Ahamed Nassar

Vs

State of Tamil Nadu and Others

Writ petition (CRI) No.166 of 1999

(K. T. Thomas, A. P. Misra JJ)

14.10.1999

JUDGMENT

MISRA, J:

1. The petitioner has challenged the detention order dated 28-04-1999 under Section 3(1)(I) of the Conversation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to a ("COFFPOSA"). The detention order was passed by Shri M. F. Farooqui, Secretary to the Government of Tamil Nadu Public (SC) Department, Chennai which reads as under:

"ORDER

Whereas the Government of Tamil Nadu are satisfied with respect to the person known as Thiru Ahamed Nassar, son of Thri Ahmed, 10, Mariamman Koil Street, Pudsupattinam, Ramanathapuram district now a remand prisoner in the Central Prison, Chennai that with a view of preventing him from smuggling goods in further, it is necessary to make the following order:

> Now, therefore, in exercise of the powers conferred by section (3)(I) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974), the Governor of Tamil Nadu hereby directs that the said Thru Ahamed Nassar, son of Thru Ahamed, be detained and kept in custody in the Central prison, Chennai".

2.The detenu (petitioner) arrived at Anna International Airport, Chennai on 12-03-1999 by an Indian Airlines flight from Singapore along with three pieces of baggage, viz., one cardboard carton marked Sony VCD MHC-V 818, one cardboard carton marked Sony VCD SS-V 818 and one green colour "VENO" zipper shoulder bag and one transparent plastic duty-free shop bag as hand luggage. He, after completing his immigration formality collected his checked –in baggage consisting of three pieces from Conveyer Belt-2 and proceeded to Table 11, where he declared to the Superintendent-in-Charge that he was in possession of one Video CD system, five cellular phones, 10 carton cigarettes and that the value of goods imported by him was Rs.60,000. On suspicion the Customs Officer intercepted the detenu as he suspected the detenu might be carrying contraband or electronic goods in huge quantities. On questioning whether he was carrying any such contraband or electronic goods, he replied in the negative. The Customs Officer not being satisfied took him to the air intelligence unit room along with the said baggage for detailed examination. Even in the presence of witnesses on being questioned he confirmed his name and that he owned three checked-in baggage and one handbag for detailed examination. Even in the presence of witnesses on being questioned he confirmed his name and that he owned three checked-in bagged and one handbag. On

examination of Sony Video CD player model, the second carton Sony Video CD-SS-V 818 contained one pair of speakers. The third green-coloured zipper shoulder bag "VENO" contained 10 cartons of State Express 555 cigarettes, each containing 400 strikes and on examining one carton it was found within, it contained two cartons of State Express 555 cigarettes, each containing 200 cigarettes. He further opened and examined both the State Express 555 cigarette cartons and recovered six cellular phones all with transparent polyphone cover wrapped in black carbon paper and secured with black cellphone tape from one cartons and one packets of State Express 555 cigarettes, each containing 20 cigarettes from the other carton. Similar he opened and examined the remaining nine State Express 555 cigarette cartons, 400/20 capacity and recovered 10 packets of State Express 555 cigarettes with 20 sticks in each and six cellular phones from each of the four above said nine State Express cigarette cartons. The said officer than examined the balance of State Express 555 cigarette cartons of 400/20 capacity and recovered ten packets of State Express 555 cigarettes with 20 sticks in each and seven cellular phones from each of the said five cartons. Thereafter the said officer cut open all the cellular phone wrappers and found 23 numbers Samsung SGH cellular phones, 31 numbers Bosch GSM 908 Cellular phones and 11 numbers Nokia 6110 cellular phones. Then his handbag was also opened which contained transparent polyphone duty-free shop bag containing 14 numbers AIWA HSGS 183 walkman and his personal effects. So in all, total goods in baggage found were 65 cellular phones, 14 AIWA walkman, 10 cartons of State Express 555 cigarette and one Sony Video CD player.

