

(1992) 10 KAR CK 0014
In the Karnataka High Court
Case No : Writ Petition No. 122 of 1992

Shaban Abdul Rahiman

APPELLANT

Vs

The Union of India and others

RESPONDENT

Date of Decision : 14-10-1992

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
(COFEPOSA) — Section 3 (1), 5 A
Constitution of India, 1950 — Article 141, 21, 22 (5)
Customs Act, 1962 — Section 108

Citation : (1993) CriLJ 1515 : (1992) 40 ECC 422 : (1992) ILR (Kar) 3286 :
(1992) 4 KarLJ 227

Hon'ble Judges : M. Ramakrishna, J; B.N. Krishnan, J

Bench : Division Bench

Advocate : M.G. Karmali for Kiran S. Jawali, for the Appellant; Shylendra Kumar, Sr. Central Govt. Standing Counsel and Govt. Advocate, for the Respondent

Judgement

Krishnan, J.—The petitioner who has been detained under S. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "the Act") has challenged the said order of detention and has sought for issue of a writ of habeas corpus to release him from detention after declaring that his detention is illegal and void.

2. The order of detention has been passed on 17-3-1992 by the Joint Secretary of Government of India specially empowered under S. 3(1) of the Act with the alleged view of preventing him from abetting the smuggling of goods in future.

3. A few facts culminating in the order of detention may briefly be stated as hereunder :

The Officers of the D.R.I Mangalore, on information that contraband silver bricks were being taken towards Indoor after passing through Karnataka from Padubidri side in truck bearing registration No KA-251254, on 8-3-1992 at about 9-15 a.m. intercepted the said truck which came from Padubidri side when it was hearing

towards Karkala. The truck was being driven by one Ramesh Kumar Ganchi, and by his side was one Madan Singh Amar Singh. It was found that 75 silver bricks weighing 2,676.394 Kgs. valued at Rs. 2,14,11,152/- had been concealed in the cabin of the said truck. The said truck had been registered in the name of one Kanthilal Ramachandra Jain of Hubli. The statements of two inmates led to the arrest of the detenu and all of them were produced before the Chief Judicial Magistrate of Mangalore on 10-3-1992 and they were remanded to judicial custody till 24-3-1992. On 10-3-1992 the detenu and others filed bail applications and on 16-3-1992 they were granted bail and the same was to come into effect on 19-3-1992. On 17-3-1992 the Joint Secretary to the Government of India passed the impugned order under S. 3(1) of the Act and the same was served on 19-3-1992 and the grounds of detention were served on 23-3-1992 with the documents along with a list.

4. Though a number of grounds have been urged in the course of the petition, only two grounds were pressed into service on behalf of the petitioner. The first ground that was urged on behalf of the petitioner is that certain portions of the order of the Chief Judicial Magistrate dated 16-3-1992 which are at pages 200 and 205 of the grounds served upon the detenu are illegible and a legible English copy of the same was not served upon the detenu and therefore there is no communication of grounds as required under law to the detenu. The second ground of attack is that even as per the very objection statement filed to the petition, the copy of the order regarding bail passed by the Chief Judicial Magistrate could be obtained by the sponsoring authority only on 17-3-1992 and it was not made available to the detaining authority before it passed the order of detention, therefore the basic material for passing the order of detention was not available to the detaining authority and hence the order of detention is rendered invalid.

5. It was also urged that in the order of detention and the documents enclosed along with the grounds of detention served upon the detenu, it has been made to appear as if the detaining authority had gone through the Court's order regarding bail and in fact the order of bail was also enclosed along with the grounds of detention served upon the the detenu though as a matter of fact, the said order had not been placed before the detaining authority and the detenu has been deprived of his right to make an effective representation against the order of detention and even in that view of the matter the order of detention is rendered invalid.

