Abdul Sathar Ibrahim Manik

Vs

Union of India and Others

Ibrahim Shareef M. Madhafushi

Vs

Union of India and Others

Writ Petition (Criminal) Nos. 105 and 106 of 1991

(S. R. Pandian, K. Jayachandra Reddy JJ)

08.10.1991

JUDGMENT

JAYACHANDRA REDDY, J. -

1. Common questions arise for consideration in these two writ petitions filed under Article 32 of the Constitution of India seeking writ of habeas corpus for quashing the orders of detention and for immediate release of the detenus. First, we shall deal with Writ Petition (Criminal) No. 105 of 1991.

Writ Petition (Criminal) No. 105 of 1991

2. The petitioner-detenu is a foreign national being a resident of Republic of Maldives. On October 25, 1990 he landed at Trivandrum Airport from Male and was moving towards the exit gate of the Customs Import Baggage Hall. He was intercepted by the Air Customs Officers and on examination he was found to be carrying 50 gold biscuits of foreign origin which were seized from either side of the handle inside the lock system of the red colour suitcase belonging to the petitioner. His passport and other documents were also seized. The petitioner's statement was recorded under Section 108 of the Customs Act, 1962 wherein he is alleged to have confessed to the guilt. After the arrest he was produced in the Court of Chief Judicial Magistrate, Trivandrum and was remanded to judicial custody for a period of 14 days. Thereafter, he was shifted to the court of the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam. While he was in jail he made an application for granting of bail under Section 437 CrPC on October 29, 1990 but it was rejected on November 2, 1990 by the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam. While the petitioner was confined in jail an order of detention was passed under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ('COFEPOSA Act' for short) by the Secretary to the Government, Government of Kerala Home (SSA) Department on November 7, 1990 and the same was served on the petitioner on November 8, 1990. The grounds of detention along with the list of documents annexed thereto were served in time. The petitioner made a representation and it was rejected.

3. It is submitted that since his bail application has been rejected and since he was in jail and his passport was also seized, there was no compelling necessity for such a detention. It is also contended that no antecedents are there showing his involvement in such incidents and this was the solitary incident, therefore the provisions of the Act are not attracted. The next main and important submission is that the copies of the bail application filed by him and the order refusing bail, which are relevant documents, were suppressed and not placed before the detaining authority nor they were supplied to the detenu and therefore there is non-application and the petition also is denied a reasonable opportunity under Article 22(5) of the constitution of India.

4. We see on force in the first submission namely that there was no compelling necessity for passing the detention order. It is true that when the detention order was passed on November 7, 1990 the detenu was in jail and his bail application also was rejected and his passport also was seized. But the detaining authority has mentioned in the grounds that "I am aware that you are under judicial custody and possibility of your release on bail in the near future cannot be ruled out. Also nothing prevents you from moving bail application in the jurisdiction court and getting released on bail". Therefor it cannot be said that the detaining authority did not apply his mind to this aspect. It is entirely within his subjective satisfaction whether there are such compelling circumstances or not. He has noted that though the detenu was in jail there is likelihood of his being released and therefore it is clear that he has applied his mind to this aspect also. The learned counsel appearing for the petitioner relied on a judgment of this court in Dharmendra Suganchand Chelawat v. Union of India ((1990) 1 SCC 746 : 1990 SCC (Cri) 249) wherein it is observed that an order of detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that the detaining authority was aware of the fact that the detenu was already in detention and there were compelling reasons justifying such detention and that there should be cogent material on the basis of which the detaining authority may be satisfied that there are compelling reasons such as that the detenu is likely to be released from custody in the near future and the nature of the antecedents and activities of the detenu which indicate that he is likely to indulge in such activities if released and therefore it is necessary to detain him in order to prevent him from engaging in such activities. But we may observe that what would be the compelling reasons in the context would depend on the facts of each case. In this case the allegation is that 50 gold biscuits of foreign origin were found in the either side of the handle inside the lock system of the suitcase. This itself manifests the expertise of the carrier in smuggling. The detaining authority was aware that the detenu was in custody but he was satisfied that there is every likelihood of his being released on bail and he is likely to indulge in such smuggling activities. It is mentioned in the counter-affidavit that the remand period of the detenu was to expire on November 10, 1990 and that was also a ground which impelled the detaining authority to think that he was likely to be released on bail. This was the material before the detaining authority on the basis of which he was satisfied that there were compelling reasons to pass the detention order. Having carefully considered the submission of the learned counsel we are unable to say that there were no compelling reasons.

