the order. The learned Advocate General, on the other hand, contends that this is not a new ground, but further elucidation of the ground already communicated on 11th October, 1974, a few details of which remained uncommunicated due to the claim of privilege. These rival contentions at once raise two questions- (1) whether the averments made in para 9 really seek to import new grounds or essential facts not adverted to in the grounds supplied to the detenu on 11th October, 1974, and if not so, (2) was the Commissioner justified in declining to disclose the same in exercise of his privilege u/s S (2) of the Act? It shall have to be conceded that title of ground No. 1, which is indeed the only ground, is extremely vague on this point. However, the scheme of the communication dated 11th October, 1974, is to give head-ground under clause 1 and enumerate sub-grounds under Sub-clauses (i) to (iii). Thus the head-ground that "Since 1964 you have been indulging in smuggling goods and abetting other persons to smuggle goods" is common to all the three sub-grounds and the particulars mentioned in the sub-grounds are really elucidations of how the detenu is alleged to be indulging in smuggling of goods from 1964. Had one fourth sub-ground been added with regard to the intelligence reports referred now in Para 9 of the return with the claim of privilege set out therein, the procedure adopted could not have been open to any objection. We are not, however, prepared to attach much importance to such omission, as the allegations made in the head ground by themselves import the allegation that the detenu is indulging in smuggling activities right from 1964 till the date of the detention order. There is thus no question of relying on any new grounds. The question is only of adverting to more facts, non-communication of

which is sought to be shielded under the cover of privilege. Answer really turns".on the validity of the claim of privilege.

37. Now, Section 8 (1) requires the communication of grounds for enabling the detenu to make representation. But Section 8 (2) enables the detaining authority to claim privilege in following terms:

8 (2) Nothing in Sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.

It is true that such privilege is not set up in the communication dated 1 1th October, 1974, nor there is any indication thereof whatsoever therein. But it is now claimed in paragraph 5 of the return as follows :

I consider it against public interest to disclose to the detenu any more material than has been supplied in the notice Exhibit "C to the petition (grounds). Without grave detriment to public interest and the efficiency of the departments concerned in the investigation of such prejudicial activities, it is impossible to disclose the names of the informers, machinery for collection of intelligence, persons habitually employed by the departments to collect such intelligence, the nature of intelligence network operating outside the country and other allied matters. I say that in exercise of my discretion, I have bona fide decided nothing more can be supplied to the detenu without causing serious injuries to the public interest.

In para 9 of the return again same plea of privilege is claimed for the up-to-date intelligence report. In the case of Lawrence Joachim Joseph D'souza Vs. The State of Bombay, , the Supreme Court has held that setting up a plea of privilege in the return instead of in communication of grounds by itself cannot disentitle the detaining authority to the said privilege. The case also further lays down that it is for the detaining authority to decide which facts cannot be disclosed and if such disclosure is against the public interest, The detaining authority avers that it is against public interest to disclose to the detenu any more material than has been supplied in the notice exhibit "C i. e. the communication dated 11th October, 1974. In the face of these facts, it is difficult to see how the detaining authority can be deprived of this privilege and how nondisclosure of these further facts as to the intelligence reports can go to affect the validity of the detention order. The detenu is, no doubt, disabled from making his representation with regard to such intelligence reports which satisfied the Commissioner about his current involvement also. But this is implicit in not only the scheme of Section 8 but has also the sanction even of the Constitution, as in terms held by the Supreme Court in the case of Puranlal Lakhanpal Vs. Union of India (UOI), , as also in the case of Lawrence Joachim Joseph D'souza Vs. The State of Bombay, . The decision of our Court in Balkrisna Kashinath Khopkar v. District Magistrate, Thana, ILR (1956) Bom 797, relied op by Mr. Mehta lays down to the same effect. In this view of the matter reliance on such uncommunicated intelligence reports and consequently the detention order cannot be said to be suffering from

any vice.