6. A few more facts are to be mentioned to understand the second ground of attack made in this petition. In the grounds of detention served upon the detenu in support of the detention served upon the detenu in support of the detention order which is Annexure-B to the Writ Petition it has been stated by the detaining authority as hereunder :

"While arriving at subjective satisfaction I have relied upon the documents mentioned in the annexed list and copies of the same are enclosed herewith

together with their Kannada translation wherever necessary."

Item 10 in the list of documents enclosed to the grounds of detention reads as hereunder :

"Bail application, objection to it and Court's order."

One of the enclosures to the grounds of detention is Annexure-R to the writ petition which is the order of bail passed by Chief Judicial Magistrate, Manga on 16-3-1992. If bail order which has been the very copy produced in the case shows that it was issued by the Court on 17-3-1992 and therefore it was urged for the petitioner that it could not have been available to the detaining authority before it passed the order of detention as the said document was not even available to the sponsoring authority by the time the order of detention was passed and therefore the order is bad. In the course of the objections filed on behalf of the respondents it has been stated that all the documents available on record pertaining to the case like statement under S. 108 of the Customs Act, Remand application, Remand order, Bail application, objection to the bail application etc. were supplied with the proposal. The detenu was granted bail as per order dated 16-3-1992. The gist of the order granting bail on 16-3-1992 was also communicated on 16-3-1992 itself through a FAX message to the COFEPOSA Cell of D.R.I. Headquarters at Delhi with a request to submit the same to the COFEPOSA Unit of the ministry. Accordingly photo copy of the FAX message which contained gist of the said order was placed before the said unit.

7. Therefore it could not be disputed that the bail order was not placed before the detaining authority before it passed the order of detention. In fact, after noticing this aspect of the undisputed case of the respondents, it was urged that the order of detention is vitiated because, the order of bail had not been undisputedly placed before the detaining authority.

8. From the narration of the facts what emerges is that the order of bail was not placed before the detaining authority before the impugned order was passed and what was placed before the detaining authority at that time was only a FAX message containing a gist of the bail order. Further, it is also an undisputed fact that the copy of the FAX message stated to have been placed before the detaining authority was not supplied to the detenu along with the grounds of detention and even till this date the same has not been supplied to him and what has been supplied to him is the copy of the order of bail passed by the Chief Judicial Magistrate and at the time of service of the grounds of detention, the detenu was made to believe that the bail order was in fact placed before the detaining authority and was relied upon, though in fact it was not so.

9. Before taking up for consideration the several contentions advanced in the case, it would be appropriate to refer to the settled position of law regarding preventive detention. The two facets recognised by Art. 22(5) of the Constitution are, that the authority making the order of preventive detention shall as soon as may be communicate to such person the grounds on which the order has been

made and shall afford him the earliest opportunity of making a representation against the order. The relevant section of the Act in this regard is S. 3(3) which reads as hereunder :

"For the purposes of Clause (5) of Art. 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention."

By its various decisions the Supreme Court has given a new dimension to the word "grounds" occurring in these provisions, in that the word "ground" does not merely mean an inference drawn by the detaining authority. It is fairly well settled now that all the basic facts and materials which influence the detaining authority in making the order of detention must be communicated to the detenu, vide *Khudiram Das Vs. The State of West Bengal and Others*, The grounds must be self sufficient and self explanatory and copies of the documents to which reference is made in the grounds must be supplied to the detenu as part of the grounds *Pari Passu* with the same, vide -

- (i) *Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others*,
- (ii) *Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others*,
- (iii) *Kamla Kanyalal Khushalani Vs. State of Maharashtra and another*,