5. Learned counsel also relied on the judgment of this Court in Abdul Razak Abdul Wahab Sheikh v. S. N. Sinha, Commissioner of Police, Ahmedabad ((1989) 2 SCC 222 : 1989 SCC (Cri) 326). That was a case of public order and after referring to some of the earlier decisions including the decision of the Constitution Bench in Rameshwar Shaw v. District Magistrate, Burdwan ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257), this Court considered the contention i.e. since the detenu was in custody at the time of service of the order of detention there was no material to disclose necessitating the detention. It was held thus : (SCC pp. 233-34, para 24)

On a consideration of the aforesaid decisions the principle that emerges is that there must be

awareness in the mind of the detaining authority that the detenu is in custody at the time of service of the order of detention on him and cogent relevant materials and fresh facts have been disclosed which necessitate the making of an order of detention. In this case, the detenu was in jail custody in connection with a criminal case and the order of detention was served on him in jail. It is also evident that the application for bail filed by the detenu was rejected by the Designated Court on May 13, 1988. It is also not disputed that no application for bail was made for release of the detenu before the order of detention was served on him on May 23, 1988. It appears that in the grounds of detention there is a statement that at present you are in jail yet 'there are full possibilities that you may be released on bail in this offence also'. This statement clearly shows that the detaining authority was completely unaware of the fact that no application for bail was made on behalf of the detenu for his release before the Designated Court and as such the possibility of his coming out on bail was non-existent. This fact of non-awareness of the detaining authority, in our opinion, clearly establishes that the subjective satisfaction was not arrived at by the detaining authority on consideration of relevant materials. There is also nothing to show from the grounds of detention nor any fresh facts have been disclosed after the detention order dated January 25, 1988 was set aside by the Advisory Board on March 13, 1988, on the basis of which the detaining authority could come to his subjective satisfaction that the detenu, if released on bail will indulge in acts prejudicial to the maintenance of public order and as such an order of detention is imperative."

Having so observed the Division Bench referred to various criminal cases pending against the detenu at the relevant time and noted that some of the cases have nothing to do with the maintenance of public order and then held that : (SCC p. 234, para 24)

> "These statements do not disclose any activity after March 14, 1988 or any activity of the time when the detenu was a free person. Considering all these facts and circumstances we are constrained to hold that there has been no subjective satisfaction by the detaining authority on a consideration of the relevant materials on the basis of which the impugned order of detention has been clamped on the detenu. It also appears that the detenu was in detention as well as in jail custody for about three years except released on parole for short periods."

The Division Bench finally concluded thus : (SCC p. 235, para 25)

> "It is highlighted in this connection that in the affidavit-in-reply filed by respondent 1, the detaining authority, he merely denied the specific averments made in para 3(III) that no act prejudicial to the maintenance of law and order on the part of detenu is alleged to have been committed by the detenu between March 14 to April 13, 1988 etc. without specifically denying those statements. In this background, a mere bald statement that the detenu who is in jail custody is likely to be released on bail and there are full possibilities that he may continue the above offensive activities without reference to any particular case or acts does not show on the face of the order of detention that there has been subjective satisfaction by the detaining authority in making the order of detention in question."

From the above passages it can be seen that this Court categorically held that a person in custody can be detained. There must be awareness in the mind of the detaining authority that the detenu is in custody and that there should be cogent and relevant material showing that there is a compelling necessity to detain him. Since that was a case of public order, the learned Judges proceeded to consider the nature of the cases that were pending and ultimately on the facts and circumstances of

the case held that the absence of a reference to any one of such recent cases would show that the subjective satisfaction has not been arrived at properly. This reasoning cannot be applied to the facts of this case. In the grounds, the manner in which the gold biscuits were concealed is mentioned and that itself suggests that the detenu must have been indulging in smuggling activities. So there was relevant material on the basis of which the detaining authority was satisfied that there was compelling necessity to pass the detention order.

6. The next submission is that there were no antecedents and that this being the solitary incident the detention is unwarranted. It is again a question of satisfaction of the detaining authority on the basis of the material placed before it. Even a solitary incident which has been detected may speak volumes about the potentialities of the detenu and merely on the ground that there were no antecedents the detention order cannot be quashed. The authorities cannot and may not in every case salvage the antecedents but as noted above even a solitary incident may manifest the potentialities of a detenu in the activities of smuggling.

