SUPREME COURT OF INDIA

A. C. Razia

Vs.

Government of Kerala

Crl.A.No.53 of 2004

(V. N. Khare, C.J.I., P. Venkatarama Reddi and S. B. Sinha, JJ.)

12.01.2004

JUDGEMENT

P. VENKATARAMA REDDI, J. (For himself and on behalf of **V. N. KHARE, C.J.I.**) :-

1. Leave granted in S. L. P. (Crl.) No. 153 of 2003.

2. Questioning the detention of the petitioner's husband by name, P. Mohd. Kutty under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), Writ Petition (Cri.) No. 6 of 2003 has been filed by her praying for the issuance of a writ of habeas corpus. The detention order was also challenged in the High Court of Kerala by way of a petition filed under Art. 226. The Writ Petition was dismissed on 29-11-2002. The said judgment has been challenged in the Special Leave Petition. The Special Leave Petition came up for hearing before a bench consisting of Rajendra Babu, J. and G. P. Mathur, J. Rajendra Babu, J. allowed the writ petition by quashing the order of detention. However, Mathur, J. held that the writ petition and the SLP were liable to be dismissed. In view of this difference of opinion, the matter has been placed before this three Judge Bench.

3. On 24-12-2000 the baggage of one Anodiyil Mammu, who was waiting to take the flight to Dubai, was inspected at Trivandrum International Airport. He is related to the detenu. On such inspection, foreign currencies were found in a brief case and various other articles which he was carrying. Some of the foreign currency notes were concealed in a cardboard carton. The foreign currency was seized and the statement of Mr. Mammu was recorded under Section 108 of the Customs Act. He stated that the foreign currency was entrusted to him by P. Mohd. Kutty i.e. the detenu for conveying it to Dubai and handing it over to one Shafeek for which he was to be paid some remuneration. He gave various details as to how and from where he got the carton and foreign currency. On the same day and the next day, the statements of Mohd. Kutty, the detenu and various other persons, who were directly or indirectly involved in this operation, were recorded under Section 108 of the Customs Act and they were substantially in conformity with the version of A. Mammu. Initially, Mohd. Kutty confessed to his involvement. However, the statements were retracted later on. Anodiyil Mammu claimed the ownership of foreign currency in his representation dated 15-1-2001 and thus retracted from earlier statement. On the basis of the information together with the supporting material received from the Directorate of Revenue (Intelligence), the order of detention was passed by the Government of Kerala (Home Department) on 19-4-2001. However, the detenu could only be arrested on 24-6-2002. The detenu was served with the order and grounds of detention together with the copies of various documents referred to in the grounds. The representation addressed to the detaining authority was sent by the detenu's wife on 13-7-2002 and the same was rejected by the State Government. The representation addressed to the Central Government was also rejected on 29-7-2002. The case of the detenu was referred to the Advisory Board and on the basis of the report received, the Government confirmed the detention order on 6-9-2002. At that stage the writ petition under Art. 226 was filed in the Kerala High Court challenging the detention.

4. The only point raised in the course of the arguments in the High Court was that the documents furnished to the detenu were not translated into Malayalam on account of which he was unable to make proper representation against his detention. This contention was rejected by the Division Bench of the High Court, relying on the averments in the counter-affidavit filed by the State. The High Court referred to the fact that the documents duly translated into Malayalam were in fact furnished to the detenu and he acknowledged the same on 24-6-2002. The High Court also observed that the detenu was familiar with the English language. The contention, which was rejected by the High Court, has not been reiterated before this Court. However, the only contention urged is that the disposal of the representation by the Central Government was not proper. As many of the crucial documents were in Malayalam, the officials of the Central Government who dealt with the case being unacquainted with Malayalam language, should have called for translated copies of the documents. The authorities of Central Government would not have, therefore, perused the relevant documents and in this sense there was no proper application of mind. It is submitted that the improper disposal of the representation has vitiated the detention and the continued detention is violative of Arts. 21 and 22 of the Constitution.