10. It was urged on behalf of the petitioner that when undisputedly the order of bail was not available to the detaining authority, the subjective satisfaction arrived at by it is impaired. The learned Central Government standing Counsel contended that though the order of bail with its full text was not available to the detaining authority, the gist of the order was communicated to it by the FAX message and because it was aware of the fact of the detenu having been ordered to be released on bail the order of detention is not in any way impaired. It was also urged that, the fact that the person has been granted bail is only a relevant circumstance and not at all a vital circumstance or basic factor. Alternatively it was urged that the non-placing of the full text of the bail order before the detaining authority and non-consideration of the same by it, does not matter in any way in view of the amended section 5-A of the Act. It has to be seen whether the order of bail was only a relevant piece of document and is not a basic material for passing the order of detention and whether mere awareness on the part of the detaining authority that there was an order of bail is sufficient to meet the criticism levelled by the learned Advocate for the petitioner. In *M. Ahamedkutty Vs. Union of India (UOI) and Another*, it has been observed as hereunder :

"Considering the facts in the instant case, the bail application and the bail order were vital materials for consideration. If those were not considered, the

satisfaction of the detaining authority itself would have been impaired and if those had been considered they would be documents relied on by the detaining authority and those ought to have formed part of the documents supplied to the detenu with grounds of detention."

Yet in another latest decision of the Supreme Court *Abdul Sathar Ibrahim Manik Vs. Union of India and others*, the matter has been put beyond all controversy. After referring to a number of decisions on the subject their Lordships in the course of paragraph 12 have set down their conclusions in this regard in six propositions. Propositions at Sl. No. 3 and 6 therein are more apposite for purpose of our discussion. We would be in a position to appreciate the several contentions urged in the case if we juxtapose these two propositions.

Proposition No. 3. Proposition No. 6. If the detenu has moved for bail in a case where detenu is bail then the application and released on bail and is at the order thereon refusing liberty at the time of passing bail even if not placed before the order of detention, then the detaining authority it the detaining authority has to does not amount to suppression necessarily rely upon them as of relevant material. The that would be a vital ground question of non-application of for ordering detention. In mind and satisfaction being such a case the bail impaired does not arise as application and the order long as the detaining granting bail should authority was aware of the necessarily be placed before fact that the detenu was in the authority and the copies actual custody. should also be supplied to the detenu.

Just a look at these two propositions would make it clear that the Supreme Court has ruled that awareness of the fact that detenu was in actual custody would be sufficient only in a case where bail has been refused and the order refusing the bail even if not placed before the detaining authority does not impair the order of detention. But, in the case where the bail has been granted the detaining authority has to necessarily rely upon the same as it would be a vital ground for ordering detention. It was pointed out by the learned Standing Counsel for the Central Government that, that particular case arose out of a situation where bail had been refused and not granted. Even though in the above said case their Lordships were concerned with a detenu to whom bail had been refused, the law declared by the Supreme Court as per proposition No. 6, in respect of cases where bail has been granted, is binding on this Court and this Court cannot countenance a plea that this aspect had not arisen for consideration for purpose of that case or on that ground to state that proposition No. 6 extracted above is not binding on this Court, as it is fairly well settled that even obiter dicta of the Supreme Court is the law declared by the Supreme Court within the meaning of Art. 141 of the Constitution. If the awareness on the part of detaining authority that bail had been granted to the person was sufficient, there would have been no necessity for the Supreme Court to put the proposition under two separate heads at Se. It could have as well mentioned both the aspects in one single proposition namely No. 3 by stating that awareness is sufficient whenever bail

was granted or refused. When the Supreme Court has not done so and has dealt with these aspect of the case when bail has been refused and granted in two propositions and further in respect of a case where bail has been granted, has stated that the order granting bail should "necessarily" be placed before the detaining authority and it is a vital document and the detaining authority has to "necessarily rely" upon it, it is too much on the part of anyone to still contend that just awareness is sufficient even in the case of grant of bail. The use of the word "necessarily" twice in addition to the word "vital" in the sixth proposition would lose all its significance if such a contention is accepted.