7. The next and main submission is that there was suppression of vital documents namely bail application and the order refusing bail, which are relevant documents, and had those documents been placed before the detaining authority they might have influenced the mind of the detaining authority one way or the other. Alternatively, it is also contended that irrespective of the fact whether they were placed before the authority or not the copies thereof ought to have been supplied to the petitioner pari passu the grounds of detention and that failure to supply the same has deprived the petitioner of an opportunity of making an effective representation and therefore the detention as such is illegal and violate of Article 22(5) of the Constitution of India. There is no dispute that the detenu moved for bail under Section 437 CrPC on October 29, 1990 before the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam and by an order dated November 2, 1990 the bail application was rejected. The first grievance of the petitioner is that these two documents were not placed before the detaining authority and they were suppressed. In support of this plea reliance is placed on the grounds wherein the detaining authority has stated that he was aware that the petitioner was in judicial custody and possibility of his release on bail in the near future cannot be ruled out. It is submitted that this statement itself shows that the detaining authority was not aware that a bail application in fact was made and the same has been rejected and the only inference that can be drawn is that these relevant documents were suppressed and not placed before the detaining authority. In the counter-affidavit filed by respondent 2, State of Kerala, it is categorically denied that the bail application and the other refusing bail were suppressed from the detaining authority and that at the time of sponsoring the petitioner's name the copies of the bail application and the order refusing bail were not made available to the department and therefore they were not placed before the authority. From these averments, one of the questions that arise for consideration is whether the failure to supply these two documents to the detenu or alternatively whether the failure to place the bail application and the order refusing bail before the detaining authority does in any way affect the detention order. The learned counsel in this context sought to place reliance on some of the judgments of this Court. In M. Ahamedkutty v. Union of India ((1990) 2 SCC 1 : 1990 SCC (Cri) 258) the contention was that the bail application and the order granting bail which were relied upon by the detaining authority were not supplied to the detenu and therefore the detention was illegal. A Division Bench of this Court noticed that in the grounds it was clearly mentioned that the detenu was remanded to judicial custody and was subsequently released on bail. Therefore, these documents were in fact placed before the detaining authority and were relied upon by it and therefore the non-supply of these relevant documents to the detenu disabled him to make an effective representation. Therefore there was violation of Article 22(5) of the Constitution. In arriving at this conclusion, the Division Bench relied on several other decisions and observed that

all the documents relied upon by the detaining authority must be pari passu supplied to the detenu. In the instant case, the facts are different. In the counter-affidavit it is clearly stated that the bail application and the order refusing bail were not there before the sponsoring authority. Therefore, they were not placed before the detaining authority. The grounds do not disclose that the detaining authority has relied upon any of these two documents. On the other hand as already noted the detaining authority mentioned in the grounds that it was aware that the detenu was in custody but there is every likelihood of his being released on bail. This itself shows that these documents were not before the authority. Therefore it cannot be said that the documents referred to and relied upon in the grounds were not supplied to the detenu and the ratio in Ahamedkutty case ((1990) 2 SCC 1 : 1990 SCC (Cri) 258) on this aspect does not apply to the facts in the instant case. It is not necessary to refer to in detail various decisions of this Court wherein it has been clearly laid down that the documents referred to or relied upon in the grounds of detention only are to be supplied. This has been settled by a long line of decisions : Ramachandra A. Kamat v. Union of India ((1980) 2 SCC 270 : 1980 SCC (Cri) 414), Frances Coralie Mullin v. W. C. Khambra ((1980) 2 SCC 275 : 1980 SCC (Cri) 419), Icchu Devi Choraria v. Union of India ((1980) 4 SCC 531 : 1981 SCC (Cri) 25), Pritam Nath Hoon v. Union of India ((1980) 4 SCC 525 : 1981 SCC (Cri) 19), Tushar Thakker v. Union of India ((1980) 4 SCC 499 : 1981 SCC (Cri) 13), Lallubhai Jogibhai Patel v. Union of India ((1981) 2 SCC 427 : 1981 SCC (Cri) 463), Kirit Kumar Chaman Lal Kundalia v. Union of India ((1981) 2 SCC 436 : 1981 SCC (Cri) 471) and Ana Carelina D'Souza v. Union of India (1981 Supp SCC 53(1) : 1982 SCC (Cri) 131). At this juncture it is also necessary to note that such of those documents which are not material and to which a casual or passing reference is made in the grounds, need not be supplied. In Mst L. M. S. Ummu Saleeman v. B. B. Gujral ((1981) 3 SCC 317 : 1981 SCC (Cri) 720), after referring to some of the earlier decisions of this Court, it was held thus : (SCC p. 320, Para 5)

