

(1983) 06 MAD CK 0017

In the Madras High Court

Case No : Writ Petition No. 1412 of 1983

S. Chandra Mohan

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 14-06-1983

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 3(1), 5A

Citation : (1984) 3 ECC 159 : (1984) ILR (Mad) 12

Hon'ble Judges : Ratnam, J;P.R. Gokulakrishnan, J

Bench : Division Bench

Advocate : K.A. Panchapakesan, for the Appellant; A.G., Assisted by Public
Prosecutor, for the Respondent

Judgement

Gokulakrishnan, J.—The petitioner herein, who is the son of the detenu N. Subbaraja Nadar, has filed this petition for the issue of a writ of

habeus corpus with a direction to the respondents to produce the detenu N. Subbaraja Nadar before this court and to set him at liberty for the

reasons stated by him in the supporting affidavit filed along with the petition.

2. The detention order in effect makes out two incidents for detention of the detenu under the COFEPOSA Act 1974, for the reason that the

detenu is prone to smuggling activities. The order of detention of the detenu was made on 7-12-1982. Detention of the detenu as such was made

on 10-12-1982. The grounds of detention were served on the detenu on 14-12-1982.

3. According to the authorities concerned, on 12-4-1982, the officials of Madurai Customs and Central Excise conducted parol at the outskirts of

Tanjore in Tanjore-Nagapattinam road pursuant to a specific information. During

the course of the parol, they intercepted a lorry bearing registration No. 1355, and bearing the name "Tiruchendur Murugan" coming from Nagapattinam towards Tanjore. The lorry did not respond to the signals given by the Customs officers. However, the lorry was chased and intercepted at the outskirts of Tanjore. At the time of interception, there were four persons in the lorry, whose names were ascertained to be K. A. Raju, R. Swaminathan, R. Thangavelu and P. Rajagopal. On examination, the lorry was found to contain eleven bags, and those bags were found to contain smuggled nylon zips of foreign origin. They were seized under the regular mahazar dated 12-4-1982, along with the said lorry in which they were transported. On enquiry, the driver of the lorry, Raju by name, indicated that the eleven bags of contraband zip fasteners were loaded at a place in Nagapattinam Velangani Road and brought to Tanjore under the direction of one A. S. Krishnan Chettiar. This Krishnan Chettiar was also brought to the spot and was also present at the time of the drawing of the mahazar. The eleven bags seized contained 1,27,000 number of Y.K.K. Zip fasteners of foreign origin, valued at Rs. 1,90,650/-.

4. During the course of investigation, the witnesses indicated that the smuggled goods belonged to the detenu. Investigation also revealed that the lorry was purchased by the detenu benami in the name of one Jagannathan. Jagannathan, in whose name the said lorry has been purchased, in his statement dated 3-6-1982, given in his own handwriting, has indicated that Rajagopal and Thilagar are employees under the detenu and that Jagannathan is the son of Rajagopal. Jagannathan also admitted in that statement that the lorry was purchased benami in his name by the detenu.

5. It has also been stated by the detaining authority in the detention order that on 7-2-1981, a seizure of contraband textiles, valued at Rs. 74000/- was made from car TNO 1662 at Alangudi Cross Road. The car, when signalled to stop, did not stop but proceeded fast, running over a sepoy of the Customs department. There were evidences showing that the car was purchased by detenu, as spoken to by a.m. Ziaddin and Sundararaju in their statements dated 11-2-1981 and 10-2-1981. The same was confirmed by a letter recovered from the house of Shahul Hameed on 7-4-1981. That was a letter of the detenu requesting Shahul Hameed to persuade

Malumiar to own up the car, assuring that the detenu would manage to meet the consequences. The Forensic Laboratory, Madras, certified that the handwriting in that letter was that of the detenu. From this, the detaining authority concluded that it was clear that the detenu made every effort to fasten the ownership of the car which carried the contraband goods, to another individual to escape the consequences, although the car belonged to him.

6. After referring to the statements of the various witnesses, the detaining authority observed that it was necessary in the interests of the State that the detenu should be detained under S. 3(1)(iv) of the COFEPOSA Act, 1974, in order to prevent him from dealing in smuggled goods.