3. The case of the respondent is that the goods brought in were in trade and they were not bona fide baggage goods and the petitioner grossly misdeclared the type and quantity of goods brought by him. In fact he ingeniously concealed the cellular phones in cigarette cartons to evade detection by Customs Authorities and attempted to clear the goods without payment of appropriate customs duty. The aforesaid 65 assorted cellular phones, 14 AIWA walkman, 10 cartons of State Express cigarettes and one Sony Video MHC VCD system were seized under the Mahazar for action under the Customs Act, 1962. The total value of goods seized is Rs.7,16,200 (CIF) and Rs.10,74,300 (market value) on the day of seizure. The further case is that on the same day, on 12-03-1999 he made a voluntary statement before Customs Officers at Anna International Airport, Chennai that since his income was not sufficient so to earn, he took a passport with the help of his friend to import goods to Chennai and to sell them in Burma Bazar. On 07-03-1999 he went to Singapore and from the income earned there brought some walkman and one VCD and when he was about to leave Singapore one Seeni Mohamed met and introduced himself and gave some cigarette cartons and five cellular phones at Kuala Lumpur to be carried to India and for which in turn he was paid his air ticket. These goods were contained in a green colour VENO zipper bag. The said friend informed the detenu that on his arrival at Chennai he should carry the said green-coloured VENO zipper bag outside the airport where it should be handed over to the person identifying him who shall pay him Rs.15,000. The case of the respondent as disclosed in the counter-affidavit is, under Section 11(2)(u) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992, import of cellular phones and electronic goods by way of concealment and misdeclaration of their value with an attempt to evade duty, renders such goods liable for confiscation under Section 111(d), (I) and (m) of the Customs Act. The petitioner was arrested on 13-03-1999 and produced before the Additional Chief Metropolitan Magistrate, EO II, Chennai, who remanded him to judicial custody till 26-03-1999. The aforesaid detention order was served on the detenu while he was in the Central Prison, Chennai on 28-04-1999.

4. On the other hand, the case of the detenu is that the Customs Officers illegally seized the above goods by obtaining involuntary and false statement from the petitioner by the use of threat, force and intimidation.

5. The learned counsel for the petitioner K. K. Mani submits that the material documents which have a bearing on the subjective satisfaction of the detaining authority were neither placed nor considered before passing of the impugned detention order. He refers to the following documents.

> (a) Detenu's letter dated 23-04-1999 addressed to the detaining authority which was given to the jail authorities on the same day at 1745 hours.
>
> (b) The letter dated 19-04-1999 sent by his advocate to the Customs Authority was also not placed before the detaining authority.

6. Next he submits, on account of delay in considering the detenu's representation dated 21-05-199 both by the State Government and the Central Government, the detention order is liable to be set aside. For this he submits the following dates:

> (a) Representation of the detenu to the State Government is dated 21-05-1999 which was received by the State Government on 22-05-1999. After receiving it, remarks were called for on 24-05-1999 from the sponsoring authority which were received only on 27-05-1999. The delay pointed out is two days for the dates 25-05-1999 and 26-05-1999.
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> (b) Representation dated 21-05-1999 to the Central Government was received on 25-05-1999 and the Central Government called for comments from the detaining authority only on 01-06-1999. The submission is, this delay could have been eliminated if the same were called through fax or by email.

7. The next submission is, the subjective satisfaction recorded by the detaining authority that there was liklihood of the detenu being released on bail is not based on any factual basis, which shows non-applying of mind by the detaining authority. He submits, the bail application of the petitioner dated 1-4-1999 was dismissed by the Additional Chief Metropolitan Magistrate on 12-4-1999, and no other bail petitioner was either pending on brought to the notice of the detaining authority when it passes the detention order on 28-4-1999. Finally, he submits that the detaining authority filed to take note that the petitioner was arrested under Section 104 of the Customs Act for an offence under Section 135 of the same Act and the conviction for which is only seven years imprisonment. Hence, there was no compelling reason to detain the detenu under COFEPOSA.

8. The first submission for the detenu is that there was delay in considering the representation of the detenu by the State Government. It arises out of the following facts. The detenu's representation dated 21-5-1999 was received by the State on 22-5-1999, remarks were called from the sponsoring authority on 24-5-1999m which were received back on 27-5-1999. The delay is said to be for these two days, namely, 25-25-1999 and 26-5-1999. The alleged delay was of two days, viz., 25-5-1999 and 26-5-1999 which is the time taken by the sponsoring authority to send its comment. Thought both the authorities were in the same city it cannot be held that this delay is attributable for the delay in disposal of the detenu's representation, in a given case even a few day's delay may be fatal while in another set of circumstances a longer delay may still be held to be for valid reasons. Expeditious disposal of any representation only means which could be expeditiously disposed of by the authority concerned but should not be with any unexplained odelay through carelessness. This would depend on the facts and circumstances of each case. In L.M.S. Ummu Sleema v. B.B. Gujral [SCC (para 7)] THE Court held that the explanation of each days delay is not a magical formula. It only means it should be done with the utmost expedition: (SCC Headnote).