> "It is, therefore, clear that every failure to furnish copy of a document to which reference is made in the grounds of detention is not an infringement of Article 22(5), fatal to the order of detention. It is only failure to furnish copies of such documents as were relied upon by the detaining authority, making it difficult for the detenu to make an effective representation, that amounts to a violation of the fundamental rights guaranteed by Article 22(5). In our view it is unnecessary to furnish copies of documents to which casual or passing reference may be made in the course of narration of facts and which are not relied upon by the detaining authority in making the order of detention."

It will therefore be seen that failure to supply each and every document merely referred to and not relied upon will not amount to infringement of the rights guaranteed under Article 22 (5) of the Constitution. We may of course add that whether the document is casually or passingly referred to or whether it has also formed the material for arriving at the subjective satisfaction, depends upon the facts and grounds in each case. In the instant case we are satisfied that these two documents were not placed before the detaining authority nor they were referred to or relied upon.

8. The learned counsel, however, proceeded to submit that even assuming that these documents were not relied upon or referred to by the detaining authority yet the failure to place these relevant documents before the detaining authority amounted to suppression and therefore there was non-application of mind and that the detention order passed without looking into such relevant material is invalid. In Ahamedkutty case ((1990) 2 SCC 1 : 1990 SCC (Cri) 258) no doubt there is an observation having regard to the facts therein that non-consideration of the bail application and the order of releasing would amount to non-application of mind and that would affect the detention

order. The Division Bench made these observations while considering the contention that the order granting bail and the bail application, though referred to, were not relied upon. It is not laid down clearly as a principle that in all cases non-consideration of the bail application and the order refusing bail would automatically affect the detention. The relevant observations in this context made by this Court in Ahamedkutty case ((1990) 2 SCC 1 : 1990 SCC (Cri) 258) may be noted : (SCC p. 15, para 25)

> "If in the instant case the bail order on condition of the detenu's reporting to the customs authorities was not considered the detention order itself would have been affected. Therefore, it cannot be held that while passing the detention order the bail order was not relied on by the detaining authority. In S. Gurdip Singh v. Union of India ((1981) 1 SCC 419 : 1981 SCC (Cri) 168), following Icchu Devi Choraria v. Union of India ((1980) 4 SCC 531 : 1981 SCC (Cri) 25) and Shalini Soni v. Union of India ((1980) 4 SCC 544 : 1981 SCC (Cri) 38), it was reiterated that if the documents which formed the basis of the order of detention were not served on the detenu along with the grounds of detention, in the eye of law there would be no service of the grounds of detention and that circumstance would vitiate his detention and make it void ab initio."

It is further observed in this case that : (SCC p. 16, para 27)

> "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 though not specifically mentioned in the annexure to the order of detention and those ought to have formed part of the documents supplied to the detenu with the grounds of detention and without them the grounds themselves could not be said to have been complete. We have, therefore, no alternative but to hold that it amounted to denial of the detenu's right to make an effective representation and that it resulted in violation of Article 22(5) of the Constitution of India rendering the continued detention of the detenu illegal and entitling the detenu to be set at liberty in this case."

Placing considerable reliance on this passage, the learned counsel contended inter alia that in the instant case from either point view namely (i) if the bail application and the order refusing bail were not considered or (ii) if considered the non-supply of the copies of the same to the detenu would affect the detention order. In other words, according to him, non-consideration of these two documents by the detaining authority would itself affect the satisfaction of the detaining authority. If on the other hand they are taken into consideration and relied upon the non-supply of the same to the detenu would result in violation of Article 22(5) of the Constitution rendering the detention invalid. We are unable to agree with the learned counsel. We are satisfied that the above observations made by the Division Bench of this Court do not lay down such legal principle in general and a careful examination of the entire discussion would go to show that these observation were made while rejecting the contention that the bail application and the order granting bail though referred to in the grounds were not relied upon and therefore need not be supplied. The case is distinguishable for the reason that the Division Bench has particularly taken the care to mention that "considering the facts .... the bail application and the bail order were vital materials." In that view these observations were made. Further that was released on bail and was not in custody. This was a vital circumstance which the authority had to consider and rely upon before passing the detention

order and therefore they had to be supplied.

