
(1975) 07 RAJ CK 0019

In the Rajasthan High Court

Case No : Habeas Corpus Petitions 24, 92 and 93 of 1975

Shamsher Singh and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 15-07-1975

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 10, 11, 12, 13, 14
Constitution of India, 1950 — Article 14, 21, 22, 226, 352
Customs Act, 1962 — Section 108, 111, 2
Penal Code, 1860 (IPC) — Section 353

Citation : (1975) 8 WLN 400

Hon'ble Judges : P.D. Kudal, J; Kan Singh, J

Bench : Division Bench

Judgement

Kan Singh, J.—The three petitions before us have certain common features and were called on for hearing together. They, inter alia, raise a question regarding the availability of the remedy of a writ in the nature of habeas corpus to a detainee on account of the proclamation of emergency by the President and his order suspending the fundamental rights under Article 14, 21 and 22 of the Constitution. We may give the facts with reference to Shamsher Singh petitioner.

2. Shamsher Singh was a resident of Jaipur carrying on business in general merchandise. To start with he was detained under an order of the District Magistrate, Jaipur dated 22.11.74 passed under the Maintenance of Internal Security Act, 1971, as it stood amended on the relevant date by an Amending Ordinance, No. 2 of 1971, which was promulgated on 16.11.74. We will be referring to this Act, hereinafter for the sake of brevity, as "MISA". The grounds of detention were served on him on 25.11.74. Shamsher Singh thereafter made a representation to the State Government against his detention on 18.12.74. Simultaneously he removed a writ petition in this Court which was writ petition No. 3406 of 1974. (sic) was issued by a Division Bench of this Court. It appears that before the filing of that petition the Conservation of Foreign Exchange &

Prevention of Smuggling Act, 1974 (Act No. 52 of 1974), hereinafter to be referred as the Shuggingling Act", received the assent of the President on 13.12.74. Section 1(3) of the Act provided that it shall come into force on such date not later than the twentieth day of December, 1974, as the Central Government, by notification, in the Official Gazette appoint. By a Gazette Notification, 19th December, 1974 was appointed as the date for enforcing the Act. By Section 14 of Ami Smuggling Act, ordinance No. 2 of 1974, by which the MISA had been amended earlier, was repealed. The repeal clause ran as under:

Section 14. Repeal: The Maintenance of Internal Security (Amendment) Ordinance, 1974 (II of 1971), shall, on the commencement of of this Act, stand repealed and accordingly the amendments made in the Maintenance of Internal Security Act 1971 (26 of 1971) by the said Ordinance shall, on such commencement, cease to have effect.

On 12.12. 74, a fresh detention order was passed in respect of the petitioner u/s 3(1) of the Anti Smuggling Act, which we may read:

GOVERNMENT OF RAJASTHAN

HOME (GR. V) DEPARTMENT

No. F. 8 (299) Home/Gr /74 Jaipur, the 19th Dec, 1974

ORDER

Whereas I, Ram Singh, Secretary to the Government of Rajasthan, Home Department, am satisfied with respect to the person known as Shamsheer Singh s/o Shri Heeraial Jain, residing at Kundigaroon-Ka-Rasta, Jaipu, that with a view to preventing him from engaging in keeping smuggled goods, and dealing in smuggled goods otherwise than by engaging in transporting or keeping smuggled goods, it is necessary to make the following order;

Now, the refore, in exercise of the powers conferred by Section 3(1) of the Conservation of Fereign Exchange and Prevention of Smuggling Activities Act, 1974 (Act 62 of 1974), 1, Ram Singh, Secretary to the Government of Rajasthan, Home Department, direct that the Said Shri Shamsber Singh s/o Shri Heeraial Jain be detained.

sd/- Ram Singh

(Ram Singh)

Secretary to the Government.

Place Jaipur

Date 19th Dec, 1974.

To

Shri Shamsheer Singh,

s/o Shri Heeraial Jain,
residing at Kundigaron Ka Rasta,
Jaipur.

It was issued by Shri Ram Singh, Secretary to the Government in the Home Department On 23.12.74 the grounds for detention were communicated to petitioner by the detaining authority. As considerable arguments have centered round the ground in one form or the other, we may read document No. 2 on record which embodies the grounds in full:

GOVERNMENT OF RAJASTHAN

HOME (GR. V) DEPARTMENT

NO, F. 8 (307), H. Gr. V/74

Jaipur dated the

December 23, 1974.