11. It is not as if for the first time that the order granting bail has been placed on such a high pedestal, in Abdul Sathar Ibrahim Manik Vs. Union of India and others, In decision in Union of India (UOI) and Others Vs. Manoharlal Narang, the Supreme Court's interim order in a pending appeal against High Court's order of quashing the previous order of detention had not been considered by the detaining authority while passing a subsequent order of detention and it was held that the non-consideration of the interim order which constituted a relevant and important material was fatal to the subsequent detention order on the ground of non application of mind. It was urged that, that interim order had been passed by the Supreme Court in an appeal preferred against the quashing of the High Court's order of previous order of detention and therefore it cannot be pressed into service in the present case which does not relate to any previous order of detention and is a mere case of arrest and release of detenu. It appears that the circumstances under which the Supreme Court passed the interim order of bail in that particular case being different than the one concerned with the present detenu cannot in any way be used as a distinguishing feature not to act upon the proposition that his interim order of bail granted by the Supreme Court in the appeal constituted a relevant and important material at the time of passing of the subsequent order of detention.

12. In M. Ahamedkutti Vs. Union of India (UOI) and Another, it was pointed out that the bail application and the bail order are were vital materials for consideration and if those were not considered, the satisfaction of the detaining authority itself would have been impaired and if those had been considered they would be documents relied on by the detaining authority and those ought to have formed part of the documents supplied to the detenu with the ground of detention. In Kurjibhai Dhanjibhai Patil v. State of Gujarat 1985 (1) SCALE 136 it has been pointed out by the Supreme Court that the question is not whether the material that has been withheld from the detaining authority formed part of any separate or independent proceedings, but the question is, whether the material is relevant and would have influenced the mind of the detaining authority or not and in that case it was pointed out that the show cause notice and the reply of the detenu to the same were certainly more relevant materials which ought to have been placed before the detaining authority. In Ashadevi Mehta (Detenu) Vs. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Another, it has been pointed out that if material or vital facts which would have a bearing on the issue

and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order, then the subjective satisfaction of the detaining authority would get vitiated.

13. A superficial reading of the Pushpa Devi's case gives one an impression whether S. 5(A) of the Act would be applicable to a case of this kind where bail order despite being a vital document has not been placed, whether the order of detention could be justified on other grounds. It may be noticed that in Pushpa Devi's case it has not been held that the decisions in Asha Devi's case and Kurjibhai's case are not good law. On the other hand after referring to the various aspects relating to these two cases in paragraph 12 at page 1756 it has been observed as follows :

"Both these decisions proceed on the well settled principle that if material and 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 it would vitiate its subjective satisfaction rendering the detention order illegal. We fail to see the relevance of these decisions to the present case."

This principle referred to in both Asha Devi's case and Kurjibhai's case has practically been reiterated as the well settled principle even in Pushpa Devi's case.

14. When the Supreme Court in Ahmed Kutty's case has pointed out that the bail order was a vital material for consideration by the detaining authority and non consideration of the bail order would amount to non-application of mind and in Abdul Sattar Manik's case has pointed out that the detaining authority has to necessarily rely upon the order granting bail and that would be a vital ground for ordering detention and that the order granting bail should necessarily be placed before the authority, it cannot be said that the order of bail is not a vital material or did not constitute a basic fact for ordering detention or that the non consideration of the same would not in any way impair the subjective satisfaction of the detaining authority.

15. The learned standing counsel for the Central Government contended that even though the order of bail was not placed before the detaining authority its subjective satisfaction must be held to be not vitiated in view of S. 5-A of the Act and also the view taken by the Supreme Court in Madan Lal Anand Vs. Union of India and others, where the non-placement of the retraction of the confession was held to have not vitiated the detention order as it may be deemed to have been made separately on each of the other grounds. This decision was rendered by the Supreme Court on 26-10-1989 and in a later decision in Vashisht Narain Karwaria Vs. State of U.P. and another, disposed of on 28-3-1990 it has been pointed out that what S. 5-A provides is, that where there are two or more grounds covering various activities of the detenu and if each activity is a separate ground by itself and if one of the grounds is vague, non existent or not