7. On these grounds, the detaining authority called upon the detenu to submit his representation.

8. The detenu sent his representation on 27-12-1982. On 18-1-1983, the same was rejected by the Government. On 24-1-1983, the Advisory Board confirmed the order of detention for a period of one year from 10-12-1982. On 5-2-1983, the Government passed the order of detention after receiving the report of the Advisory Board.

9. The detention order is attacked on various grounds by Mr. Panchapakesan, learned counsel for the petitioner. The learned Advocate General appearing for the State, defended the order of detention and submitted his arguments. We will be referring to the arguments of the respective counsel as and when we take up the points in seriatim.

10. Witnesses whose names have been referred to in the order of detention are Swaminathan, Raju. Thangavelu, Krishnan Chettiar and Rajagopal, and their statements were recorded on 13-4-1982. All these persons have retracted their statements by telegram dated 15-4-1982, and letter dated 16-4-1982. Apart from the statements of these persons, the detaining authority took into consideration the statements of Seethapathi recorded on 22-4-1982, Paulraj recorded on 27-4-1982, Muthupalani recorded on 27-4-1982, and Premchand recorded on 30-4-1982. As far as Thilagar is concerned, his statement was recorded on 24-5-1982, and he retracted it on 2-6-1982. The persons who have not retracted the statements are Seethapathi, Paulraj and Muthupalani. Premchand is not an important witness for the purpose of the present case. The abovesaid

three persons speak about the benami purchase of the lorry by the detenu in the name of Jagannathan.

11. According to Mr. Panchapakesan, the detaining authorities in paragraph (x) of the order has stated that the retraction of the statements by the

witnesses aforementioned was with a view to take away the allegations against the detenu regarding the act of smuggling committed by him and to

extricate him from the offence proper and that therefore the retraction by these witnesses are not convincing.

12. After reading out the statements of witnesses Swaminathan, Raju. Thangavel, Krishna Chettiar and Rajagopal and also their retraction by way

of telegram and letter, as referred to above, the learned counsel for the petitioner submitted that the detaining authority has misread the statements

and also the retraction made by them. According to the learned Advocate General for the State, there is absolutely nothing in the retraction made

by the witnesses so as to extricate the detenu from the offence except for the fact that they deny the allegations levelled against them and state that

the statements had been forcibly extracted from them.

13. We have carefully gone through the statements recorded from these witnesses and also the retraction made by them. In their statements, they

have definitely stated that the contraband goods belonged to Subburaja Nadar of Madurai. In their retraction both by telegram and letter, they

have simply extricated themselves from the confession given earlier implicating the detenu in the smuggling activities. The detaining authority after

carefully considering all the documents and also the background in which the statements have been recorded and the retraction has been made,

concluded that the objection of the witnesses was merely to take away the allegations against the detenu. The statements wherein the witnesses

have categorically involved the detenu and connected him with the contraband goods and the retraction made by them both by the telegram and

the letter, clearly spell out the anxiety of these witnesses to extricate the detenu from the offence alleged.

14. In Ashadevi Mehta (Detenu) Vs. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Another, the Supreme Court observed as

follows :-

Questions whether the confessional statements recorded were voluntary

statements or were statements which were obtained from the detenu under duress or whether the subsequent retraction of those statements by the detenu was in the nature of an afterthought, were primarily for the detaining authority to consider before deciding to issue the impugned detention order but since admittedly the aforesaid vital facts which would have influenced the mind of the detaining authority one way or the other were neither placed before nor considered by the detaining authority it must be held that there was non-application of mind to the most vital facts vitiating the requisite satisfaction of the detaining authority thereby rendering the impugned detention order invalid and illegal".

In this decision there is a specific statement by the Supreme Court that it is for the detaining authority to judge the confessional statement and the subsequent retraction and find out as to how far the subsequent retraction is an afterthought. The case on hand is not one where the retraction of the statements by the witnesses was not placed before the detaining authority. The detaining authority had all the materials before him and on those materials and on application of its mind to them, has come to the conclusion that the object of the witnesses was more with a view to take away their allegations made against the detenu in their original statements. On the facts and circumstances of the present case, we do not think there is any misreading of the statements and the retraction on the part of the detaining authority, as contended by the learned counsel for the petitioner.