5. **RAJENDRA BABU, J.** was of the view that for a proper consideration by the Central Government, there shall be full and independent application of mind on the representation and on all

the documents which formed the basis of detention order. The grounds of detention and the documents upon which it is based should be 'strictly scrutinized'. For this purpose, the necessary documents should be translated into the language which could be understood by the concerned official without which full and independent application of mind cannot be ensured. Since the detaining authority had not placed the representation and the alleged documents in a translated form before the Central Government, the appellant's representation was not properly evaluated and therefore the guarantee under Art. 22(5) was violated.

6. **G. P. MATHUR, J.** observed that the power under Section 11 to revoke the order of detention is some kind of a supervisory power. If so, while considering the representation, it is not necessary for the Central Government to look into and thoroughly examine all those documents which have been supplied to the detenu along with grounds of detention. The principle that the documents which are not material and to which only casual reference was made in the grounds need not be supplied to the detenu will equally apply in the matter of consideration of representation by the Central Government. Basically, the Central Government is required to examine the pleas raised by the detenu in his representation and in the present case the detenu hardly raised any specific plea which would require perusal and examination of the document, copies of which were supplied to the detenu. If the translation is to be insisted, it would often lead to delay and that itself may become a ground to invalidate the detention.

7. The only question on which the arguments have been addressed before us is whether there could be due application of mind on the part of the Central Government and proper disposal of the representation in the absence of English translated copies of documents relied on in the detention order? Though the answer to this question lies in a narrow compass, arguments on certain wider issues were addressed before us, keeping in view the differing view points expressed by the two Hon'ble Judges. The questions debated relate to the ambit of the guarantee incorporated in Art. 22(5) vis-a-vis the consideration of representation by the Central Government and the nature and extent of power under Section 11 of COFEPOSA Act. We have felt that it is desirable to marshal the thoughts on the subject and restate the principles with clarity. Hence, this wider discussion.

8. The law of preventive detention is a drastic law as it authorizes detention without trial in a Court of law and is an encroachment on the liberty of an individual which is a cherished freedom under our Constitution. At the same time, the need for such law in larger public or national interest has been recognized by the Constitution. In order to mitigate the rigour of the law, certain minimum safeguards have been provided in the Constitution in order to ensure that there is no unjustified detention and the detention should not continue unnecessarily. The preventive detention laws such as the COFEPOSA Act, with which we are concerned, apart from ensuring the minimum safeguards expressly mandated by the Constitution, have supplemented to these safeguards especially by making provisions enabling scrutiny and review of detention order by more than one authority on the representation of the detenu or otherwise. By judicial interpretation, some more ancillary safeguards to effectuate the constitutional guarantees flowing from Arts. 21 and 22 have been carved out.

9. The twin constitutional safeguards related to preventive detention are enshrined in clauses (4) and (5) of Art. 22. Clause (4) prescribes a ban on the law authorising preventive detention for a period longer than 3 months unless the Advisory Board reports before the expiration of a period of 3 months that in its opinion there is sufficient cause for such detention. This is however subject to the exception laid down in sub-clause (a) of Art. 22(7). The Advisory Board is composed of persons who are, or have been or are qualified to be Judges of the High Court. The proviso to Clause (4) further mandates that the detention cannot extend beyond the maximum period prescribed by a law made by the Parliament vide clause (7) of Art. 22.

10. We are concerned here with clause (5) of Art. 22. The dual rights under clause (5) are : (i) the right to be informed as soon as may be of the grounds on which the order has been made, that is to say, the grounds on which the subjective satisfaction has been formed by the detaining authority and, (ii) the right to be afforded the earliest opportunity of making a representation against the order of detention. By judicial craftsmanship certain ancillary and concomitant rights have been read into this Article so as to effectuate the guarantees/safeguards envisaged by the Constitution under Clause (5) of Article 22. For instance, it has been laid down by this Court that the grounds of detention together with the supporting documents should be made available to the detenu in a language known to the detenu. The duty to apprise the detenu of the right to make representation to one or more authorities who have power to reconsider or revoke the detention has been cast on the detaining authority. So also the duty to consider the representation filed by or on behalf of the detenu with reasonable expedition has been emphasized in more than one case and where there was inordinate delay in the disposal of representation, the detention was set aside on that very ground.