38. Mr. Mehta, however, referred to paras 5 and 9 of the return and contends that the privilege is not claimed in regard to the contents of such intelligence reports, but is confined to (1) names of the informer, (2) machinery for collection of intelligence, (3) persons habitually employed by the department to collect such intelligence, (4) nature of intelligence net-work operating outside the country and (5) other allied matters. According to Mr. Mehta, non-communication of the essential contents stands unexplained, even under this affidavit. The attempt of the learned Advocate General to split up the last sentence indicating as though the privilege also was claimed to (1) nature of intelligence, (2) the net work operating outside the country and (3) allied matters runs counter to the context and the contention based thereon does not appear to us to be plausible. We have, however, extracted above the entire relevant passage, When, the sentence relied on by Mr. Mehta is read in the context of the preceding and following sentences the conclusion is inescapable that the sentence relied on by Mr. Mehta is illustrative of the claimed privileges in addition to what is covered by the preceding and following sentences. It is thus clear that the privilege is claimed with regard to all the contents of such intelligence reports, which indicate the current smuggling activities of the detenu.

39. Mr. Mehta then contends that even so, no privilege can be claimed on any rational basis with regard to the contents of these reports without disclosing the source of these reports and without disclosing the source of the information and details of the network. There could be no conceivable public interests contends the learned Advocate, in withholding the dates of the activities, the goods alleged to have been smuggled out, quantity and the price thereof and the place from where the goods were smuggled out. If, contends Mr. Mehta, the privilege is sought to be claimed with regard to such facts and material, the same must be disallowed as being arbitrary, capricious and mala fide. The contention cannot be said to be without some substance and notwithstanding the wide language of Section 8 (2) of the Act, the claim of privilege can never be said to be immune from the limited judicial review on the suggested grounds. In this case, the fact that the claim of privilege was set up at a late stage does operate adversely to a certain extent against the claimant. Detention without trial, with limited opportunity to refute the allegations and open only to a limited judicial review itself weighs heavily against any citizen and one would be slow to permit adding to the said weight by such privilege tending to deprive him of even such limited protection. We have, however, not been able to see any one good reason to deny this claim of the Commissioner in this case. We do not find any material from which it can be inferred that such a claim is mala fide or arbitrary or capricious. It is impossible to hold that there cannot be any facts in this case which the Commissioner could not have reasonably withheld in public interest. It is not uncommon and unusual that in operations carried on with utmost secrecy, even the disclosure of a few innocent facts can also lead to the disclosure of source and consequently to unlimited disclosure and also consequences. Such disclosure

can affect, course of investigation, trial and also the lives of the informants. It is impossible to hold that all such fears in such cases are imaginary. Secondly, some information in an intercepted letter may lend assurance ,of his activities without enabling the detenu to have any effective say in the matter. It is enough for the purposes of this case to observe that the decision of privilege is entirely left to the detaining authority and circumstances on record do not warrant any inference of mala fides or arbitrary or capricious exercise thereof.

40. It is difficult to see what benefit Mr. Mehta can derive from the ratio of the judgment of this Court in the case of Balkrisna Kashinath Khopkar ILR (1956) Bom 797 . Ratio of this case is in keeping with other cases. Here the claim was denied as it was found to be an after thought and too bold to admit any scrutiny. We are unable, therefore, to reject the claim of privilege set up by the detaining authority in this case.

41. It will not be out of place to mention in this context that the detaining authority had in its affidavit offered the said confidential record for our perusal. We, however, did not think it necessary to look into the same, as no such request was made on behalf of the counsel for the petitioner or the detenu and we ourselves do not find any justification for doubting the averments made by the Commissioner in his affidavit before us.

42. The learned Advocate General also drew our attention to the observations of the Supreme Court in the case of Golam Hussain alias Gama Vs. The Commissioner of Police Calcutta and Others, and contended that pendency of criminal cases since the very first incident of 1963-64, adverted to in the second ground, itself affords an explanation for the gap in the live link. Even it is assumed to have been snapped merely because of the absence of evidence of any subsequent incidents, the same cannot be said to have remained unexplained. Admittedly the cases are still are pending. If the pendency of the two cases before the Magistrate in Gulam Hussain's case, contends the Advocate General, was found to be a reasonable explanation of the snap in the live-link, the pendency of the adjudication proceedings and criminal case from 1966 till this day also should be considered to be sufficient explanation of the supposed snap in the live-link. The contention undoubtedly is plausible, Mr, Mehta, on the other hand, contends that the very fact that the cases are pending should rather tilt in favour of taking the view that the smuggler would not indulge in the activities, at any rate, till the disposal of the criminal cases and as such the apprehension entertained by the detaining authority should be deemed to have been unwarranted. This contention also cannot be said to be not plausible. However, notwithstanding the pendency of the case since 1966 before the adjudication authorities, the detenu seems to have indulged in similar activities in the year 1968. Whatever inference could have been drawn on this count in favour of the detenu, must be deemed to have been crippled because of the incident of 1968.