15. Mr. Panchapakesan next contended that the detenu was refused the assistance of an advocate while being interrogated by the Customs authorities, and the fact of refusal of permitting an advocate to be present at the time of the interrogation of the detenu by the Customs officers, was not placed before the detaining authority. According to the learned counsel, such a procedure would vitiate the order of detention.

16. In the grounds of detention, no doubt, the detaining authority has stated -
In your further representation dated 23-6-1982, you have reiterated your earlier submissions and requested for a lawyer's presence at the time of recording your statement".

But, we do not find any reference to any refusal of permission to have the assistance of an advocate at the time of the interrogation of the detenu by the customs authorities.

17. The learned Advocate General refuting the argument on behalf of the petitioner on this aspect, took us through the statement of the detenu and submitted that the detenu has completely denied any connection with the alleged smuggling activities, levelled against him, and that therefore, the absence of a lawyer at the time of interrogation would not have prejudiced his interest. According to the learned Advocate General no incriminating statement has been obtained from the detenu and therefore the presence or absence of counsel to assist him will not make any difference.

18. In *Nandini Satpathy Vs. P.L. Dani and Another*, the Supreme Court has observed :-

Lawyer's presence is a constitutional claim in some circumstances in our country also, and in the context of Art. 20(3), is an assurance of

awareness and observance of the right to silence. The *Miranda* decision 1966 384 U.S. 436 has insisted that if an accused person asks for

lawyer's assistance at the stage of interrogation, it shall be granted before commencing or continuing with the questioning. We think that Art. 20(3)

and Art. 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be

present at the time he is examined. Over-reaching Art. 20(3) and S. 161(2) will be, obviated by this requirement. We do not lay down that the

police must secure the services of a lawyer. That will lead to police-station-lawyer" system, an abuse which breeds other vices. But all that we

mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied,

without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will, was the project".

In paragraph 60 of the same judgment, the Supreme Court has further observed :-

Not that a lawyer's presence is a panacea for all problems of involuntary self-crimination, for he cannot supply answers or whisper hints or

otherwise interfere with the course of questioning except to intercept where intermediary tactics are tried, caution his client where incrimination is

attempted and insist on questions and answers being noted where objections are not otherwise fully appreciated. He cannot, harangue the police

but may help his client and complain on his behalf, although his very presence will ordinarily remove the implicit menace of a police station.

Mr. Panchapakesan, stressing the above observations, contended that the failure on the part of the Customs authorities to permit a lawyer to be present at the time of interrogation of the detenu has vitiated the proceedings and it should be held that the detention order is illegal on this ground alone. The learned Advocate General, as already noticed, would urge that inasmuch as the detenu has not made any incriminating statement, there is absolutely no question of any prejudice having been caused to the detenu, and that the observations relied on by the learned counsel cannot have any relevance to the facts on hand.

19. In *Ashadevi Mehta (Detenu) Vs. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Another*, , the Supreme Court has observed as follows (paragraph 7) :

In the instant case, admittedly three facts were not communicated to or placed before the detaining authority before it passed the impugned order against the detenu, namely, (i) that during interrogation of the detenu, in spite of request, neither the presence nor the consultation of the advocate was permitted; (ii) that in spite of intimation to the advocate in that behalf the detenu was not produced before the Magistrate on December 14, 1977; and (iii) that the confessional statements were squarely retracted by the detenu on December 22, 1977, as the first available opportunity while he was in judicial custody; the first two had a bearing on the question whether the confessional statements had been extorted under duress from the detenu or not, while the third obviously was in relation to the confessional statements which formed the main foundation of the impugned order and as such were vital facts having a bearing on the main issue before the detaining authority".

In this context, the Supreme Court has also referred to *Nandini Satpathy Vs. P.L. Dani and Another*, , and the passage which we have extracted above.