> "The time imperative can never be absolute of obsessive.' The occasional observations made by the Supreme Court that each day's delay in dealing with the representation must be adequately explained are meant to emphasize the expedition wit which the representation must be considered and not that it is a magical formula, the slightest breach of which must result in the release of the detenu.
>
> (para 7)"

9. In K.M. Abdulla Kunhi v. Union of India the court held (SCC p.484, para 12)

> "The words 'as soon as may be' occurring in clause (5) of Article 22 reflect the concern of the frames that the representation would be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts circumstances of each case. There is no period prescribed either under the Constitution of under the detention law concerned, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference, slackness or callous attitude in considering the representation."

10. Within this sphere of legal premise we do not find that there was any callousness of undue delay caused by the State Government in disposing of the detenu's representation. So far as the consideration of the detenu's representation by the Central Government is concerned the relevant facts are, that the detenu sent his representation on 21-5-1999 from chennai which was received in Delhi on 25-5-1999 and on the same day comments were called from the sponsoring authority at Chennai. Reply was sent by the sponsoring authority on 28-5-1999 which was received I Delhi on 31-5-1999. The same was placed before the Deputy Secretary, Central Government on 1-6-1999 who called for the comment of the detaining authority. This comment was sent by the detaining authority on 10-6-1999 which was received by the Central Government on 14-6-1999. On 15-6-1999 it was submitted to the Special Secretary and on the same day it was rejected and information was sent to the detenu also on the same day. The detenu on these facts presses that there in delay in considering his representation. the first is between 25-5-1999 and 28-5-1999 and then two day's delay in receipt of the same by the Central Government which is on 31-5-1999. Next the delay is of nine day's between 1st June and 10th June. On 1-6-1999, the Central Government (Deputy Secretary, COFEPOSA) called for comment from the detaining authority and on 10-6-1999 reply was sent by the State Government. Similarly three days delay is said to be when the same was received by the Central Government on 14-6-1999. In considering this delay it has to be kept in mind that this is the communication period as the two authorities are placed at a long distance in two different cities, one is in New Delhi and the other is in Chennai. The delay is defended to be on account of delay by the postal authorities in communicating the letters. The submission is, when liberty of an individual is affected, faster mode of communication should have been adopted, if necessary it should have been sent by air or through a special messenger by flight. This in our considered opinion is too far – fetched to be adapted. The liberty of an individual under the constitution is very sacrosanct and there is a constitutional obligation cast on the authorities concerned but this liberty should not be so stretched to such unreasonable extent to force communications to be sent through special messenger by air.

11. we have to keep in mind that the mode of communication for the statutory authorities has to be in the mode prescribed which has to be reasonable. It has been stated and we have also found from the file placed before us that the mode of these communications was through speed post. This could not be constructed as callous, slack or casual disposition of his representation. For the respondent it

was stated from the records that the communication between the Central Government at New Delhi and the sponsoring authority and detaining authority at Chennain was through speed post. The stated delay was on account of vagaries of the Postal Department, it is not attributable to the States. Hence on the facts and circumstances of this case, it is not possible to hold, there was any delay in the disposal of the detenu's representation by the Central Government. In our considered opinion there was no delay in consideration of the detenu's representation both by the State and the Central Government.

12. Relience has been placed on behalf of the detenu in Venmathi Selvam v. Sate of T.N.. In this case the Court held: (SCC p,511, para 4).

> "through the delay is not long, it has remained unexplained. Through the delay by itself is not fatal, the delat which remains unexplained becomes unreasonable. In spite of this well settled legal poistion the State Government has railed to explain satisficatorily tha tit had dealt with the representation of the detenu as promptly as possible."

13. In this case even after an opportunity was given by the Court, the Sate did not file any counter affidavit.

14. In Rajammal v. State of T.N. the Court held: (SCC p, 421, para 8).

> "8. The position, therefore, now in that if delay was caused on account of any indifference of lapse in considering the representation, such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing of the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned."

15. in this case, the Court held that though there is explanation for delay till 9-2-1998 but no explanation had been given for the delay which occurred thereafter that is to say till 14-2-1998. These decisions render no help to the detenu. The present case is not such a case. The delay attributed was caused in postal communications. So such a short delay may not have much may not have much bearing. What is relevant is, there should be a reasonable explanation for such delay. How have the authorities dealt with the matter? If it was casual, neglect, keeping relevant papers immobile without any reasonable cause they are attributable to assess delay. But delay on account of vagaries of or on account of inefficiency of postal of communicating agencies cannot in normal circumstances be taken as inexcusable delay either by the sponsoring or detaining authority or the State authorities concerned in disposal of the detenu's representation.