(Through the Officer-in-charge of the Central Jail, Jaipur)

Grounds on which detention Order No. 8(299) H Gr. v/74 dated 19th December, 1974 has been made against Shri Shamsher sinsh s/o Shri Heeralal Jaim, u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

1. The business premises of the Firm M/s Saudagar Shamsher Singh, of which you are the sole proprietor, were searched by by the officers of the Customs Department on 30.6.73 and 24 pieces of textiles of foreign origin, and other goods of foreign origin, namely, seven nail cutters valued at Rs. 25/ and two packs of face powder valued at Rs. 25/- illegally imported into India were recovered In your statement dated 30.6,73, made before the Superintendent of Customs and Central Excise, Jaipur, you sated that you bad purchased sixty pieces of Art Silk Fabrics, 12 Nail cutters and packs of face power, all of foreign origin, from Bombay and that 29 pieces of Art Silk Fabrics and 5 nail cutters had been disposed of by you by sale while 7 pieces of Art Silk Fabrics had bee a gifted by you to your relatives and friends. The case was adjudicated by the Assistant Collector, Customs and Central Excise, Jaipur and a penalty of Rs. 260/- was imposed on you besides absolute confiscation of the recovered goods, vide his order dated 17.7.74 The copies of the Panchnama dated 30-6-73, statement dated 30.6.73 and adjudication Order dated 17.7.74 are enclosed and marked as Annexure "A" "B" and "C" respectively.

2. Your business premises as well as residential premises were gain searched on 11-4-74 by the officers of the Customs Department and as a result thereof textiles of foreign origin legally imported into India valued at Rs. 630/- and Rs. 1050/- were recovered from the business and residential premises respectively. In your statement dated 11-4-74 made before the Inspector of Customs and

Central Exise, Jaipur immediately after the seizure you stated that though you had been dealing in miscellaneous goods, like cosmetics, Hosiery and general goods, you had purchased the seized foreign made textiles from an unknown person who came from Bombay. A show cause notice dated 30-5-74 in this case had been issued to you by the Assistant Collector (Prev) Customs and Central Excise, Jaipur Copies of Panchnama dated 11-4-74, statement dated 11-4-74 and show cause notice dated 30-5-74 are attached and marked as Annexure "D", "E" and "F" respectively.

3. Your business premises were again searched on 6-7-1974 by the officers of the Customs Department and textiles of foreign origin illegally imported into India valued at Rs. 37,460/- were recovered from your business premises. For these goods you had no supporting vouchers to indicate their lawful import or acquisition. This is clear from your statement dated 7-7-74 made before the Superintendent of Customs (Prev) Jaipur u/s 108 of the Customs Act, 1962. Copies of the Panchnama dated 7.7.74 and statement dated 7.7.74 are annexed as Annexure "G" and "H" respectively.

The above grounds are communicated to you in pursuance of Clause 5 Article 22 of the Constitution of India.

If you wish to make any representation against the order of detention, you may do so and address it to the Secretary to the Government of Rajasthan, Home Department, Secretariat, Jaipur and forward it through the Officer-in-Charge of the Central Jail, Jaipur.

Sd/ Ram Singh

23-12-74

(Ram Singh)

Secretary to the Government of Rajasthan

Home Department.

3. The petitioner challenges this order on a number of grounds. They now be broadly divided under two major heads bearing on the form of the order, its execution and it omitting certain material particulars like place of detention. We will be dealing with these grounds in the later part of our judgment. These grounds are contained in Para-6 of the petition. The other major ground of challenge is regarding the validity of the detention itself on account of there being no satisfaction of the detaining authority regarding the necessity of detention, the grounds being wholly insufficient or incomplete in several respects and not being related to the object of detention. These grounds are set out extensively in paras 2 to 4 of the petition. We will be dealing with these grounds to hereinafter.

4. At the very outset, however, the learned Public Prosecutor confronted us with the Presidential order suspending the fundamental rights of the citizens within the framework of the proclamation of emergency under Article 359(1) of the

Constitution He raised a preliminary objection that the right to move any court with respect to the orders of detention which had already been made under the Anti Smuggling Act and other Acts of similar nature for the enforcement of rights conferred by Articles 14, 21 and 22 of the Constitution being suspended, the petitioner has no right to invoke the jurisdiction of the Court for examining the validity of his order of detention and all that we can do is to postpone the hearing as long as the Presidential Proclamation regarding suspension of fundamental rights remains in force. We may deal with this question first with a view to examining the area within which a citizen can invoke the jurisdiction of this Court in the framework of the Proclamation of emergency and the Presidential Order suspending the fundamental rights, Article 359 reads:

Article 359 Suspension of the enforcement of the rights conferred by Part III during emergencies. - (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any Court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

The Presidential order of emergency reads:

PROCLAMATION OF EMERGENCY

In exercise of the powers conferred by Clause (1) of Article 352 of the Constitution, I, Fakhruddin Ali Ahmed, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by internal disturbance.