relevant, or not connected or not proximately connected with such person or invalid for any other reason whatsoever, then that will not vitiate the order of detention. It is not the case of the Central Government that there are more activities than one in the present case or the attack made by the learned Advocate for the petitioner is in respect of any particular activity forming a separate ground. In yet another subsequent decision rendered by a larger bench of three Judges in *K. Satyanarayan Subudhi Vs. Union of India*, and others, it has been held that the non-placement of retraction of the confessional statement by the detenu before the detaining authority and non-consideration of the same went to the root of the detention and in the considered opinion of the three learned Judges, the same made the order of detention invalid. Therefore, the earlier decision of the Supreme Court in *Madanlal Ananda's* case relied upon by the learned Advocate for the Central Government cannot in our considered view assist him in any way to overcome the non-production of the bail order before the detaining authority.

16. It is no doubt true though in the case of *Khudiram Das Vs. The State of West Bengal and Others*, it has been held that human mind does not act in compartments and S. 5-A of the Act introduced subsequently provides that if an order of detention is based on two or more grounds such order of detention shall be deemed to have been made separately on each of such grounds and if any one or more ground is found invalid, such order shall not be deemed to be invalid only for that reason. Where there are more than one activity of the detenu and the same providing different grounds for passing the order of detention, the order of granting bail to the detenu before the order of detention is passed cannot be connected with any particular activity of the detenu and in fact it would be basic fact or vital material for passing the order of detention after taking note of one or more than one activity of the detenu. In other words it would be a basic fact connected with all the activities of the detenu. If such a basic fact is not placed before the detaining authority even after the authoritative exposition of law in *Abdul Sattar Manik's* case it has to be held that it necessarily impairs the subjective satisfaction of the detaining authority. As already pointed out even in a case where number of activities by the detenu are involved and if each of such activity also provides the basis for detention, another circumstance namely order directing release on bail is linked with all these grounds and if this vital basis falls to the ground, then the entire edifice based on all the activities has to fall to the ground.

17. In the instant case such a contingency does not arise as it is not the case of detaining authority that its order is based on number of activities of the detenu.

18. In Criminal Writ Petition No. 1190 of 1991 on the file of the High Court of Bombay (*Sachin Bai Arjun v. State of Maharashtra*) the full text of the bail order had not been placed before the detaining authority though an extract under the bail certificate was placed before it. Following the decision in *Abdul Sattar Manik's* case, it was held by the Bombay High Court that the bail order was a

vital document which the detaining authority should necessarily have relied upon for ordering detention of the detenu and the same having not been placed before the detaining authority, had vitiated the subjective satisfaction of the detaining authority. In Criminal Writ Petition No. 3 of 1992 (Usuf Gani Abdul Aziz v. State of Maharashtra) the Bombay High Court has again followed Abdul Sattar Manik's case and the impugned order of detention was held to have been vitiated because the full text of the order on bail application was not placed before the detaining authority though the gist of the order on the bail application was placed before it. Even before the decision of the Supreme Court in Abdul Sattar Manik's case the Bombay High Court had taken the same view as in these two writ petitions, in Veena Deepak v. Secretary to the Government of Maharashtra (Crl. Writ Petition No. 983 of 1988), wherein it has been held that placing a document which only incorporated the information contained in another document could not be regarded as a proper substitute for the other document and the non-placing of the order of bail impaired the subjective satisfaction though the document embodying the information regarding the release of the detenu on bail had been placed before the detaining authority.

19. The learned Senior Standing Counsel for the Central Government invited our attention to a Division Bench decision of this Court in G. Pichaimani Vs. State of Karnataka, wherein at page 1086 at Para 47 it has been observed as hereunder with reference to the non-placing of the order of bail.

"We do not think that the production of the order containing reasons on which the detenu had been enlarged on bail would have made any difference at all. At the highest Govt. had only to take note of such fact and that had been done. We are of the view that the failure of the Govt. to examine the reasons on which the detenus had been enlarged on bail does not vitiate the detention orders."