9. Now we shall consider the other submission regarding the non-supply of the bail application and the order refusing bail to the detenu and its effect. According to the learned counsel these two documents formed relevant material and irrespective of the fact whether they were placed before the detaining authority or not they ought to have been supplied to the detenu and failure to do so has caused prejudice in making an effective representation. We are unable to agree. In Abdul Sattar Abdul Kadar Shaikh v. Union of India ((1990) 1 SCC 480 : 1990 SCC (Cri) 242) it is observed thus : (SCC p. 483, para 12)

> "In fact the bail applications were filed by the detenu himself and he was very much aware of the contents of those bail applications and the orders made thereon. These documents were not relied upon by the detaining authority. When a request is made by the detenu for the supply of these bail applications and orders refusing thereon are made, the court inter alia has to look into the question whether the detenu is in any way handicapped in making an effective representation by such refusal. No authority has been placed before us which goes to the extent of holding that a mere non-supply of any document whatever its natured may be, to the detenu per se amounts to the denial of an opportunity under Article 22(5)."

In Syed Farooq Mohammad v. Union of India ((1990) 3 SCC 537 : 1990 SCC (Cri) 500 : JT (1990) 3 SC 102) this Court considered precisely the same question and it was observed thus : (SCC p. 543, para 10)

> "The third ground of challenge is that the relevant document i.e. bail application of the petitioner and order made thereon which might have been considered by the detaining authority were not supplied to the petitioner and as such his right of making effective representation guaranteed under Article 22(5) of the Constitution of India has been seriously prejudiced. This ground is without any substance because firstly there is nothing to show from the grounds of detention that rejection of this bail application by the Sessions Judge, Greater Bombay on January 5, 1990 was considered by the detention and as such this being not referred to in the grounds of detention, the documents has not been supplied to the petitioner, and it, therefore, cannot be urged that non-supply of this documents prejudiced the petitioner in making effective representation against the order of detention. Article 22(5) of the Constitution, undoubtedly, mandates that all the relevant documents referred to in the grounds of detention and which are considered by the detaining authority in coming to his subjective satisfaction for clamping an order of detention are to be supplied to the detenu. The said document was not considered by the detaining authority in coming to his subjective satisfaction and in making the impugned order of detention. The non-furnishing to the detenu of the said document i.e. the bail application and the order passed thereon, does not affect in any manner whatsoever the detenu's right to make an effective representation in compliance with the provisions of Article 22(5) of the Constitution of India. This ground, therefore, is wholly untenable."

10. From the above discussion it emerges that even if the bail application and the order refusing bail are not placed before the detaining authority or even if placed, if the detaining authority does not refer to or rely upon or has failed to take them into consideration, that by itself does not lead to an inference that there was suppression relevant materiel or in the alternative that there was non-

application of mind or that subject satisfaction was impaired. When these documents are neither referred to nor relied upon, there is no need to supply the same to the detenu.

11. As already noted, in all such cases where the detenu was in custody at the time of passing an order of detention what is strictly required is whether the detaining authority was aware of the fact that the detenu was in custody and if so was there any material to show that there were compelling reasons to order detention in spite of his being in custody. These aspects assume importance because of the fact that a person who is already in custody is disabled from indulging in any prejudicial activities and as such the detention order may not normally be necessary. Therefore the law requires that these two tests have to be satisfied, in the case of such detention of a person in custody.

12. The Constitution Bench in Rameshwar Shaw case ((1964) 4 SCR 921 : AIR 1964 Sc 334 : (1964) 1 Cri LJ 257) held thus : (SCR p. 929)

> ".... Whether the detention of the said person would be necessary after he is released from jail, and if the authority is bona fide satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released.
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> Therefore, we are satisfied that the question as to whether an order of detention can be passed against a person who is in detention or in jail, will always have to be determined in the circumstances of each case."