New Delhi

The 25th June, 1975.

F.A. Ahmed,

President.

We may then read the Presidential order suspending the fundamental rights:

MINISTRY OF HOME AFFAIRS

ORDER

New Delhi, the 27th June 1975

G.S.R. 361(E). - In exercise of the powers conferred by Clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in any court for the enforcement of the above mentioned

rights shall remain suspended for the period during which the Proclamations of Emergency made under Clause (1) of Article 352 of the Constitution of the 3rd December, 1971 and on the 25th June 1975 are both in force.

This Order shall extend to the whole of the territory of India except the State of Jammu and Kashmir.

This Order shall be in addition to and not in derogation of any Order made before the date of this Order under Clause (1) of Article 359 of the Constitution.

(No II/16013/1/75 S & P) II)

S.L. Khurana, Secy.

5. We may at once observe that where as the operation of the fundamental rights under Articles 14, 21 and 22 has been suspended and further the right to move any court for the enforcement of these fundamental rights have been put under suspension. Article 226 of the Constitution, in our view, is not touched by these provisions. Article 226, inter alia, vests this Court with the power of issuing writs in the nature of habeas corpus. Learned Public Prosecutor, however, went to the length of arguing that once there was this proclamation of emergency and order suspending the fundamental right under, Articles 14, 21 and 22 without any limitation whatsoever the citizen has lost his remedy to challenge the order of detention. Learned Public Prosecutor made a comparison of the words of this recent Presidential order suspending the fundamental rights with similar Presidential orders on earlier occasions for reasons of external aggression emergency was declared from time to time; firstly in the year 1962, then in 1965 and finally in 1971 before the present declaration of emergency on account of the threat to security of India due to internal disturbances.

6. The question seriously requiring is whether with the suspension of the fundamental rights even the rule of law itself is put under suspension. Learned Public Prosecutor will have us hold that once the executive passes any order of detention by the highest executive of the State or the person at the lowest rung of the ladder, the citizen cannot come to this Court for redress. We are unable to accept such a wide, tall or sweeping contention. The powers of the legislature, the executive and the judiciary are well demarcated by our Constitutions. With the existence of the fundamental rights in our Constitution the obligation is imposed on all the organs of the State, be it legislative sphere is executive not to infringe such fundamental rights and if that is done then the law or an executive action as the case may be shall be null and void. With the fundamental rights the legislative measure may not be open to challenge on the ground of infringement of fundamental rights under Articles 14, 21 or 22 and so may not the executive action under any law be challengeable on the ground that it is in contravention of any of these fundamental rights, but should it mean that the executive can detain a citizen without the authority of law or it will have to act under the provision of a law made by a competent legislature. When they are referring to the competent legislature this will include the powers of to

President and the Governor, as the case may be, to issue Ordinances from time to time. The Constitution has for the first time created certain fundamental rights, but it is otherwise in the fabric of our Constitution itself that the executive cannot take away the liberty of a citizen without the authority of a law made by a competent legislature. In *Eshugbayi v. Govt of Nigeria* AIR 1931 PC 248 at a time when there were no fundamental rights while referring to the British Jurisprudence their Lordships of the Privy Council observed thus:

The executive can only act in pursuance of the powers given to it by law. In accordance with British Jurisprudence no member of the executive can interfere with the liberty of property of a British subject except on the condition that he can support the legality of his action before a Court of justice.

In England there are no fundamental rights as can stand in the way of Parliament in making a law. The Magna Carta, there is only a declaration, but it does not fetter the powers of the British Parliament like our fundamental rights.

7. In *Makhan Singh v. State of Punjab* 1975 (1) All ER 810 their Lordships of the Supreme Court quoted the above passage of Lord Atkin and their Lordships further referred to Lord Atkin's minority speech in the case *Liversidge v. Anderson* 1942 AC 208 and observed:

These noble sentiments so eloquently expressed by Lord Atkin as well as his classic minority speech in the case of *Liversidge* 1942 AC 206 evoke a spontaneous response in the minds of all of us who have taken the oath to administer law in accordance with our Constitution and to uphold the fundamental rights of citizens guaranteed by the Constitution.