11. In COFEPOSA Act and cognate Acts, we find an array of statutory safeguards with regard to detention "in tune with the constitutional requirements".1 Sub-section (2) of Section 3 of COFEPOSA Act casts an obligation on the State Government to forward to the Central Government within 10 days the report in respect of the detention order. It is obvious that this provision is meant to enable the Central Government to address itself to the issue of detention at the earliest opportunity and to intervene in appropriate cases by exercising its power of revocation under Section 11. Section 3(3) of the Act provides that the grounds of detention shall be furnished ordinarily not later than 5 days after the detention. Section 8 provides for constitution of Advisory Board, the procedure to be followed by the Board and the action to be taken by the Government on receipt of the opinion of the Board. Section 10 prescribes the maximum period of detention which is one year or two years, depending on the applicability of Section 9. Section 11 empowers the State Government or the Central Government, as the case may be, to revoke the detention order without prejudice to the power of the detaining authority to rescind the same under Section 21 of the General Clauses Act.

1.

See para 8 of ((1991) 1 SCC 476) K.M. Abdulla Kunhi v. U.O.I. AIR 1991 SC 574 : (1991 AIR

12. The combined effect of the constitutional and statutory provisions from the point of view of the detenu's right to make the representation is to provide more than one forum to re-examine or review the case of the detenu and to afford him various means of redressal of his grievance. Thus, the matter could be examined by (i) the Advisory Board, (ii) the detaining authority and (iii) the State or Central Governments acting under Section 11 or on receipt of Advisory Board's opinion. This is apart from the power of the Central Government to examine the validity of detention acting suo motu on receipt of report under Section 3(2). Under Section 11 - which is of immediate relevance in the present case, the Central Government has the power to revoke the orders made by (i) the State Government, (ii) an officer specially empowered by the State Government and (iii) an officer specially empowered by the Central Government. The order passed by an officer specially empowered by a State Government can be revoked by the State Government as well. "The conferment of this power on the Central and the State Governments does not, however, detract from the power that is available to the authority that has made the order of detention to revoke it". This is ensured by the words "without prejudice to the provisions of Section 21 of the General Clauses Act" in sub-section (1) of Section 11 (vide observations of the Constitution Bench in paragraph 22 in the case of Kamlesh Kumar v. Union of India ((1995) 4 SCC 51)).

13. Whether the right to make a representation to the State or the Central Government under Section 11 becomes an integral part of Art. 22(5) or it remains to be a statutory safeguard only is the next aspect which merits discussion. Clause (5) of Art. 22 does not, in express terms, spell out the authority to whom the representation has to be made. Does it contemplate the representation being made to and considered by the detaining authority? Doubts in this respect have been cleared by the Constitution Bench in Kamlesh Kumar's case (supra) which is also a case arising under COFEPOSA Act. In that case, the stand taken by the Union of India speaking through Additional Solicitor General was that the use of the word 'a' in singular indicates that only one representation is to be made and that representation is meant to be placed before the Advisory Board which is the only authority contemplated under the Constitution to consider such a representation. This contention was unhesitatingly rejected by the Court and it was observed that if such a restricted interpretation is to be given to the expression "making a representation against the order", the guarantee under clause (5) of Art. 22 may be rendered nugatory. The Constitution Bench, having noted that Art. 22(5) does not specify the authority to whom the representation is to be made, ruled thus :

"Since the object and purpose of the representation that is to be made by the person detained is to enable him to obtain relief at the earliest opportunity, the said representation has to be made to the authority which can grant such relief, i.e., the authority which can revoke the order of detention and set him at liberty. The authority that has made the order of detention can also revoke it. This right is inherent in the power to make the order. It is recognized by Section 21 of the General Clauses Act, 1897 though it does not flow from it. It can, therefore, be said that Art. 22(5) postulates that the person detained has a right to make a representation against the order of detention to the authority making the order. In addition*, such a representation can be made to any other authority which is empowered by law to revoke the order of detention."

* Ephasis supplied.