16. Mr. R. Mohan, learned counsel for the detenu submitted that material and vital documents which have a bearing on the subjective satisfaction the detaining authority were not placed before him. Reference was made to the detenu's letter dated 23-4-1999, addressed to the detaining authority, delivered to the jail authorities on the same day at 1745 hours and letter dated 19-4-1999 of his advocate, addressee to the sponsoring authority. Both these letters were not placed before the detaining authority. These letters refer tom apart from the detenu's retraction from his earlier confession dated 12-3-1999, the information which the detenu gave to the Customs Officers that he was in possession of non-prohibited and dutiable goods for which he was ready to pay duty. The

respondent's reply with reference to letter dated 23-4-1999 is that this letter was given to the jail authority late in the evening on the 23rd April, which was dispatched the very nest oday by speed post, to the Secretary Public, which is the prescribed and acknowledged mode for sending letters for jail. 25-4-1999being Sunday, the letter reached the Secretariat on 26-4-1999which after its aggregation and processing reached the Secretary concerned at about 3.00pm. on the same day. This receipt was after the secretary concerned signed his proposal for the detention on the 24th April, after it was sent to the Minister concerned, who being the detaining authority signed the same on 26-4-1999. Thereafter the grounds of detention were sent for translation to the Department of Culture which returned them back on 28-4-1999 on which date the formal order of detention was signed. Hence, the said representation letter could not be placed before the detaining authority. It is also submitted that after its receipt the Secretary found it containing retraction of the confession but it was only a repetition of what was contained in the detenu's bail application dated 1-4-1999, which was placed before the detaining authority and was considered by him.

17. with reference to the letter of the advocate dated 19-4-1999, two reasons are stated for it not being placed before the detaining authority. Firstly, it refers to the retraction of the confession made by the ditenu which is refereed to in the detenu bail application dated 1-4-1999 and secondly since this was sent to a quasi-judicial authority. It should have been accompanied with either a vakalathnama or an authorization signed by the detenu. Further I, is said that the retraction could not be considered as it was not sent by the detenu himself. As a legal submission it is submitted, Article 22(5) of the Constitution of India guarantees earliest opportunity to made a representation and its disposal but a detenu has no pre-existing right for representation and its disposal but a detenu has no pre-existing right for expeditions consideration of his representation by the detaining authority prior even to his detention order.

18. Submissions so far made are discovered and hence we have no hesitation to reject the same. The question here is not any consideration of any representation of the detenu expeditiously by the detaining authority prior to his detention order but non-placement f the aforesaid two relevant letters before the detaining authority. What relevant must be placed before the detaining authority for its consideration.

19. about sending the letter to the detaining authority it was submitted that the Secretariat to which the letter was sent was situated at a short distance and hence it should have sent through a special messenger. Reply is that the same was dispatched through speed post which is the prescribed and acknowledgment mode for sendinr such letters. It is true that in a given circumstances, where urgency is spelt out an officer may opt for such a resource, but where dispatch is through a prescribed mode, which is more expeditious than that normal mode, it cannot be attributed other the authorities were either callous or careless or casual in their dealing.

20. So far as the stand of the respondent with reference to the advocate's letter dated 19-1-1991 is concerned it cannot be held to be a justifiable stand. These technical injections must be shunned where a detenu is being dealt wit under the preventive detention law. A man is to be detained in the prison base on the subjective satisfaction of the detaining authority. Every conveyable material which is relevant and vital which may have a bearing on the issue should be place before the detaining authority. The sponsoring authority should not keep it back, based on his interpretation that it would not be of any help to a prospective detenu. The decision is not no to be made by the sponsoring authority. The law on this subject is well settled; a detention order vitiates if any relevant document is not subject is well settled; a detention order vitiates if any relavant document is not placed before the detaining authority which reasonably could effect his decision.

21. In Ashadevi v. K. Shivraj, Addl. Chief Secy. To the Govt. of Gujral the Court held: (SCC Headnote)

> "If material or vital facts which would influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order are not placed before or are not considered by the detaining authority, it would vitiate its subjective satisfaction rendering the detention order illegal."