Fundamental rights are certainly under suspension but the right that a citizen's person shall not be violated by another unless he is justified by some law is the negative right of every citizen which stands outside the scope of the order suspending the fundamental rights. Our Constitution embodies the noble sentiments of the founding father expressed in the preamble which lays down that We the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens; justice social, economic and political; liberty of thought and expression, belief, faith and worship; equality of status and of opportunity and to promote among them all fraternally assuring the dignity of the individual and the unity of the Nation." There will be no dignity of the individual if the executive can take away the freedom of an individual without the sanction of the legislature, be it in the shape of an Act or Ordinance. The basic rights of man arise from the concept of a free man in a free or welfare State and interference in his freedom by other individuals when it transgresses the law of the land gives him a cause of action. Therefore, it is, we believe, fundamental in the fabric of our democratic Constitution that before the executive can take away the liberty of a citizen it must have the authority of law. Under our Constitution it is for the legislature to make the law for the executive to carry out these laws, but it is the executive

jurisdiction of the Courts to interpret the laws. The rule of law is evolved by the legislature making the laws and the Courts interpreting the laws by Judicial decisions. We may usefully quote a passage from a recent case of the house of Lords in *Black-Clawson v. Papierwerke* 1975 (1) All. ER 810.

Legislation in England is passed by Parliament, and put in the form of written words. This legislation is given legal effect on subjects by virtue of judicial decision, and it is the function of the courts to say what the application of the words used to particular case or individuals is to be. This power which has been devolved on the judges from the earliest times is an essential part of the constitutional process by which subjects are brought under the rule of law-as distinct from the rule of the king or the rule of Parliament; and it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say. The saying that it is the function of the courts to ascertain the will or intention of Parliament is often enough repeated so often indeed as to have become an incantation. If too often or unrelentingly stated, it leads to neglect of the important element of judicial construction; an element not confined to a mechanical analysis of today's words, but, if this task is to be properly done, related to such matters as intelligibility to the citizen, constitutional propriety, considerations of history, comity of nations, reasonable and non-retroactive effect and, no doubt, in some contexts, to social needs.

8. The rule of law was firmly established in India even before the fundamental rights ever existed. In AIR 1943 36 (Nagpur) sc, Justice Niyogi posed the question : "Can it be reasonably said that there is on express provision anywhere in the Government of India Act, 1935, affecting the personal liberty of the subject can it be invaded otherwise than by the authority of law?" There are other cases. Even during the three emerge is in India inspite of the suspension of fundamental rights the executive has to act within the four corners of the law for Preventive detention. We may just make a mention of a law cases *Makhan Singh Vs. State of Punjab* (and connected appeals), . *Run Manohar v. State of Bihar* AIR 1966 SC 640, *Jagannath Misra Vs. State of Orissa*, and *Durgadas Shirali Vs. union of india (UOI) and Others.*, , Therefore we regretfully reject the contention of the learned Public Prosecutor. The remedy of a writ of habeas corpus will be available to a citizen even at the time of emergency law does not remain silent even in emergency and stands as the sentinal of the citizens" rights though they may be considerably diminished on account of emergency, but to what extent they will be deemed to be taken by law, will again be a matter for the Courts to see because the construction of the statutory law is the exclusive function of the Courts.

9. The wait of habeas corpus h nothing but an order of the Court to being the corpus of the person of the detenue with a view to seeing under what authority of law he is kept under detention. If the Court finds that the detention is without the authority of law, it will be competent to grant a proper relief. Fundamental

rights undoubtedly will not be available to the citizen on account of their suspension, but the Court can enquire as to whether the order under which the person is detained has the sanction of the law behind it. It will be competent to see whether the order was passed under the statute under which it purports to have been passed, whether there was any absence of authority, excess of authority or the action was not mala fide. For this it will be for the Court to properly interpret law and then examine the order under which the person is detained. As we have already observed, Article 226 remains unaffected. The Court can certainly entertain the writ petition and examine whether the citizen is not debarred from invoking the aid of the Court, if he is not able to make out any case for exercise of the powers under Article 226 of the Constitution by the Court, he may not succeed. We, therefore, overrule the contention of the learned Public Prosecutor.

10. Now we may examine the Anti Smuggling Act under which the petitioner is detained at present with a view to seeing what provisions of this Act can be said to be adjunct or incidental to the fundamental rights which have been suspended and what provisions thereof can be said to be independent ones which have to be examined on that footing. The Anti Smuggling Act, as we have observed earlier, received the President's assent on 13-12-74 and it came into force on 19-12-74. It has a long preamble laying down that the Act was passed to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith. It further says that where as violations of foreign exchange regulations and smuggling activities are having an increasing deleterious effect on the national economy and thereby a serious adverse effect on the security of the State and whereas having regard to the persons by whom and the manner in which such activities or violations are organised and carried on, and having regard to the fact that in certain areas which are highly vulnerable to smuggling, smuggling activities of a considerable magnitude are clandestinely organised and carried on, it is necessary for the effective prevention of such activities and violations to provide for detention of persons concerned in any manner therewith that the Act was being enacted. The preamble sets out the conditions under which the Parliament was led to pass this Act. Section 2 contains certain definitions, Clause (e) thereof defines the word "smuggling" and it says that it will have the same meaning as in Clause 39 of Section 2 of the Customs Act, 1962. Section 3 confers the power to make orders of detention. It reads:

Section 3. Power to make orders detaining certain persons. - (1) 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 a "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

(iii) engaging in transporting or concealing or keeping smuggled goods or

(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or

(v) harbouring persons engaged in smuggling goods or in abetting it is necessary so to do, make an order directing that such person be detained.