14. Adverting to the cases beginning with S. K. Abdul Karim ((1969) 1 SCC 433) in which it was held that the representation should be considered by the State Government it was explained that all those cases related to orders of detention made by the District Magistrate under the Preventive Detention Act which specifically provides in Section 7(1) that the authority making the order of detention shall afford to the person detained the earliest opportunity of making a representation against the order to the 'appropriate government'. It was observed that in those cases, the Court was not required to consider whether the detaining authority should also consider the representation. However, it was noticed that in Pankaj Kumar Chakrabarty v. State of W. B., (1969) 3 SCC 400, the Constitution Bench did say that the detaining authority must consider the representation when so made. Approving the majority view taken in Amir Shad Khan v. L. Hmingliana, (1991) 4 SCC 39, the legal position as to the content of the right under Art. 22(5) in the context of the opportunity to make representation has been succinctly stated thus in Kamlesh Kumar : AIR 1969 SC 1028 : 1969 Cri LJ 1446, AIR1970 SC 97, AIR 1991 SC 1983 : (1991 AIR SCW 2214 : 1991 Cri LJ 2713

"Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation."

15. We get even a clearer idea of the exposition of law in this regard by referring to the three Judge Bench decision in Amir Shad Khan's case (supra) which was approvingly cited by the Constitution Bench in Kamlesh Kumar's case (supra). The following passage makes the legal position clear : Para 3 of AIR 1991 SC 1983 : 1991 AIR SCW 2214 : 1991 Cri LJ 2713

"Thus on a conjoint reading of S. 21 of the General Clauses Act and S. 11 of the Act it becomes clear that the power of revocation can be exercised by three authorities, namely, the officer of the State Government or the Central Government, the State Government as well as the Central Government. The power of revocation conferred by S. 8(f) on the appropriate Government is clearly independent of this power. It is thus clear that S. 8(f) of the Act satisfies the requirement of Art. 22(4) whereas S. 11 of the Act satisfies the requirement of the latter part of Art. 22(5) of the Constitution. The statutory provisions, therefore, when read in the context of the relevant clauses of Art. 22 make it clear that they are intended to satisfy the constitutional requirements and provide for enforcement of the right conferred on the detenu to represent against his detention order. Viewed in

this perspective it cannot be said that the power conferred by S. 11 of the Act has no relation whatsoever with the constitutional obligation cast by Art. 22(5)."

16. Again, after referring to the observations in Razia Umar Bakshi v. Union of India ((1980) 3 SCR 1398) Ahmadi, J. (as he then was) speaking for the majority observed thus :- AIR 1980 SC 1751

"This observation would show that the power of revocation conferred by S. 11 of the Act has a nexus with the right of representation conferred on the detenu by Art. 22(5) and, therefore, the State Government when requested to forward a copy of the representation to the Central Government is under an obligation to do so." para 4 of 1991 AIR SCW 2214

17. It is interesting to note that Punchi, J., though agreed with the conclusion of the majority, was not inclined to hold that S. 11 of COFEPOSA Act was part of the constitutional guarantee under Art. 22(5). The learned Judge made the following crucial remarks :-

"Have S. 11 of the Act repealed, it causes no affectation to the constitutional guarantee under Art. 22(5) of the Constitution. Correspondingly, S.11 of the Act derives no sustenance from the said Article. Both operate in mutually exclusive fields, though not as combatants."

18. The reasoning of the Constitution Bench in Kamlesh Kumar's case (supra) proceeded on similar lines as the majority view in Amir Shad Khan's case (supra).

19. The emerging result of the above discussion is that the additional remedy or safeguard provided by S. 11 has been projected into the fabric of Art. 22(5) so as to be absorbed into the ambit of safeguard provided by the latter part of Art. 22(5). A provision like S. 11 may or may not be necessary to give effect to that safeguard, but, once a provision like S. 11 finds its place in the detention law, the detenu's constitutional right to make representation gets amplified. His right extends to making representations to all those authorities who can grant him relief and the opportunity afforded to the detenu to submit such representations thus becomes a part of the guaranteed right under Art. 22(5). That is how the ratio of the above decisions has to be understood. In fact, that is how it has been understood by the detaining authority in the instant case. We find at the end of the order a note to the effect that the detenu has the right to make representations to the detaining authority, the Central Government and COFEPOSA Advisory Board against the detention. The addresses of the said authorities were also mentioned.