Following the above principles, another bench of three Judges of this Court in N. Meera Rani v. Government of T. N. ((1989) 4 SCC 418 : 1989 SCC (Cri) 732), after reviewing the various other decisions, it was observed that : "A review of the above decisions reaffirms the position which was settled by the decision of the Constitution Bench in Rameshwar Shaw case ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257) and that "none of the observations made in any subsequent case can be construed at variance with the principle indicated in Rameshwar Shaw case ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257) ....." Having so observed the bench summarised the principle thus : (SCC p. 434, para 22)

> "Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case; preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc. ordinarily it is not needed when the detenu is already in custody; the detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while make order; but, even so, if the detaining authority is reasonably satisfied on cogent material that there is likehood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made even in anticipation to operate on his release. This appears to us, to be the correct legal position."

In Chelawat case ((1990) 1 SCC 746 : 1990 SCC (Cri) 249) after examining the various decisions of this Court dealing with preventive detention of a person in custody, it is held thus : (SCC p. 754

para 21)

> "The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) detaining authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression 'compelling reasons' in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial in activities and it is necessary to detain him in order to prevent him from engaging in such activities."

In Sanjay Kumar Aggarwal v. Union of India ((1990) 3 SCC 309 : 1990 SCC (Cri) 473) after reviewing all the relevant cases including Chelawat case ((1990) 1 SCC 746 : 1990 SCC (Cri) 249), this Court observed as under : (SCC p. 316, para 11)

> "It could thus be seen that no decision of this Court has gone to the extent of holding that no order of detention can validly be passed against a person in custody under any circumstances. There fore the facts and circumstances of each case have to be taken into consideration in the context of considering the order of detention passed in the case of a detenu who is already in jail. We have already, in the instant case, referred to the grounds and the various circumstances noted by the detaining authority and we are satisfied that the detention order cannot be quashed on this ground."

In a very recent judgment of this Court in Kamarunnissa v. Union of India ((1991) 1 SCC 128 : 1991 SCC (Cri) 88 : AIR 1991 SC 1640) all the abovementioned decisions dealing with the detention of a person in custody have been reviewed and it is finally held as under : (SCC p 140, para 13)

> "From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so release he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition, to question it before a higher court."

Having regard to the various above-cited decision on the points often raised we find it appropriate to set down our conclusions as under :

> (1) A detention order can validly be passed even in the case of a person who is already in custody. In such a case, it must appear from the grounds that the detenu was already in custody.

(2) When such awareness is there then it should further appear from the grounds that there was enough material necessitating the detention of the person is custody. This aspect depends upon various considerations and facts and circumstances of each case. If there is a possibility of his being released and on being so released he is likely to indulge in prejudicial activity then that would be one such compelling necessity to pass the detention order. The order cannot be quashed on the ground that the proper course for the authority was to oppose the bail and that if bail is granted notwithstanding such opposition the same can be questioned before a higher court.

(3) If the detenu has moved for bail then the application and the order thereon refusing bail even if not placed before the detaining authority it does not amount to suppression of relevant material. The question of non-application of mind and satisfaction being impaired does not arise as long as the detaining authority was aware of the fact that the detenu was in actual custody.

(4) Accordingly the non-supply of the copies of bail application or the order refusing bail to the detenu cannot affect the detenu's right of being afforded a reasonable opportunity guaranteed under Article 22(5) when it is clear that the authority has not relied or referred to the same.

(5) When the detaining authority has merely referred to them in the narration of events and has not relied upon them, failure to supply bail application and order refusing bail will not cause any prejudice to the detenu in making an effective representation. Only when the detaining authority has not only referred to but also relied upon them in arriving at the necessary satisfaction then failure to supply these documents, may, in certain cases depending upon the facts and circumstances amount to violation of Article 22(5) of the Constitution of India. Whether in a given case the detaining authority has casually or passingly referred to these documents or also relied upon them depends upon the facts and the grounds, which aspect can be examined by the court.

(6) In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu.

13. Bearing in mind the principles laid down in the abovementioned case, we shall now examine the facts in the case before us. The detaining authority in ground Nos. 3 and 4 has stated as under :

"3. You were arrested under Section 104 of the Customs Act, 1962 by the Superintendent on October 26, 1990. You were produced before the Chief Judicial Magistrate, Trivandrum on the same day. The Magistrate remanded you to judicial custody.