(2) When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order.

Section 4 makes provision for execution of detention orders and we may lead this section as well as it will be necessary for dealing with a contention of the learned Counsel for the petitioner in the course of our discussion:

Section 4 Execution of detention orders - A detention order may be executed at any place in India in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure, 1973 (2 of 1974)

Section 6 lays down a person in respect of whom a detention order has been made shall incur the liability of being detained. Section 6 confers immunity on certain types of detention orders passed beyond the limits of the territorial jurisdiction of the Government or the officer making the order of detention. Section 8 makes provision for the constitution of Advisory Boards for the purposes of Sub-clause (a) of Clause (4) and Sub-clause (c) of Clause (7) of Article 22 of the Constitution. We may pass over this section, as no arguments were addressed to us. Section 9 lays down for the duration of the orders of detention in certain cases. Section 10 makes provision for the maximum period of detention. Section 11 provides for revocation of detention orders. Section 12 enables the Government to temporarily release a detainee. Section 13 affords protection of action taken in good faith. Section 14 is the last section which we have already quoted.

11. The point that we have to consider at this stage is as to what provisions of this Anti Smuggling Act which we have quoted can be deemed to be closely related to the enforcement of fundamental rights and not independently of them so that they are rendered unenforceable. Sub-section (3) of Section 3 of the Anti Smuggling Act in our view, is entirely an adjunct to Article 22 itself and we cannot construe it as an independent provision. Article 22(5) lays down that 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, (emphasis is ours) 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. Article 22, inter alia, lays down as to what the law of preventive detention must, inter alia, provide. It provides for the constitution of an Advisory Board and also for the maximum period of detention. If the law were not made in conformity with these provisions of Article 22 it may be void at its very inception if the fundamental rights are not under suspension. Article 22(5) creates a right of representation in the detainee and it is for that purpose that the grounds of detention have to be furnished to him as soon as may be. Therefore, when once this Article is put under suspension, Sub-section (3) of Section 3

with a view to preventing him from various activities specified in the section. It is admitted on all hands and for this proposition which is well settled we need not refer to any authority that the satisfaction of the detaining authority is subjective and cannot be tested or scrutinized in a court of law objectively. It has also been settled that the Court cannot enter into the sufficiency of the material as would satisfy the authority, but the satisfaction has to be as honest one i.e. it should not be with any collateral purpose, but it should be only for the object specified in the section namely, to prevent the person from acting in any prejudicial manner as specified therein. If the authority acts on extraneous consideration or that the data or material before it has no live connection with the object to be achieved then it will follow that it was not honestly satisfied or, in other words, there was no real satisfaction, but only a feigned one only with a view to verbal compliance of the provisions of the statute. We will be examining the various contentions advanced by learned Counsel for the petitioner separately in a moment, but we make it clear that the law did not require, during the period of emergency and on account of the suspension of the fundamental rights under Articles 14, 21 and 22, the furnishing of any grounds of detention, but at the same time the detaining authority is not debarred from supplying the grounds and if it does so in wisdom or good sense all that we can say is that the grounds will be furnishing us material for to seeing whether on this data or material the authority could be satisfied regarding the apprehended prejudicial activities of the person concerned. Here we may like to make distinction when Article 22 was in force. In the framework of that Article the grounds were required to be examined particularly from the point of view whether they were sufficient to enable the detainee to make a proper representation before the authority concerned. This consideration will be absent when we deal with the question as it was at a time when the fundamental rights did not exist under the Constitution. For seeing whether the authority was satisfied we have to examine (1) the grounds that they have placed before us. This is only in the shape of material and not grounds properly so called (2) the affidavit of the detaining authority, (3) other material placed before us, In this background we propose to consider the several contentions of learned counsel for the petitioner.