20. What then is the width and amplitude of the power exercisable under S. 11 by the Central/State

Governments to revoke the order of detention? Are there inherent limitations in such power? This question assumes some relevance in resolving the controversy arising in the present case. The decisions of this Court starting from Pankaj Kumar Chakrabarthy's case ((1969) 3 SCC 400) make it clear that there is qualitative difference between the manner of disposal of representation by the Government on the receipt of the report from the Advisory Board or otherwise and the manner of consideration by the Advisory Board. It was observed in the above case thus : "whereas the Government considers the representation to ascertain whether the order is in conformity with its power under the relevant law, the Board considers such representation from the point of view of arriving at its opinion whether there is sufficient cause for detention." These observations made in a series of cases where in the context of Preventive Detention Act where the order of detention is passed by the District Magistrate who in turn has to afford to the detenu the earliest opportunity of making representation to the appropriate Government. However, in K. M. Abdulla Kunhi v. Union of India ((1991) 1 SCC 476) the Constitution Bench while dealing with the case under COFEPOSA adopted the same line of approach in regard to the powers of the Government in considering the representation. While pointing out that the obligation of the Government to afford to the detenu an opportunity to make representation and to consider such representation is distinct from the obligation to refer the case of detenu AIR 1970 SC 97, AIR 1991 SC 574 : (1991 AIR SCW 362 : 1991 Cri LJ 790 along with the representation to the Advisory Board, it was observed thus :

"The Government considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, considers the representation and the case of the detenu to examine whether there is sufficient cause for detention. The consideration by the Board is an additional safeguard and not a substitute for consideration of the representation by the Government. The right to have the representation considered by the Government is safeguarded by Cl. (5) of Art. 22 and it is independent of the consideration of the detenu's case and his representation by the Advisory Board under Cl. (4) of Art. 22 read with S. 8(c) of the Act."

21. Thus, the principle is well settled that the Government in exercise of the power under S. 11 does not consider the question of sufficiency or adequacy of the grounds but it would only see whether the detention order is within the parameters of the power conferred under the statute. In other words, it will not review the case as if it is an original or appellate authority. That is why the power under S. 11 has been described as supervisory in nature as pointed out by G. P. Mathur, J. taking support from the observations in Sabir Ahmad v. Union of India ((1980) 3 SCC 295 and Sat Pal v. State of Punjab ((1982) 1 SCC 12)). Obviously, this supervisory power cannot be equated to the subjective satisfaction of the detaining authority or the power of the Advisory Board to examine whether there is sufficient material for detention. The range of consideration by the Advisory Board is thus wider. AIR 1981 SC 2230 : 1981 Cri LJ 1867

22. The proposition that the power conferred under S. 11 is supervisory does not however mean that the exercise of power is purely discretionary or that the process of consideration could be casual and superficial. No doubt, as laid down in Abdulla Kunhi's case (vide para 19), there need not be a speaking order in disposing of such representation. However, the Government has a duty to consider

the representation in proper perspective in order to see whether the order of detention is in conformity with law. The Government, should, quite apart from the points raised in the representation, apply its mind broadly to the question whether the detention is in accordance with law. For instance, if the material relied upon by the detaining authority does not ex facie establish a nexus with the pre-conditions for the exercise of the power or the conclusions of the detaining authority are found to be wholly perverse or the prescribed procedure has not been followed by the detaining authority, the appropriate Government acting under S. 11 has a duty to interfere and revoke the order of detention. In order to achieve this end, the Central Government must necessarily have regard to the representation, the report received from the State Government, the detention order and the material relied upon the detention order or referred to in the representation. The exercise of the power under S. 11 should not be a mere formality or a farce. Care and vigilance should inform the action of the Government while discharging its supervisory responsibility. As observed in Haradhan Saha's case (1975) 3 SCC 198) and reiterated in K. M. Abdulla Kunhi's case, what is required is "real and proper consideration." The following observations in Abdul Karim , are quite apposite in this context : AIR 1974 SC 2154 : 1974 Cri LJ 1479

AIR 1969 SC 1028 : 1969 Cri LJ 1446, para 11

". . . . . .But it is a necessary implication of the language of Art. 22(5) that the State Government should consider the representation made by the detenu as soon as it is made, apply is mind to it and, if necessary, take appropriate action. In our opinion the constitutional right to make a representation guaranteed by Art. 22(5) must be taken to include by necessary implication the constitutional right to a proper consideration of the representation by the authority to whom it is made. The right of representation under Art. 22(5) is a valuable constitutional right and is not a mere formality. . . . . ."