20. In the above Supreme Court case, there was a confession implicating the detenu in the offence and there was also a retraction from the same subsequently. In these, circumstances, the Supreme Court has held that there was non-application of the mind on the part of the detaining authority to most material and vital facts vitiating the requisite satisfaction of the detaining authority thereby rendering the detention order invalid and illegal.

As we have observed already, no prejudice would have been caused to the detenu since the detenu has not given any statement implicating himself

in the smuggling activities. Therefore, we do not think the argument advanced by the learned counsel for the petitioner in this case can have any force.

21. The next contention advanced by Mr. Panchapakesan is with regard to the incident that happened on 7-2-1981. This incident was referred as

one of the incidents considered by the detaining authority. The learned counsel first submitted that material documents for substantiating this

incident had not been placed before the detaining authority and that the failure to substantiate this incident would vitiate the whole detention order.

The learned counsel further contended that the Constitutional right provided under Art. 22 of the Constitution cannot be whittled down by resorting

to S. 5-A of the COFEPOSA Act. S. 5-A of the COFEPOSA Act states :-

Where a person has been detained in pursuance of an order of detention under sub-section (1) of S. 3 which has been made on two or more

grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly,

(a) such order shall not be deemed to be invalid or in operative merely because one or some of the grounds is or are -

(i) vague,

(ii) non-existent,

(iii) not relevant,

(iv) not connected or not proximately connected with such person, or

(v) invalid for any other reason whatsoever, and it is not therefore possible to hold that the Governor or officer making such order would have

been satisfied as provided in sub-section (1) of S. 3 with reference to the remaining ground or grounds and made the order of detention;

(b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said sub-section (1)

after being satisfied as provided in that sub-section with reference to the remaining ground or grounds.

No doubt, Mr. Panchapakesan referred to the decision reported in Mohd. Yousuf Rather Vs. State of Jammu and Kashmir and Others, and

submitted that if one ground is not substantiated the whole order of detention must go. In that decision, in paragraph 18 (of SCC) : (Para 17 of AIR), the Supreme Court has observed -

We are primarily concerned in this case with Art. 22(5) which is as follows :

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order

shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him with earliest opportunity

of making a representation against the order.

The extent and the content of Art. 22(5) have been the subject-matter of repeated pronouncements by this Court-vide *The State of Bombay Vs.*

Atma Ram Sridhar Vaidya, ; Dr. Ram Krishan Bhardwaj Vs. The State of Delhi and Others, ; Shibban Lal Saksena Vs. The State of Utter

Pradesh and Others, ; and Dwarka Dass Bhatia Vs. The State of Jammu and Kashmir, . The interpretation of Art. 22(5), consistently adopted by

this Court, is, perhaps, one of the outstanding contributions of the court in the cause of human rights. The law is now well settled that a detenu has

two rights under Art. 22(5) of the Constitution : (1) To be informed, as soon as may be, of the grounds on which the order of detention is based,

that is, the grounds which led to the subjective satisfaction of the detaining authority, and (2) to be afforded the earliest opportunity of making a

representation, against the order of detention, that is, to be furnished with sufficient particulars to enable him to make a representation which on

being considered may obtain relief to him. The inclusion of an irrelevant or non-existent ground among other relevant grounds is an infringement of

the first of the rights and the inclusion of an obscure or vague ground among other clear and definite grounds is an infringement of the second of the

rights. In either case, there is an invasion of the constitutional rights of the detenu entitling him to approach the court for relief. The reason for saying

that the inclusion of even a simple irrelevant or obscure ground among several relevant and clear grounds is an invasion of the detenu's

constitutional right is that the court is precluded from adjudicating upon the sufficiency of the grounds and it cannot substitute its objective decision

for the subjective satisfaction of the detaining authority.