13. To begin with we may deal with the objection relating to the form of the detention order, regarding the authority of Shri Ram Singh to issue the detention

order, its execution by the officer by whom it is said to be executed. Learned Counsel for the petitioner raised a two-fold contention. Firstly, he submitted that the order of detention does not show that Shri Ram Singh was at all delegated with the act in authority to issue such an order and, in the second place, the authority was not confined in the name of Shri Ramsingh, but by his designation and, therefore, that was bad. We have already set out the order of detention. It does not make mention that Shri Ramsingh was empowered by the Government for the purposes of Section 3 of the Anti Smuggling Act to issue orders thereunder, but we find it exceedingly difficult to accept that the order stands vitiated on that ground. The Government have placed before us document Ex. R/1 which is a notification issued in the Gazette of 18.12.74. It runs as follows:

Regd. No. RJ. 2539

RAJASTHAN GAZETTE

Extraordinary

Published by Authority

Tip Missing 413

16 Now, in the present case, learned Counsel for the petitioner submitted that at the relevant time the petitioner was already under detention and yet the order of detention was issued against the petitioner Shamsheersingh showing his address as Kundigaron Ka-Rasta, Jaipur", and there was nothing to show that it was served at that address. According to learned Counsel this was a fictitious and futile attempt to create an impression that Shamsheer Singh was a free man, not under detention at the time the order of detention was issued. Learned Counsel further submits that though the warrant was addressed to the Superintendent of Police, it was never executed by him and there is no endorsement of service of this warrant by any Police officer. Indeed, according to learned Counsel, the entry of release of the petitioner from jail was only a paper entry and the petitioner was never released, but the so called order of detention was served on him while he was very much in jail. Learned Counsel cited a number of cases in support of his submission ILR 1989 10 Raj Gilla v. Sugan Singh and Anr. which was a case where a warrant was held to be bad as it did not bear any seal, He cited Emperor v. Thavarmal AIR 1929 Bom. 157 and Kundan Lal v. Emperor AIR 1948 Lab. 81 which were cases of warrants under the Public Gambling Act for showing that a delegate cannot issue such warrants, He also cited Ouseph Varkey and Another Vs. State of Kerala, for showing that directing a person by designation and not by name in a warrant of arrest was bad. It was a case for an offence u/s 353 IPC, We have carefully considered the submission. The order of detention cannot be equated in all respects with a warrant of arrest. Only the manner of executing it has to be as in the case of a warrant of arrest, as we have already observed. The petitioner was certainly in jail at the relevant time, but we have to remember that from 13.12.74 the Anti Smuggling Act had come on the statute book. It was also expected that the Act was to be brought in force before

20.10.74 and it was in fact brought into force from 19.12.74 Section 14 of the Anti Smuggling Act was to repeal the earlier Ordinance with the result that the detention of the petitioner was to end (sic) and, therefore, the authorities were very much aware of the petitioner's detention coming to an end. If in that context an order under the Anti Smuggling Act was passed for the first time ex necessitate it will have to be served on the person at the place where he was. The issuing of the warrant to a Police officer in the rank of Superintendent of Police mentioning the address of Shamsher Singh as "Kundegaron Ka-Rasta, where all superfluous formalities. We do not approve of them in any manner and the authorities would have done well if they had acted in a realistic manner, but that by itself cannot, in our opinion, invalidate the detention of Shamshersingh under the order of 19th Dec. 1974, if it was otherwise valid. We will be going into the question separately whether the prior detention of Shamsher Singh will have a bearing on the question of satisfaction of the detaining authority, but so far as the manner of executing the order of detention is concerned, it cannot, in our view, invalidate the detention.

17. Then as regards the place of detention it may be sufficient to say that the original papers have been placed before us. The order of detention was prepared in triplicate. There is an endorsement to the Superintendent, Central Jail, Jaipur for detaining Shamsher Singh. This, therefore, meets the requirement of law regarding the place of detention. Learned Counsel submitted that the gist of the order of detention was not conveyed to the detenu. Learned Public Prosecutor has invited our attention to the acknowledgment taken from the detenu in token of his having received the order of detention. We may reproduce the acknowledgment:

Order Received. Detenu Shamsher Singh admitted in jail. Sd/- 10-12-74 v/kh{kd

dsfUnz; dkjx`g t;iqj]

g- "ke"ksj flag

10&12&74

vVsLVsM

,l-Mh- lokbZflag

v/kh{kd

dsfUnz; dkjx`g] t;iqj

Therefore, when a copy of the detention order was given to the detenu this, to our mind, complies with the manner of serving a warrant of arrest in substance. Learned Counsel for the petitioner invites our attention to an earlier, certified copy filed by the respondent which does not contain the endorsement. It is available in writ petition No. 3406 of 1974, The certified copy does not contain endorsement reproduced by us above, but we have seen the original and the endorsement

that we have reproduced above is from the original. It is to be regretted that the Deputy jailor Central Jail, Jaipur, has not taken good care in preparing a true copy for filing it in the writ petition and the learned Counsel for the petitioner is not unjustified in making the criticism that he made. But that as it may, we are satisfied that the signatures on the original are of the petitioner. The original has been seen by learned Counsel for the petitioner and he has not disputed the signatures. Therefore, there is nothing left in the contention.