22. This is a case of preventive detention under section 3(1) of COFEPOSA, where the confessional statement retracted by the detenu was not placed before the detaining authority.

23. In Ayya v. State of U.P. the Court held: (SCC p385, para 28)

> "There would be vitiation of the detentio on grounds of non application of mind if a piece of evidence , which was relevant through not binding, had not been considered at all. If a piece of evidence which might reasonably have affected the decision whether or not to pass and order of detention is excluded from consideration, there would be a failure of application of mind which, in turn, vitiates the detention. The detaining authority might very well have come to the same conclusion after considering this material; but in the facts of the case the omission to consider the material assumes materiality."

24. In Sita Ram Somani v. State of Rajastan the Court held: (SCC p89, para 4)

> "[1]t appears to be clear to us that the documents mentioned by the appellant in his petition were not placed before the detaining authority were not considered by the detaining authority possible that they were paced before the Screening Committee in the first instance, but that is immaterial. It was the detaining authority that has to consider the relevant material before taking a decision whether it was necessary to detain the appellant under COFEPOSA. That was not done and there was, therefore a clear non-application of mind by the detaining authority to relevant material."

25. The aforesaid two letters, viz., dated 23rd April and 19th April Contain factual assertions, not only retraction of the detenu's earlier alleged confession but other matters. So far as the retraction of confession by the detenus concerned, we accept the stand of the respondent that the same was also recorded in the bail application dated 1-4-1999 of the detenu which was placed and considered by the detaining authority. But in these letters the stand of the detenu was that the seized good are not prohibited good which passed through the red channel for which the detenu offered to pay the duty but instead , the officer concerned without listening proceeded to arrest him. It is true , the respondent's case is that the detenu brought these goods in trade which were not bona fide baggage and were misdeclared; both the type and quantity of goods were found concealed (65 cellular phones in 10 cigarette cartons of State Express 555) to evade detection and payment of customs duty. But this stand is on merits. It is not necessary in these proceedings to go into its merits and demerits.

26. The question is no whether the second part of the contents of those letters was relevant or not but whether they were placed before the detaining authority for his consideration. There could be no two opinions on it. It contained the very stand of the detenu of whatever worth. What else would be relevant if not this? It may be that the detaining authority might have some to the same conclusion

as the sponsoring authority but its contents are relevant which could not be withheld by the sponsoring authority. The letter dated 19-4-1999reached the sponsoring authority and reached well within time for it being placed before the detaining authority. There is an obligation cast on the sponsoring authority to place it before the detaining authority, which has not been done. Even the letter dated 23-4-1999 which reached the Secretary concerned at 3.00 pm. on 26-1-1999 was much before the formal detention order dated 28-4-1999. The secretary concerned was obliged to place the same before the detaining authority. The respondent authority was not right in not placing it as it contains not only what is already referred to in the bail application dated 1-4-1999 but something more.

27. This shows there was really non- application of mind. It is not in dispute that the relevant date of the issue of formal detention order was 28-4-1999 though it was signed on 26-4-1999. Thus, there should be consideration of all relevant materials in case such material were within the reach of the detaining authority till a formal detention order was issued.

28. In the case of Mohd. Shakeel Wahid Ahmed v. State of Maharashtra also detention was challenged as relevant material came into existence after signing to the detention order but before issuance of a formal order. The Advisory Board opined in the case of another detenu Shamsi that there was no sufficient cause for Shamsi's detention but this material was not placed before the detaining authority. The defiance taken by the State was that the detention order is dated 8-101981 while the Advisory Board's opinion is dated 19-10-1981. The Constitution Bench of this Court rejected this contention and held : (SCC p 396-97 para 10)

> "The explanation offered by Shir Capoor as to why the opinion of the Advisory Board in Shamsi's case was not placed before him is that the report of the Advisory in Shamsi's case which is dated 19-10-1981, was not in existence when he 'formulated and ordered to issue the detention order against the petitioner' in this case. We see quite some difficulty in accepting this explanation. In the first place, the fact that it was on October 8,1981 that Shri. Capoor had directed the detention of the petitioner is a matter of no consequence. The order of detention was issued, that is to say passed on November7,1981 and we must have regard to the state of circumstances which were is existence on that date Shri. Capoor seems to suggest that the Advisory Board's opinion dated October19,1981 came into existence after he had made up his mind to pass and order of detention against the petitioner on October 8,1981 and therefore he could not take, or need not have taken, that opinion into account. The infirmity of this explanation is that the order of detention was passe against the petitioner on November 7,1981 and the Advisory Board's opinion in Shamsi's case was available to the State Government nearly three weeks before that date."