Meeting the point, the learned Advocate General pointed out that the case

referred to above arose under S. 8 of the J and K Public Safety Act

1978. There is no provision in that Act corresponding to S. 5-A of the COFEPOSA Act. S. 5-A makes it clear that a detention order is deemed

to have been made separately on each of the grounds if passed on two or more grounds. Apart from this submission, the learned Advocate

General submitted that no second ground as such contemplated by the authorities concerned in order to detain the detenu under the COFEPOSA

Act. Even the grounds of detention, in so far as it concerns the incident dated 7-2-1981, simply state that the detenu is in the habit of fastening

ownership of cars carrying contraband goods of his, on another individual, obviously to escape the consequences of the act. This is made clear

from the averments contained in paragraph 3 of the counter-affidavit, which runs as follows -

As regards the contentions in paras 3 and 4 of the affidavit, it is submitted that this Hon"ble court may be pleased to peruse the grounds of

detention in which the details of the materials on which the detenu has been detained are clearly set out. As regards the contentions in para 4 of the

affidavit, to the effect that "this ground also does not state how the detenu was concerned with the possession of contrabands seized from the car

on 7-2-1981, and how he was dealing in these contrabands", it is submitted that the detention of the detenu is based on materials set out in the

grounds of detention relating to the seizure dated 12-4-1982, and the seizure of contrabands dated 7-2-1981 referred in para 2(i) of the grounds

of detention shows the tendency on the part of the detenu to fasten the ownership of the vehicle concerned in the transport of contraband articles

to some other third persons to escape the consequences although the car belonged to him.

It is averred as follows in paragraph 4 of the counter-affidavit. -

As regards the contentions in para 5 of the affidavit, it is submitted that this detention order is based on the materials set out in the grounds of

detention relating to the seizure on 12-4-1982 and a reference to the seizure dated 7-2-1981, shows the tendency on the part of the detenu to

fasten the liability of the vehicle involved in the transport of contraband goods to some third party to escape liability, as stated in the previous

paragraph. In the circumstances, of the case, it cannot be contended that the

order of detention must be held to be based on non-existent grounds.

It has been specifically mentioned that the detention order is based on materials set out in the grounds of detention relating to the seizures on 12-4-

1982 and a reference to the seizure dated 7-2-1981, shows the tendency on the part of the detenu to fasten the liability of the vehicle involved in

the transport of contraband goods to some third party to escape liability. Thus, it is clear that the detaining authority was concerned only with the

incident that happened on 12-4-1982 and that is the ground on which the detaining authority found that the detenu has to be detained under the

COFEPOSA Act.

22. In view of these averments made in the counter-affidavit and also in view of the submission of the learned Advocate General in this behalf, it is

not necessary for us to discuss as to how far the failure to substantiate some of the grounds would vitiate the whole detention order. For the case

on hand, we do not think the argument advanced by Mr. Panchapakesan on this aspect has any bearing to decide the issue on hand.

23. Mr. Panchapakesan next contended that when the ordinary Criminal Law of the land is enough to punish the detenu, it is quite unnecessary to

invoke the provisions of the COFEPOSA Act against him. The learned Advocate General, rightly, pointed out the averments in paragraphs 3, 4

and 5 of the detention order referring to the activities of the detenu, in smuggling of contraband goods, and submitted that these activities have led

the detaining authority to reasonably apprehend that unless the detenu is detained under the COFEPOSA Act 1974, he would continue to indulge

in such activities further. Such a subjective satisfaction arrived at by the detaining authority on the available materials, if found to be enough, cannot

be revied by us, on the ground that the ordinary law of the country can be invoked instead of the special enactment. Further, as observed by the

Supreme Court in Haradhan Saha Vs. The State of West Bengal and Others, -

There is no parallel between prosecution in a court of law and a detention order under the Act (MISA). One is a punitive action and the other is a

preventive act. In one case a person is punished on proof of his guilt and the standard of proof is beyond reasonable doubt whereas in preventive

detention a man is prevented from doing something which it is necessary to

prevent.

It has been further observed in paragraph 32 -

The power of preventive detention is qualitative by different from punitive detention. The power of preventive detention is a precautionary power

exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution

even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made

before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or

even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to

prosecution".

Therefore, we are not able to continuance the argument of Mr. Panchapakesan that the ordinary criminal law of the land is enough to punish the

detenu and it is unnecessary to invoke the special enactment.