18. We may now turn to the other contentions of the learned Counsel. It was submitted that the grounds of detention served on 23.12.74 after the impugned order of detention were the same as those served on 26.11.74. This implies that the petitioner has been detained precisely on the same material and as the petitioner was already in detention this could not have been done. Learned Counsel submitted that the provisions of Ordinance, 1974 were of a temporary nature and they ipso facto came to an end as soon as the same were repealed, unless the repealing law saved the action of the detaining authority under the repealed law. Learned Counsel also submitted in this connection that the order of detention was mechanically drawn up in a hurry and it was altogether indefinite and vague and did no more than reproduce the language of the section. As an illustration he invited attention to the joining of the two clauses in the detention order by using the conjunction "and". Learned Counsel argued that the object of Section 3 was to prevent a person from acting in any prejudicial manner in future and not to punish him and when the order was issued in respect of a person already in prison without releasing him the order was mala fide and not in furtherance of the avowed object of the law.

19. We have carefully considered the question. The consideration that weighs with us is that to start with the petitioner was detained on 22.11.74 under the MISA as amended by Ordinance No. 2 of 1974. The Anti Smuggling Act came on the statute book in less than a month i.e. on the 13th December, 1974. By that time the petitioner had hardly been in detention for about three weeks i.e. for 21 days. With the coming into force of the Anti Smuggling Act from 19.12.74 the order of detention dated 22.11.74 ipso jure came to an end. If in that situation the same material was considered by the detaining authority who is different one under the Anti Smuggling Act, 1974 from one under the MISA namely, the Home Secretary and not the District Magistrate, Jaipur, who passed the order dated 22.11.74 then we fail to see how this detaining authority was precluded from considering the material that was the basis of the earlier order of detention by a different authority. If the new detaining authority applied its mind to that material and felt satisfied about the detainee's like hood of indulging in prejudicial activities in future, if released, unless there would be a fresh order, the satisfaction of the detaining authority cannot be held to be vitiated. Where material may be stale and an old one and the incarceration has continued for a pretty long time then while the person may be in detention and there is no fresh ground, the detaining authority may not be held to be honestly satisfied about the future behavior of the person concerned, but here the matter is not stale and

had not lost its freshness by (sic) of time. We cannot, therefore, hold that the same material could not be made use of by the detaining authority for its satisfaction. Here, on 19th December, 1974 when the impugned order of detention was issued by the Home secretary the detainee had been in detention in all for 21 days. We have read the affidavit of Shri Ram Singh. He has stated that he has passed the detention order after the perusal of the record as mentioned in the grounds of detention only and after being fully satisfied that with a view to preventing Shamsher Singh from engaging in keeping smuggled goods and dealing in smuggled goods or in any other way than in transporting or concealing or keeping smuggled goods it was necessary to detain him under the provisions of Section 3(1) of the Anti Smuggling Act. The petitioner has been furnished: (a) with the grounds of detention, Document No. 2, which we have already reproduced above, (b) Panchnama for recovery of certain goods made from Shamshersingh's shop on 30.6.73, (c) statement of Shamshersingh recorded by Shri S.P Shungloo, Superintendent of Customs on 30.6.73, (d) order (sic) by the Assistant Collector, Central Excise and Customs, Jaipur on 17.7.74, ordering confiscation of the seized goods u/s 111 of the Customs Act, 1962 and further imposing certain penalties on Shamsher Singh, (e) Panchnama 11.4.74 in respect of the recoveries again made from the shop of Shamsher Singh, (f) statement of Shamshersingh made on 11.4.74 in the presence of one Mohan Singh, an official of the Customs Department and order dated 30.6.74 passed by the Deputy Collector Customs and Central Excise, Jaipur giving notice to Shamsher Singh to show cause why certain goods recovered from him be not confiscated, (g) Panchnama dated 7.7.74 made before the Superintendent of Customs Jaipur. As we have already pointed out above, the grounds cannot be viewed as grounds under Article 22(5) of the Constitution for the purposes of seeing whether Shamsher Singh had a proper opportunity of making a representation, but they could be put to use only for examining the question whether on this material the detaining authority could be satisfied regarding the future activities of Shamsher Singh. With the limited purpose we have to see whether the material that was used by the Secretary was extraneous or could legitimately be made use of by him learned Counsel tried to make a point in respect of this material as (sic) It was that in (sic) to the detention order dated 22.11.74 (sic) grounds and material were furnished, but the so called confessional statements made available to the petitioner this time on 23.4.74 were not then made available to him, Therefore, learned Counsel argued that these confessional statements were obviously fabricated at a later date. He submitted that on many occasions the Customs officials had compelled the petitioner to sign certain blank sheets of papers and these confessional statements had been cooked up on such blank sheets of papers. We have considered this matter. We are afraid, it is not convenient to the Court in exercise of its powers under Article 226 of the Constitution to go into the question whether the confessional statements were genuine or not. As we have already observed the detaining authority on the earlier occasion was the District Magistrate and at this time it is the Home Secretary. It was for the Home Secretary

to see if the confessional statements were genuine or not, but he has taken them to be genuine and has acted on them. The matter being one for his subjective satisfaction and not one for our satisfaction it is not for this Court to go into the genuineness or other" wise of this material. We are not nearing this matter in appeal, but have to consider the question whether on the material before the detaining authority namely, the Home Secretary, he could be satisfied about the future conduct of the detune.