This decision was rendered long prior to Abdul Sattar Manik's case decided by the Supreme Court and it runs exactly contra to the law enunciated by the Supreme Court in that decision and therefore it has to be held that this principle enunciated by the Division Bench of this Court stands overruled by implication by the decision of the Supreme Court in Abdul Sattar Manik's case.

20. Having considered all these decisions and given our anxious consideration to the same, we are of the view that bail order is not just a relevant circumstance as contended by the Senior Standing Counsel for Central Government and in fact it is a vital document which should have been necessarily placed before the detaining authority and it should have also necessarily considered it and mere awareness on its part is not sufficient and the non-placing of the said order before the detaining authority is a serious lapse which has impaired its subjective satisfaction.

21. One may look at the facts of this case yet from another angle regarding the prejudice caused to the detenu. As already pointed out it is undisputed that the copy of the FAX message has not been supplied to the detenu even till this day

and again at the time of service of the grounds of detention the detenu was made to believe that the order of bail, copy of which was also served on him had in fact been placed before the detaining authority before it passed the order of detention. If the detenu had not been given this wrong impression and if in fact he had been made aware of the fact that the order directing his release had not been placed before the detaining authority and that it had been substituted by placing the FAX message containing gist of the order of bail, the detenu could have thought of making an effective representation on that basis to the Central Government and he could also have urged this point before the Advisory Board. When as a matter of fact that bail order had not been placed before the detaining authority and when in fact only the FAX message containing gist of the bail order had been placed before the detaining authority, as to why the detenu was practically misled in this regard could not be explained on behalf of the Central Government. In the decision of the Bombay High Court Usuf Gani's case, it has been pointed out that it was necessary to have informed the detenu while serving grounds of detention that only the gist of the bail order was made available to the detaining authority and only that was considered by it and that would have enabled him to make an effective representation against the same. As to what view would have been taken by the Central Government or the Advisory Board if such a contention had been placed before it cannot be reasonably be postulated at this stage nor is it permissible to do so. Anyway, it cannot be disputed that this misleading impression given to the detenu has also affected the right given by the second facet of Art. 22(5) of the Constitution viz., an earliest opportunity to make effective representation against the order of detention.

22. It was urged by the learned Standing Counsel for the Central Government that in these cases we are dealing with anti social elements and a pragmatic view of the rights of the detenu should be adopted and a mere lapse on the part of the sponsoring authority to place the full text of the bail order before the detaining authority should not be viewed seriously. If the bail order is a vital piece of document which should necessarily have been placed before the detaining authority, as pointed out by the Supreme Court in Abdul Sattar Manik's case, and the same was not undisputedly made available to the detaining authority, the said order is a very vital basic material for passing the order of detention and on application of the principles enunciated by the Supreme Court, the subjective satisfaction of the detaining authority is impaired. Even though our conclusion that the subjective satisfaction is impaired may result in letting free a person who may possible have been connected with large scale smuggling of silver bricks, that by itself is no ground not to take a view in his favour if otherwise such a view is inevitable. The answer to the contention of the learned standing counsel is provided by the following observation in *Ichchudevi's case* at page 1986 *Smt. Ichchu Devi Choraria Vs. Union of India (UOI) and Others*,

"We are not unmindful of the fact that the COFEPOSA Act has been enacted for the purpose of eradicating the evil of smuggling which is eating into the vitals of