29. The above was a case where detention order was signed on 8th October but formal order was only signed on 7-11-1981. The relevant material viz, opinion of the Advisory Board came into existence on 19-10-1991, i.e. between the aforesaid two dates. Non placement of the opinion, which came into existence after signing of the detention order before the detaining authority was held to vitiate the detention. Thus issuance of the formal order is held to be the relevant date up to which is any relevant material comes in possession of the authority concerned it has to be placed before the detaining authority. In the present case, we find the letter of the detenu dated 23-4-1999 was received on 26-4-1999, i.e., before issuance of formal detention under dated 28-4-1999. It was incumbent for the Secretary concerned to have placed it before the detaining authority. So we

conclude, non-placement of those two letters which were relevant, vitiates the impugned detention order.

30. The next submission is, the detaining authority while recording his subjective satisfaction recorded that there was likelihood of the detenu being released on bail was based on no factual basis. Such recording in the absence of any material shows non-application of mind by the detaining authority. The facts are, the detenu moved the bail application on 1-4-1999, which was dismissed by the Additional Chief Metropolitan Magistrate (EO II), Madras on 12-4-1999. No other bail application was brought to the notice of the detaining authority till the date he passed the detention order on 28-4-1999. Repelling this contention, the submission for the respondent State is that this rejection of the bail application was placed before the detaining authority, higher forum, namely, the Sessions Court, the High Court etc. It is in anticipation of such expected action from the detenu the said subjective satisfaction was arrived at. The submission is that in fact later a bail application was moved in the Sessions Court which was dismissed on 23-4-1999 and another bail application was filed in the High Court the same day which was also dismissed on 30-4-1999 which is after passing of the detention order.

31. in interpreting any provision of preventive detention law its preamble and its objectives have to be kept in mind. The preamble of COVFEPOSA is:

> "An act to provide for preventive detention in certain cases for the purposes of conversion and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith."

32. The Objects and Reasons of this Act are also incorporated therein:

> "Whereas violations of foreign exchange regulations and smuggling activities are having an increasingly deletions effect on the national economy and thereby a serious adverse effect on the security of the State:
>
> And where as having regard to the persons by whom and the manned 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 and clandestinely organized and carried on, it necessary for the effective prevention of such activities and violations to provide for detention of persons concerned in any manner therewith;"

33. So this "Act" is brought in for the conservation and augmentation of foreign exchange and for the prevention f smuggling. This became necessary as there were large-scale violations of foreign exchange regulations and increasing smuggling activities affecting the national economy. In other words it was brought in to prevent such clandestine activities by detaining such person.

34. In order to achieve this objective, in the national interest an obligation is cast on the State even to curtail the most sacred of the human rights, viz., personal liberty. The source of power to curtail this flows from Article 22 of the constitution of India within the limitation as provided therein. Every right in out Constitution within its widest amplitude is clipped with reasonable restrictions. Right under Article 15 not to be discriminated on grounds of religion, race, caste, sex, etc. is clipped through its sub-clauses on grounds of religion, race, caste, sex, etc. is clipped through its sub-clauses (3) and (4) while making provisions for women, children, socially and educationally backward

classes, Schedule Castes and Scheduled Tribed respectively. Article 16 creates right for equality of opportunity in the matter of public employment which is curtailed through its sub-clauses (3), (4), (4-A) and (5) by enabling Parliament to make law confining to a class or classes for employment to an office even prior to such employment, permitting reservation in favour of Backward Classes, Scheduled Castes and Scheduled Tribes or ion the cases of religious denominational institutions Each of the most solemn rights of any citizen is cloaked with reasonable restriction under various sub- clauses of Article 19. The protection of life and personal liberty enshrined in Article 21 itself contains the restriction which can be curtailed thought the procedure established by law, which of course has to be reasonable, fair and just. Article 22 confers power to deprive of the very sacrosanct individual right of liberty under very restricted conditions. Sub-clauses (1) and (2) confer right to arrest within the limitations prescribed therein. Sub-clause (3) even erases this residual protective right under sub-clauses (2) and (3) by conferring eight on the authority to detain man without trial under the preventive detention law. This drastic clipping of right is for a national purpose and for the security of the State.