20. Learned counsel fir the petitioner further submitted that the grounds do not say in so many words that the petitioner would be acting in a manner prejudicial to the purposes of the Ann Smuggling Act. Thue, the grounds do not recite the foctum of the reasonable apprehension of the detaining authority for future, but the order does note this We are not to see these grounds, as we have already observed more than once, as grounds under Article 22(5), but only as material which may not even be put in proper shape in the from of grounds. On reading the order of detention actually framed by the detaining authority in the light of the material brought on record we are unable to hold that the detaining authority could not be honestly satisfied about the future conduct of the detenue. We may at this point even refer to what is contained in these grounds, In the grounds it is mentioned that they were being communicated to the petitioner in pursuance of Clause 5 of Article 22 of the Constitution of India. At that time the present Proclamation of emergency bad rot been made, nor was there the present presidential order, suspending the fundamental rights. We cannot deal with the right of the detenue under Clause 5 of Article 22 of the Constitution, Therefore, in the new context we are unable to accept the contention of the learned Counsel that simply because the grounds do not make a mention of the fact that the detaining authority was satisfied about the future conduct of the detenue, the order will be Dad. For judging the validity if the detention order we have not only to take into consideration me material that was already furnished to the detenus, but also the affidavit of the detaining authority filed before us for justifying its order of detention when the fundamental rights are not in operation h is open to the detaining authority to place even such material, before the Court which were not given to the petition on the earlier occasion, Nothing need be given to this petitioner and yet such martial could be placed by the detaining authority before the Court.

21. Learned Counsel further surmised that the last incident of recovery was dated 6th and 7th July, 1974 and the present detention order was passed on 19th December, 1974 and thus there was no live link between the incident of the recovery of goods and future activities of the petitioner. As we have already observed, these are miners for the subjective satisfaction of the detaining authority and on the material before us we are unable to hold that there was no live link between the recovery of the smuggled goods from the petitioner and the aprehension about his engaging in smuggled goods in future. Learned Counsel went to the length of arguing that on the material that was before the Customs Authorities they could not have held that the goods were smuggled. We may

refer to the statement of the petitioner himself:

ryk"kh ds le; gkftj nks xokgks us ;g Hkh rlnhd fd;k Fkk fd ;s dVihl tkikuh vkVZ fIYd ds VqdM+s gS A dLve vQljku ds ekaxus ij eS fdlh Hkh diM+s dh bEiksVZ o [kjhn ds ckjs es dksbZ lcwr is"kh ugh dj ldk Fkk u gh ,slk dksbZ lcwr nkSjku ryk"kh dLve vQljku dks feyk ,slk dksbZ lcwr ckn es Hkh is"kh ugh dj ldrk gwW A

;g eS tkurk gwa fd ,slk fons"kh diM+k cspuk o [kjhnuK o j[kuk dLve ,DV ds eqrkfcd dLve vQljku dks fcuk lcwr ds ,slk ugh djuk pkfg, D;ksfd ;g ,DV fcuk----- ;g diM+k eSus cEcbZ ls ,d eqlyeku dh nqdku ls 29-6-74 o 17&74 dk [kjhnik Fkk bl eqlyeku nqdkunkj dk iwjk uke o irk ugh gS A og iBku ds uke ls e"kgwj gSA

This statement is dated 7.7.74. We need not refer to the entire material. Earned Counsel wanted us to examine the provisions of the Customs Act and hold that by no stretch of imagination could the recovered goods be held to be smuggled goods. We are afraid, we will be over-stepping our limits if we were to do so It is a matter primarily for the detaining authority to see and if on this material the detaining authority felt satisfied that the petitioner was dealing in smuggled goods then we are unable to hold that the detaining authority was not honestly satisfied for the necessity of passing an order u/s 3 of the Anti Smuggling Act.

22. The other writ petitions are of similar nature We, therefore order that the writ petitions shall remain Dunlins till the proclamation of emergency and the Presidential Order suspending the fundamental rights under Articles 14, 21 and 22 are in force. NO other order need be passed.