4. I am aware that you are under judicial custody and possibility of your release on bail in the near future cannot be ruled out. Also nothing prevents you from moving bail application in the jurisdictional court and getting release on bail."

In the counter-affidavit, it is stated that the period of remand to the judicial custody was to expire the next day after his detention. Therefore there was every likelihood of his moving for bail and getting released on bail. These materials show that the detaining authority was not only aware that the detenu was in jail but also noted the circumstances on the basis of which he was satisfied that the detenu was likely to come out on bail and continue to indulge himself in the smuggling activities. It, there-fore, cannot be said that there were no compelling reasons justifying the detention despite the fact that the detenu is already in custody. Likewise the failure to supply the bail application and the order refusing bail does not in any manner prejudice the detenu from making a representation particularly when he was fully aware of the contents of application made by himself and also the refusal order. However, when they are not referred to or relied upon the non-supply does not affect the detention.

14. These are all the submissions made by the learned counsel for the petitioner and we do not see any merit in any of them. Accordingly the writ petition is dismissed.

Writ Petition (Criminal) No. 106 of 1991

15. In this writ petition also the petitioner is a foreign national, being resident of Republic of Maldives. On October 25, 1990 he landed at Trivandrum Airport from Male. After customs clearance the petitioner proceeded to Hotel Geeth at Trivandrum and while he was staying there, some officers of customs came to the room and conducted a search. Nothing was recovered. But the officers took the petitioner by the force to the Customs Import Baggage Hall and it is alleged that on examination, 30 gold biscuits of foreign origin were seized from either side of the handle inside the lock system of the blue colour suitcase which is alleged to be of petitioner. The petitioner's passport and other documents were also seized by the Air Customs Officer, Trivandrum. The petitioner's statement was recorded under Section 108 of the Customs Act, 1962 wherein he is alleged to have confessed to the guilt. After the arrest he was produced in the Court of Chief Judicial Magistrate, Trivandrum and was remanded to judicial custody for a period of 14 days. Thereafter he was shifted to the Court of the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam. While he was in jail he made an application for grant of bail under Section 437 CrPC on October 29, 1990 but it was rejected on November 2, 1990 by the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam. While the petitioner was in jail, an order of detention was passed under Section 3(1) of the COFEPOSA Act by the Secretary to the Government, Government of Kerala, Home (SSA) Department, on November 7, 1990 and the same was served on the petitioner on November 8, 1990. The grounds of detention along with the list of documents annexed thereto were served in time. The petitioner made a representation stating that since his bail application has been rejected and since he was in jail and his passport was also seized, there is no compelling necessity for such a detention. He also stated that no antecedents are there showing his being involved in such incidents and this was the solitary incident, therefore the provisions of the Act are not attracted.

16. The same points as in Writ Petition (Criminal) No. 105 of 1991 are raised in this petition also. We have negatived all the contentions in the above case.

17. One other submission of the learned counsel for the petitioner is that in the case of this petitioner the detention order mentions only smuggling and that when once the detenu is in jail and when his passport is seized, he can no more indulge in smuggling and therefore according to the learned counsel, there is non-application of mind. In this context he relied on the definition of "smuggling". Section 2(e) of the COFEPOSA Act defines "smuggling" thus :

"2. Definitions. - In this Act, unless the context otherwise requires, -

* * *##

(e) 'smuggling' has the same meaning as in clause (39) of Section 2 of the Customs Act, 1962, and all its grammatical variations and cognate expression shall be constructed accordingly."

Clause (39) of Section 2 of the Customs Act, 1962 defines "smuggling" thus :

"2 Definitions. - In this Act, unless the context otherwise requires, -

* * *##

(39) 'smuggling', in relation to any goods, means any act or omission which will render such goods liable to confiscation under Section 111 of Section 113;"

Section 111 and 113 of the Customs Act provide for confiscation of improperly imported goods and exported goods respectively. The submission of the learned counsel is that the petitioner being is custody in India can no more indulge in smuggling and therefore and detention on the ground that he is likely to indulge in smuggling in non-existent. We see no force in this submission. The potentialities of the detenu as gathered from his act of smuggling form the basis for detention. It is difficult to comprehend precisely the manner in which such a detenu with such potentialities is likely to indulge in the activities of smuggling. It is for the detaining authority to derive the necessary satisfaction on the basis of the materials placed before him.

18. In the result this writ petition is also dismissed.

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