43. Mr, Mehta lastly contended that there has been a violation of the mandatory

provisions of Section 8 inasmuch as grounds of the detention were not communicated to the detenu within the time prescribed thereunder. Now, admittedly the detention order was served on the detenu on 5th October, 1974. Grounds admittedly were served on the detenu on 11th October, 1974. This is undoubtedly later than five days contemplated under the first part of Section 8(1). Threefold time-limit is prescribed under this section. The grounds are to be served as soon as possible, after the service of the detention and Secondly, ordinarily it should not be beyond five days thereafter. Thirdly, under exceptional circumstances this could be done even, after expiry of five days. The Commissioner in his affidavit says that he was required to leave the headquarters unexpectedly in the morning of 9th October, 1974, due to unforeseen urgent private work and could not return to headquarters till 11th October, 1974, and, therefore, the grounds could not be served in time. We have no reason to doubt these averments. We are not prepared to hold, as was contended by Mr. Mehta, that the requirement of leaving the headquarters for unforeseen private work cannot satisfy the test of exceptional circumstances contemplated in Section 8 of the Act. If it is true, as is averred by the Commissioner before us, that he was away from the head-quarters on private grounds during the period from 9th to 11th October, we do not see any reason why this should not amount to "exceptional circumstances". Every public servant, high or low, has moments in his life when compulsorily he has to get relief from the official work. Ordinarily he alone can be judge of the urgency in such small matters. Requirement of leaving head-quarters by such officer in response to such urgent private work cannot cease to be "exceptional circumstance". Mr. Mehta, however, contends that this may explain at best delay on the second count, but there is no explanation why the same was not done before his departure on 9th as he was under statutory obligation to do so "as early as possible". There is thus no reason why the grounds should not have been communicated to the detenu during the period from 5th to 9th October, 1974. In our opinion, this contention is well founded, 5 days period is only an outer limit of the limitation and even, within that period also the detaining authority is under an obligation to communicate the grounds "as soon as may be". The Legislature seems to have intended that the grounds should be communicated, to the detenu as early as possible after the liberty of the citizen is taken away and the same should not be delayed unless the exigencies of work so rendered it inevitable. The words "as soon as possible" cannot be considered to be redundant. Its only import seems to be to emphasise the urgency in a matter where liberty of a citizen is at stake. It is only when the five days outer limit expires that additional proof of exceptional circumstances is required. That way, the detaining authority is under an obligation to explain every day after the arrest of the detenu. With the leave of the court the learned Advocate General has filed a supplemental affidavit explaining how the Commissioner was prevented from communicating grounds during the period from 5th to 9th October, 1974, Mr. Mehta protested and urged that even belated explanation offered is not satisfactory. We are unable to accept "this view of the learned

Counsel. Facts indicate that the Commissioner was really busy with public duties connected with the security of the State. In our view, the communication of the grounds was delayed between 5th and 9th due to the exigency of the work in the office and from 9th to 11th because of the exceptional circumstances in which the detaining authority was required to leave the headquarters. The contention thus appears to us to be ill-founded.

44. In the result the application is liable to be rejected.

45. Rule is accordingly discharged.

46. Liberty to the petitioner to challenge the validity of the Notification dated 26th September, 1974.

47. Mr. Mehta, the learned Counsel appearing for the petitioner asked orally for leave to appeal under Articles 133 and 134 (1) (e) of the Constitution on the memo of grounds filed by him.

48. We have already held that the question of staleness essentially is a question of fact depending on the circumstances of each case. We have in our own way tried to follow the ratio of the judgments of the Supreme Court cited before us. On other points also we have only followed the ratio of other cases. It will not be possible for us to certify either that the case involves substantial question of law of general importance or that the questions arising in this case and urged by Mr. Mehta before us need be decided by the Supreme Court. Leave refused.