23. The same proposition has been highlighted by Rajendra Babu, J. by observing that "there should be full and independent application of mind."

24. The next and most relevant point to be considered in the present case is whether in the absence of translated copies of the relevant documents referred to in the detention order, there could have been proper and effective consideration by the Central Government. To put it in other words, whether the decision making process under AIR 1981 SC 431 : 1980 Cri LJ 1487, AIR 1981 SC 1191 : 1981 Cri LJ 889

S.11 of the Act is vitiated by non-application of mind by reason of the fact that the translated copies of the documents were not available with the concerned officials of the Government who may be unacquainted with the particular language? In our view, the question whether any or all of the documents which formed the basis of the detention order should be before the Central Government or not, depends on the facts of each case. There can be no hard and fast rule that the appropriate Government called upon to take a decision under S. 11 should necessarily have copies of all the documents relied upon by the detaining authority with the translated version thereof. In the context

of the guarantee under Art. 22(5), it was laid down that "if the documents which form the basis of the order of detention were not served on the detenu along with the grounds of the detention, in the eye of law, there would be no service of the grounds of detention and that circumstance would vitiate the detention and make it void ab initio (vide observations in M. Ahmed Kutty v. Union of India ((1990) 2 SCC 1) and Shalini Soni v. Union of India ((1980) 4 SCC 544)). It was also clarified in a series of decisions that it is unnecessary to furnish copies of documents to which casual or passing reference is made and which are not relied upon by the detaining authority (vide LMS Ummu Saleema v. B. B. Gujaral ((1981) 3 SCC 317 etc.). We are of the view that the proposition laid down by this Court that the copies of translated documents forming the basis of the detention order should be furnished to the detenu in order to give effect to the guarantee enshrined in Art. 22(5) cannot be imported while dealing with the question in the context of exercise of power of revocation under S. 11 on the basis of representation or otherwise. The question whether there was due consideration of representation has to be judged by general principles of administrative law. There is no constitutional requirement express or necessarily implied that the authority considering the representation should have before it all the documents referred to in detention order with translated version thereof. But, the availability or non-availability of such documents with the empowered authority under S. 11 will only have bearing on the manner of consideration of representation, which in turn depends on the facts of a particular case. The endeavour of the Court in this regard is only to assess whether there was fair and proper consideration by the Government by applying its mind to the crucial aspects warranting its attention. The necessity or otherwise of having copies of documents should be viewed in that light. The Court has to be satisfied that there was due application of mind to the crucial aspects. The points raised by the detenu in the representation would naturally assume importance, as pointed out by Mathur, J. though the Government ought not to confine itself to the points highlighted in the representation alone. If, for the purpose of appreciating the points in the representation, the documents are required to be seen, naturally, the Central Government will be failing in its duty if it does not call for the documents with translation. For instance, the detenu may say that a particular statement relied upon in the detention order is something different and it was misread. The document has to be necessarily seen to appreciate that point. That apart, the Government shall have a clear idea of the nature of incriminating material against the detenu. If the detention order does not spell out the details thereof, but only makes a bare reference, here again, the need to peruse the crucial documents or statements so as to judge the validity of detention does arise; otherwise the Central Government will not be fulfilling the supervisory responsibility cast on it in the manner expected of it. However, we hasten to add that there can be no rule similar to the one laid down in the context of detenu's right under the first part of Cl. (5) of Art. 22. The question whether there could have been due application of mind and proper consideration of representation by the Government in the absence of crucial documents/translated copies thereof has to be decided on case to case basis. The approach cannot be abstract and unrealistic. No inflexible rule of general application can be laid down. However, we would like to make it clear that if in a given case, the perusal of certain documents becomes necessary, it is no answer to say that the translation involves delay. It is trite to say that where there is reasonable explanation for delay, the detention does not get invalidated.