24. Mr. Panchapakesan relied on the decision reported in *Biru Mahato Vs. District Magistrate Dhanbad*, , in support of his contention that the

counter-affidavit was not filed in this case by the detaining authority. We do not think we need labour on this point, since the facts of that decision

are completely different from ours. In our case, the State Government is the detaining authority and under the Business Rules the Joint Secretary to

Government has been authorised to authenticate the detention order. At the time when the detention order was communicated, one Mr.

Kirupakaran was the Joint Secretary. Subsequently one Mr. Karuppannan became the Joint Secretary and he has sworn to the counter-affidavit.

The learned Advocate General fairly conceded that there is some inadvertent mistake in the averment in the counter-affidavit to the effect that

Karuppannan had authenticated the order of detention. We can appreciate this submission. In our view, the submission of the learned counsel for

the petitioner on this aspect is not correct. In this connection we can usefully refer to the decision of the Supreme Court reported in *Nabani alias*

Alani Saha Vs. State of West Bengal, , in which it has been stated that as far as possible affidavit in answer to the Rule Nisi should be filed by the

person who has passed the order of detention and it has been held -

It cannot however be laid down as a rule open to no exceptions that if the detaining authority does not file his own affidavit the order of detention

must fail. Each matter has to be examined separately in the light of its own facts and it would not be appropriate to evolve a rule of universal

application to cover every such matter"".

Mr. Panchapakesan, learned counsel for the petitioner, further contended that the detention order would not fall under S. 3(1)(iv) of the

COFEPOSA Act 1974. Instead of considering the sub-sections of S. 3, we can usefully quote the decision of the Supreme Court reported in

Narendra Purshotam Umrao Vs. B.B. Gujral and Others, . The Supreme Court has observed as follows in paragraphs. 24, 26, and 27 of the

judgment :-

Learned counsel for the appellant next strenuously contends that there was non-application of mind on the part of the detaining authority. It was

submitted that though the order for detention was made with a view to preventing the appellant from smuggling goods i.e. under Clause (i) of sub-

section (1) of S. 3, of the Act (COFEPOSA Act) his case on the facts revealed in the grounds for detention clearly fall under Clause (ii) of sub-

section (1) of S. 3, as he could not, by any stretch of imagination, be treated to be a smuggler but he was only an abettor. May be, he instigated,

organised and facilitated the act of smuggling, but it is said, the actual smuggling of the contraband goods was by others. His act, therefore,

constituted abetment of smuggling for which there is a separate clause under S. 3(1)(ii). The order of detention cannot, therefore, be justified under

S. 3(1)(i). Applying a wrong clause, it is urged, shows non-application of mind, We are afraid, the learned counsel is stretching the argument too

fine. S. 3(1) of the Act so far material reads :-

"The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that

Government, specially empowered for the purposes of this section by that Government or any officer of the State Government, not below the rank

of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may if, satisfied, with respect to any

person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of

foreign exchange or with a view to preventing him from -

(i) smuggling goods, or

(ii) abetting the smuggling of goods, or

There is no doubt a distinction between an act of smuggling and abetting the smuggling of goods for purposes, of preventive detention under S.

3(1) of the Act. Nonetheless, the term "smuggling" as defined in S. 2(e) of the Act has the same meaning as S. 2(39) of the Customs Act 1962,

which, when read with S. 111 of that Act, is wide enough to include and make liable not only the actual smuggler but also persons abetting the

smuggling of contraband goods as well as all persons dealing in such goods etc. Though the provisions of Cls. (1) and (ii) of sub-section (1) of S. 3

of the Act may operate on different fields, which may sometimes, as here, overlap, still a wider meaning is given to the term "smuggling" in S. 2(e)

of the Act with a view to broaden the scope of preventive detention. Sub-section (1) of S. 3 of the Act provides for the different grounds of

detention. Clause (i) relates to smuggling of goods. Clause (ii) relates to abetting the smuggling of goods. Clause (iii) relates to engaging in

transporting or concealing or keeping smuggled goods. Clause (v) relates to harbouring persons engaged in smuggling goods or in abetting the

smuggling of goods. It must, therefore, be assumed that the intention of the Legislature was to treat the smuggling of goods and abetting the

smuggling of goods as grounds separate and distinct, and both are separate grounds for detention, i.e. to take in all such activities which results in

accomplishment of smuggling of contraband goods".