the nation like a cancerous growth and eroding the economic stability of the country and when an order is made by the Court releasing a person detained under this Act, it is quite possible that the effect of the order may be to let loose on the society, a smuggler who might in all probability, resume his nefarious activities causing incalculable mischief and harm to the economy of the nation. But at the same time we cannot forget that the power of preventive detention is a draconian power justified only in the interest of public security and order and it is tolerated in a free society only as a necessary evil. The power to detain without trial is an extraordinary power constituting encroachment on personal liberty and it is the solemn duty of the Courts to ensure that this power is exercised strictly in accordance with the requirements of the Constitution and the law. The Court should always lean in favour of upholding personal liberty, for it is one of the most cherished values of mankind. Without it life would not be worth living. It is one of the pillars of free democratic society. Men have rightly laid down their lives at its alter in order to secure it, protect it and preserve it. The Constitution has, therefore, while conceding the power of preventive detention, provided procedural safeguards with a view to protecting the citizen against arbitrary and unjustified and invasion of personal liberty and the Courts have always zealously tried to uphold and enforce these safeguards. Thus Court has also through its judicial pronouncements created various legal bulwarks and breakwaters into the vast powers conferred on the executive by the laws of preventive detention prevalent at different points of time. It is true that sometimes even a smuggler may be able to secure his release from detention if one of the safeguards or requirements laid down by the Constitution or the Law has not been observed by the detaining authority but that can be no reason for whittling down or diluting the safeguards provided by the Constitution and the law. If the detaining authority wants to preventively detain a smuggler, it can certainly do so, but only in accordance with the provisions of the Constitution and the law and if there is a breach of any such provision, the rule of law requires that the detenu must be set at liberty, however wicked or mischievous he may be. The law cannot be subverted, particularly in the area of personal liberty, in order to prevent a smuggler from securing his release from detention, because whatever is the law laid down by the Courts in the case of a smuggler would be equally applicable in the case of preventive detention under any other law. This Court would be laying down a dangerous precedent if it allows a hard case to make bad law. We must, therefore interpret the provisions of the Constitution and the law in regard to preventive detention without being in any manner trammelled by the fact that this is a case where a possible smuggler is seeking his release from detention."

Even the following observations in Kamala Kanhaiya Lal Khushailani's case provide an effective answer to the said contention of the learned Standing Counsel.

"It is well settled that the Court frowns on preventive detention without trial because the detenu is deprived of the right of proving his innocence in a trial by

a court of law. It is, therefore, of the utmost importance that all the necessary safeguards laid down by the Constitution under Art. 21 or Art. 22(5) should be complied with fully and strictly and any departure from any of the safeguards would void the order of detention. This is so because in a civilized society, like ours, liberty of a citizen is highly precious right and a prized possession and has to be protected unless it become absolutely essential to detain a person in order to prevent him from indulging in anti-national activities like smuggling etc."

23. If detention order has to be struck down for the reasons adverted to already there is no scope to charge the said conclusion because we are dealing with a case of the alleged anti social elements engaged in the act of abetting smuggling of such a heavy quantity of silver worth more than two crores.

24. As pointed out by the Supreme Court time and again in a number of decisions the infraction of two facets of the Art. 22(5) of the Constitution should be viewed seriously because this is the minimum protection provided under the said article by our Constitution. The decision in Abdul Sattar Manik's case had been rendered prior to the date of order of detention in the present case. If the concerned had taken steps to secure the copy of the bail order well before the time when it was expected to become effective and placed the same before the detaining authority, it would not have landed in such a situation. Even though the sponsoring authority had not made it available the detaining authority itself could have asked for the same and could have secured the same and relied upon it before passing the order of detention. When that has not been done and when the subjective satisfaction of the detaining authority is impaired on account of this lapse and further when our conclusion is also to the effect that the right given under the second facet of Art. 22(5) of the Constitution has also been invaded by giving a wrong impression to the detenu at the time of service of grounds of detention, we cannot in our considered view lightly deal with this lapse only because of the large quantity of silver stated to have been smuggled in the present case.

25. The learned Advocate for the petitioner did not seriously press the first point of the illegible portion of documents and the contention that there is no communication of grounds based on the said contention. He did not press any other contention.

26. In the result, the order of detention bearing No. F. 673/67/92-CUS-VIII, dated 17-03-1992 (Annexure-A) passed by the Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi is hereby quashed and the detenu is ordered to be set at liberty forthwith if not required for any other purpose.

27. Petition allowed.