25. Now, let us examine the factual situation in the instant case.

26. A perusal of the detention order would reveal that the statements of Anodiyal Mammu, who was

intercepted at the Airport and that of the detenu and the statements of all others recorded under S. 108 of Customs Act as well as the subsequent letters retracting from the earlier statements were referred to in the detention order elaborately and exhaustively. The statements are almost verbatim extracted in the detention order. We find them at pages 29 to 49 of the Paper Book. The contents of the letters received from the Assistant Commissioner of Customs and the counsel for A. Mammu have also been referred to in paras 10 and 17. When the detention order itself makes an elaborate reference to the statements/letters of concerned persons which were either relied upon or rejected by the detaining authority in the detention order, the authority exercising the power under S. 11 would, in no way be handicapped in dealing with the issue in general and the representation in particular. In the representations made by the petitioner (detenu's wife) - the English version of which were on the record of Central Government, the plea taken was that the statements were obtained under threat and coercion and that is why they retracted from the previous statements. Of course, certain other grounds were urged which are not relevant for the purpose of examining the issue with which we are concerned. On the facts alleged or points raised, there was really no need to have access to any of the documents referred to in the detention order. Having regard to this factual situation, we do not think that the Central Government should necessarily have the translated copies of the documents referred to and relied upon in the detention order and that the absence of such documents has vitiated the consideration of the representation, nor can it be said that there was no application of mind on the part of the Central Government for the simple reason that the translated copies of the documents were not available before it. The physical availability of such documents or translated version thereof, would have made no difference as regards the disposal of representation or the consideration of the question whether the detention was in conformity with law. As already stated, the very perusal of the detention order would give a clear picture of the incriminating material relied upon by the detaining authority. In the circumstances, to insist on the perusal of original or true copies of statements and other documents referred to in the detention order would amount to insisting on an empty formality. The constitutional guarantee does not go to that extent.

27. Thus, the only contention raised before us touching on the validity of detention order has to be negatived. The writ petition and criminal appeal are, therefore, dismissed.

28**. S. B. SINHA, J. :-** The nature of power of the Central Government while disposing of a representation made by a detenu or on his behalf is the question involved herein which arises out of a difference of opinion between two Hon'ble Judges of this Court.

29. The power of the Central Government to revoke an order of detention is contained in S. 11 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (hereinafter referred to as 'the Act,' for the sake of brevity). Concededly, the right to make a representation in terms of S. 11 of the Act is a constitutional safeguard provided for under Art. 22(5) of the Constitution of India. In terms of the said provision, the Central Government gets two opportunities to consider the question as to whether the order of detention passed under the Act is in accordance with law and consequently should be confirmed or revoked. In terms of S. 3(2) of the Act, the State Government is required to submit a report whereupon the Central Government is required to pass an order. The power of the Central Government to pass an order of revocation of the order of detention

on the basis of the representation made by a detenu or on his behalf, however, stands on a different footing. The jurisdiction of the Central Government in the latter case is not as limited as in the former one wherein merely upon consideration of the report of the detaining authority or the State Government, it is required to apply its mind for the purpose of taking a decision as to whether it is necessary to interfere with the order of detention by way of affirmation or modification thereof.

30. The larger jurisdiction of the Central Government must be exercised having regard to : (1) whether the order of detention has been legally passed; (2) whether the grounds of detention are adequate; and (3) whether in the facts and circumstances, the same was justifiable.

31. In other words, the consideration of the matter on the basis of a report made in terms of S. 3(2) and on a representation made by a detenu or on his behalf, bears a fundamental difference. While exercising its jurisdiction under S. 11(1)(b) of the Act, on a representation of the detenu, having regard to the fundamental right of a detenu under Art. 22(5) of the Constitution of India, the probe must be deeper. The Government is required to determine whether the order of detention is permissible under law or not; whereas at the first stage, the correctness of the order of detention per se would not fall for decision but only the legality or the duration thereof would.

32. It is beyond any cavil that the obligations of the State or the detaining authority in terms of Cl. (5) of Art. 22 are : (1) to communicate to the detenu the grounds on which the order of detention has been made; (2) to afford the detenu the earliest opportunity of making a representation against the detention order.