It follows from the above quoted observations of the Supreme Court, the submission of the learned counsel on this point cannot be appreciated.

25. The next contention raised by Mr. Panchapakesan is that there was a delay of 23 days in confirming the order of detention by the Government.

It is not denied by the Government. The Government took 23 days to confirm the order of detention. In their counter-affidavit, the Government

have given reasons for the said delay which appear in paragraph 25 thereof. The averments read as follows -

As regards the contentions in para 27 of the affidavit it is submitted that the detenu has sent his representation dated 27-12-1982 to the Tamil

Nadu Government. For a proper consideration of this detailed representation with

reference to the original document, the Detaining authority has to take soe reasonable time. Viewed with reference to this magnitude of the representation, time taken of 23 days cannot be considered to be unduly long. It is submitted that the detenu sent his representation dated 27-12-1982 received by the Government on 30-12-1982. On the same day the parawar remarks of the Collector of Central Excise and Customs, Madurai, were called for. The Collector of Customs, Madurai, sent his remarks on 5-1-1983. This was received by the Government on 7-1-1983. The parawar remarks received from the Collector of Excise and Customs, Madurai, were sent to the Director of Tamil Translation on 7-1-1983. The same was received in Public (Law and Order) department on 12-1-1983. The assistant in charge of these files dealt with this matter in the first instance. The file was submitted to the Joint Secretary to Government on 13-1-1983. The Joint Secretary to Government dealt with this matter on 13-1-1983. The file was submitted to Chief Secretary to Government on 13-1-1983. On 14-1-1983, 15-1-1983 and 16-1-1983, happened to be Government holidays. The Chief Secretary to Government dealt with this file on 17-1-1983. The Honourable Minister for Law and Co-operation was on tour on 17-1-1983. The file was directly submitted to the Honourable Chief Minister of Tamil Nadu on 17-1-1983. The Honourable Chief Minister dealt with this matter on 18-1-1983. On the same date the file was returned to the section. The Government on a careful consideration of the representation rejected the representation on 18-1-1983. This was communicated to the detenu on 19-1-1983. The same was acknowledged by the detenu the same day. Hence it is submitted that the representation of the detenu was under active consideration of the detaining authority (Government of Tamil Nadu) at all levels and after careful consideration the detaining authority has rejected the same. In the circumstances, it cannot be contended that there has been undue delay in considering the representation".

No doubt, Mr. Panchapakesan cited the decision reported in Harish Pahwa Vs. State of U. P. and Others, in support of his contention that the delay would vitiate the order of detention.

26. On the other hand, the learned Advocate General cited the decisions in State of Orissa and Another Vs. Shri Manilal Singhania and Another, ,

Nagendra Nath Mondal Vs. The State of West Bengal, and Frances Coralie Mullin Vs. W.C. Khambra and Others, and pointed out that if

reasonable cause is shown the delay will not by itself vitiate a detention order.

27. In Frances Coralie Mullin Vs. W.C. Khambra and Others, , the Supreme Court has held that the time imperative can never be absolute or

obsessive and that there has to be lee-way, depending on the necessities of the case. But no allowance can be made for lethargic indifference. No

allowance can be made for needless procrastination. But, allowance must surely be made for necessary consultation where legal intricacies and

factual ramifications are involved. The burden of explaining the necessity for the slightest departure from the time imperative is on the detaining

authority. On the facts of the case on hand, we accept the cause for the 23 days delay as explained in the counter affidavit, and find that there is no

merit in the contention that the delay of 23 days would vitiate the detention order, if it is otherwise valid.