35. Similarly, Article 301, Chapter XII of Constitution confers right to trade, commerce and intercourse freely throughout territory of India but succeeding articles, viz., Articles 302. 303 and 304 slice that absolute freedom in various grades and degrees. Each of such checks and clippings in the absolute right of an individual is made within the sphere of certain reasonableness to give preference, when in conflict with the collective right of and for the gain of the society. Man is a social animal who dedicates his works to enrich the social coffer for enriching social development. On one hand individual rights are well recognised but when they make a dent on society, affecting public right they give way, This is the pattern of our Constitution. So far as individual rights are concerned they are recognises and fully protected but such rights are curtailed when they trample on community right or right of the public at large. It is severely curtailed when it tramples with considerable magnitude for self-gain, deleteriously affecting the national interest by dealing with such person sternly through preventive detention without trial, for a specified period within the limitation provided therein. So in any organised society there can be no right in absolute terms.

36. Thus courts must first find, the extent of the individual right deciphering with the degree of trespass it makes on the public right, on which there is embargo. Where an individual acts clandestinely for his personal gain against the national interest deleteriously affecting the national economy or security the drastic curtailment of his right should be kept in mind to see takes away one’s liberty it should be strictly construed, on the other hand to subserve the objective of this Act, in the national interest it should be seen that no such person escapes.

37. In this backdrop of the constitutional scheme, the Preamble as also the Objects and Reasons of COFEPOSA we have to scrutinize and test the justifiability of the acts of every statutory functionary performing statutory obligations under the Act. It is well settled that whenever there are two possible interpretations of every statutory functionary performing statutory obligations under the Act. It is well settled that whenever there are two possible interpretations of a statute, the one that subserves the objective of an enactment is to be accepted. The same principle shall with equal force apply in testing the credibility of the acts of a statutory functionary performing its statutory obligations. Such authorities, while performing their obligations under the preventive detention law must perform it on one hand with promptness, as not to further lengthen the detenu’s detention through their casual conduct, neglect, lethargy, etc., on the other hand all what is required to be done by it if it has been done then in construing its conduct, conclusions etc. If there be two possible interpretations then the one that subserve the objective of the statute should

be accepted.

38. Nex, returning to the issue under consideration, as to what should be the measure to test the legality of the subjective satisfaction of the detaining authority when he records, there is likelihood of detenu being released on bail". Even for judging this we have to keep in mind the aforesaid conspectus of the Constitution, the preamble, Objects and Reasons of the detaining authority with the area of interference by the court being limited, then within authority with the area of interference by the court being limit, then within this limitation, the court must see, in this authority's privileged area that the detaining authority does not stretch itself illegitimately in the exercise of its jurisdiction.

39. Learned counsel for the detenu relies on *Dharmendra Suganchand chalet v. Union of India*[9]. In this case the Court: (SCC Headnote)

> "In the present case there was no material in the grounds of detention showing that the detaining authority apprehended that the further remand would not be granted by the Magistrate on October 13. 1988, and the appellants would be released form custody on that day. On the other hand the bail applications moved by the appellants had been rejected by the Session Judge a few days prior to the passing of the order of detention. The grounds of detention disclose that the appellants were engaged in activities which are offences punishable with imprisonment under the Narcotic Drugs and Psychotropic Substances Act, 1085. It cannot, therefore, be said that there was a reasonable prospect of the appellants and their being released from custody at the time when the order for preventive detention was passed on October 11, 1988."

40. In the above, it was a case under the Narcotic Drugs and Psychotropic Substances Act, therefore, it cannot be said that there was a reasonable prospect of the appellant being released on bail.

41. In *Binod Singh v. District Magistrate, Dhanbad*[10] the detenu was in detention when order of detention under Section 3(2) National Security Act, 1980 was served on him. There were criminal cases against him and in one of them the offence was Section 303 IPC. When the order of detention was passed the petitioner had not surrendered but when it was served the petitioner had already surrendered. In this background the subjective satisfaction of the order of detention was challenged as there was no likelihood of the detenu being released on bail. This Court held: (SCC pp. 420-21, para 7)

> "If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the instant case when the actual order of detention was served upon the detenu, the detenu was in jail. There is no indication that this factor or the question that the said detenu might be released or that there was such a possibility of his release, was taken into consideration by the detaining authority properly and seriously before the service of the order."