28. Finally, we have to consider as to whether the detention order is vitiated owing to the fact that vital documents were not considered by the

detaining authority. Mr. Panchapakesan, learned counsel for the petitioner, brought to our notice the fact that the statements of Jagannathan made

prior to his confession before the Customs authorities and subsequent to his confession, have not been taken into consideration by the detaining

authority and this would vitiate the detention order since these statements are very relevant materials to come to a conclusion whether the detenu

has to be detained under the COFEPOSA Act or not. In this connection, we can just mention the facts that led to the detention order. The lorry

TDU 1355 was intercepted at the outskirts of Tanjore town on 12-4-1982 on the Nagapattinam Tanjore Road. It was from this lorry, 11 bags

containing nylon zips of foreign origin valued at Rs. 1,90,650/- were seized. It is the case of the Customs authorities that this lorry belongs to the

detenu and it was purchased by him benami in the name of Jagannathan. The detaining authority, in paragraph (iv) of the grounds of detention has

referred to the statement given by Jagannathan on 3-6-1982. On his statement and on the statement of Thilagar, the detaining authority came to the

conclusion that the lorry belongs to the detenu and was purchased by him in the name of Jagannathan. It is clear therefore that the ownership of the

lorry is one of the important factors and this factor has been taken into consideration to fasten liability upon the detenu inasmuch as it is the lorry of the detenu bearing TDU 1355 that transported the contraband goods in question. While doing so, the detaining authority did not take into consideration the letter written by Jagannathan to the Collector of Central Excise, Madurai on 18-4-1982, wherein he has specifically stated that the lorry TDU 1355 belongs to him absolutely and the same was to be released since the alleged contraband goods had been transported without his knowledge. The said Jagannathan by his petition dated 24-5-1982 addressed to the Collector of Central Excise, has specifically stated that he was afraid of appearing before the Customs officials since they would coerce him to accept and conform to the dictation that they would make to him and that he was the owner of the lorry TDU 1355. Only subsequent to these two documents, the statement of Jagannathan was recorded by the Customs officials on 3-6-1982. Within 16 days thereof, Jagannathan, after coming out on bail, addressed a letter dated 19-6-1982, to the Assistant Collector of Central Excise, Madurai. In this letter he has specifically stated that the statement recorded from him on 3-6-1982 under coercion would not bind him any way that he had already represented the facts regarding the vehicle and that he was enclosing a letter sent by him to the higher authorities in this connection. He has also prayed in this letter for the release of the vehicle assuring not to dispose of the same till the case is over. Except the statement recorded by the Customs authorities on 3-6-1982 from Jagannathan, the other documents just referred to, which relate to Jagannathan, have not been referred to by the detaining authority at all. The learned Advocate General, would no doubt state that though these documents were not referred to by the detaining authority in the order of detention since all the documents have been furnished to the detenu along with the detention order, it must be presumed that the detaining authority has applied its mind to these documents as well.

29. In *Ashadevi Mehta (Detenu) Vs. K. Shivraj*, Addl. Chief Secretary to the Govt. of Gujarat and Another, , the Supreme Court has succinctly stated as follows :

The principle that could be clearly deduced from the above observations is that if material or vital facts which would influence the mind of the

detaining authority one way or the other on the question whether or not to make the detention order, are not placed before or are not considered

by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal. After all the detaining authority must

exercise due care and caution and act fairly and justly in exercising the power of detention and if taking into account matters extraneous to the

scope and purpose of the statute vitiates the subjective satisfaction and renders the detention order invalid then failure to take into consideration the

most material or vital facts likely to influence the mind of the authority one way or the other would equally vitiate the subjective satisfaction and

invalidate the detention order.

30. In our view, that statements of Jagannathan dated 18-4-1982, 24-5-1982 and 19-6-1982, which have been admittedly not referred to by the

detaining authority are vital materials and they would have influenced the mind of the detaining authority one way or the other. We cannot presume

as suggested by the learned Advocate General, that the authority has taken these materials also into consideration, when, as a matter of fact, there

is nothing on record to show that these materials were taken into consideration by the detaining authority. Hence, following the principle enunciated

in the above Supreme Court, decision, we are of the view that the order of detention is liable to be set aside on this short ground.

31. In the result, we set aside the detention order and direct the authority concerned to set the detenu N. Subbaraja Nadar, at liberty forthwith.

There will be no order as to costs.

32. Order accordingly.