42. In this case there existed prima facie no scope to release him on bail as the offence was Section 303 IPC.

43. In *Ravadeneyta Recardo Agustin v. Govt of the National Capital Territory of Delhi*[11] reliance was placed on the following passage while approving the case of *Kamarunnisa v. Union of India*[12] *held:*

(SCC pp. 138-39, para 11)

> "The decisions of this Court to which our attention was drawn by the learned counsel for the petitioners lay down in no uncertain terms that detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty."

44. The above decision is strongly relied on by learned counsel for the detenu as detention therein was also under Section 3 of COFEPOSA pertaining to an offence under Section 135 of the Customs Act. It was held that he State could not bring to notice any material indicating that release of the petitioner was imminent or there was a likelihood of his being released. In that case the bail application was finally dismissed on 9-6-1992 and hence there was no scoop for presuming a likelihood of his being released on bail. Further significantly proposal for the detention was sent on 22-5-1992 but the authority concerned passed the order only on 18-8-1992, after several months without apprising itself of the facts prevailing in the middle of August 1992. The above decision is, therefore distinguishable on facts. The Court in the above case records (SCC p. 598, para 4)

> "The bail petitions filed by him wre dismissed finally on June 9, 1992. He did not move any bail application thereafter….. It is pointed out that according to the counter, proposal for the detention of petitioner was sent to the counter, proposal for the detention of petitioner was sent to the Administrator on May 22, 1992 but the authority passed the order only on August 18, 1992 2without apprising himself of the fact situation prevailing in the middle of August 1992."

45. We have already observed in the matter of testing satisfaction of nay detaining authority, that it has to be tested on the facts and circumstances of each case. Examining the facts in the present case, in para 7 of the counter-attidavit filed on bahalf of Respondetn 1 (State) by Mr S. Retnaswamy, Deputy Secretary to Government, Public Department, Government of Tamil Nadu, Chennai-9, It is stated:

> "… It is further submitted that the detaining authority has considered the bail application of the detenu dated 1-4-1999 and arrived at the subjective stisfaction that there is likelihood of the release of the detenu on bail and hence it cannot be stated that there is non-application of mind on the part of the detaining authority."

46. So before the detaining athority, there existed not only the order dated 12-4-1999 rejecting his bail application but the contents of the bail application dated 1-4-1999. The averments made therein are relevant material on which subjective satisgaction could legitimately be drawn either way. Thus in spite of rejection of the abil application by a court, it is open to the detaining auuthority to come to his own satisfaction based on the contents of the bail applcation kepping in mind the circumstances tha there is likelihood of the detenu being released on bail. Merely because no bail application was then pending is no premise to hold that there was no likelihood of his being then pending is no premise to hold tha there was no likelihood of his being released on bail. The words "likely to be released" connote chances of bing bailed out, in case there be pending bail application or in case if it is noved in future is decide. The word "likely" shows it can be either way. So without taking any risk if on the facts and circumstances of each case, the type of crime to be dealt with under the criminal law, including contents of the bail application, each separately or all this compositely, all would constitute to be relevant material for arriving at any conclusion. As the

contents of bail application would vary from one case to the other, coupled with the different set of circumstances in each case, it may be legitimately possible in a given case for a detaining authority to draw an inference that there is likelihood of the detenu released on bail. The detention order records:

> "The Administrator of the National Capital Territory of Delhi is aware that you are in judicial custody and had not moved any bail appellation in the court(s) after 9-6-1992 but nothing prevents you from moving bail applications and possibility of your release on bail cannot be ruled out in the near future. Keeping in view your modus operandi to smuggle gold into India and frequent visits to India, the Administrator of the National Capital Territory of Delhi is satisfied that unless prevented you will continue to engage yourself in prejudicial activities once you are released."

47. Thus we hold, the conclusion of the detaining authority on the facts of the present case, "there is likelihood of his being released on bail" cannot be said to be based on no relevant material.

48. However, in view of our findings, viz., non-placement of two material documents, one leter dated 19-4-1999 by the advocate of the detenu to the sponsoring authotity and the other letter dated 23-4-1999 by the detune before the detaining authority which we relevant and were likely to affect his satisfaction, hence we have no hesitation to hold that the detention of the petitioner under Section 3(1) of COFEPOSA vitiates and the detention order is unsustainable in law.

49. Accordingly, we quash the impugned detention order dated 28-4-1999 passed by the detaining authority under Section 3(1)(i) of the Conservation of Fereign Exchange and Prevention of Smuggling Activities Act, 1974. The writ petition is accordingly allowed. The petitioner be released from jail forthwith unless required in connection with some other case.