33. Article 22 does not state that the representation is to be made before whom. Whether a representation can be made before one or the other authority including the detaining authority would depend upon the nature of the legislation whereby and whereunder, the order of detention has been passed. Whereas under one enactment it may not be permissible for detenu to make a representation before the Central Government it may be so permissible under another.

34. Violation of the provisions of foreign exchange regulations necessitating passing of an order of detention under the Act has not only nationwide repercussion but also trans-national. The Central Government has a great role to play in the matter although the order of detention may be passed by an authority of the State Government specified therefor. The Central Government in that view of the matter has to apply its mind independently. A distinction must be borne in mind that whereas the power of supervision is conferred on the Central Government while passing an order on the basis of a report made under S. 3(2) of the Act, its function under S. 11(1)(b) while considering a representation is wider. While determining the merit or otherwise of such a representation no order of the State Government or the Advisory Board or any other authority entitled to dispose of such representation made by a detenu to them may or may not be before it.

35. Having regard to the federal structure of our Constitution, the Central Government exercises its supervisory power only while considering a report in terms of S. 3(2) of the Act although the power of detention is concurrent. The expression 'at any time' are significant in terms whereof the Central Government can exercise its power at different times that is to say if and when an occasion arises therefor. The right of a detenu to make representation is a fundamental right under Art. 22 of the Constitution; whereas the forums therefor are provided under the statute involved for issuing the order of detention.

36. A right of the detenu to make representation has to be construed in the light of the constitutional mandate that ordinarily no person can be detained without trial. This Court of India in several decisions categorically held that the the detenus can make representations before the detaining authority and the Central Government besides the Advisory Board and the said authorities are obligated to pass an effective order thereupon.

37. It is well settled that the documents on the basis whereof the detaining authority arrived at his subjective satisfaction must be supplied to the detenu as on the basis thereof opinion has been formed to the effect that the order of preventive detention is required to be passed against the detenu. The detaining authority is, thus, required to supply all documents as a part of the ground or pari passu with the ground. The detenu, there cannot be any doubt whatsoever, has a right to demand copies of the documents which have not been supplied to him. Such documents can be sub-divided into two parts, namely (a) the documents which had been relied upon by the detaining authority as forming the basis of detention; and (b) additional documents which may be required by the detenu to show that such order of preventive detention was unwarranted.

38. If the documents so supplied are in a language which is unknown to the detenu, the correct translated copies thereof must be made available to him. Even the copies of the documents supplied must be legible and complete.

39. The formalities are not empty ones. 'The history of liberty,' said Frankfurter, J. in McNobb v. US (318 US 332, 347 : 87 L Ed 819, 827) 'has largely been the history of observance of procedural safeguards.' (See also Mohinuddin alias Moin Master v. District Magistrate, Beed and others (1987) 4 SCC 58). All procedural safeguards provided to a detenu being constitutionally imperative must be scrupulously followed. AIR 1987 SC 1977

40. In Sat Pal v. State of Punjab and others ((1982) 1 SCC 12), it is stated : AIR 1981 SC 2230 : 1981 Cri LJ 1867

"9. Although it was earlier thought that S. 14 of the Maintenance of Internal Security Act, 1971, which was in pari materia with S. 11 of the Act, did not confer any right or privilege on the detenu, there is a general consensus of opinion that the power of revocation conferred on the Central Government under S. 11 of the Act is a supervisory power, and is intended to be an additional check or safeguard against the improper exercise of its power of detention by the detaining authority or the State Government.

10. The power under S. 11(1)(b) may either be exercised on information received by the Central Government from its own sources including that supplied by the State Government under S. 3(2), or, from the detenu in the form of a petition or representation. It is for the Central Government to decide whether or not, it should revoke the order of detention in a particular case. The use of the words "at any time" in S. 11, gives the power of revocation an overriding effect on the power of detention under S. 3. Ordinarily, the Central Government would in a case like the present under the Act, like to await the report of the Advisory Board under S. 8(c), before taking any action under S. 11(1)(b) but the circumstances may differ, and there may be a case where the Central Government finds that the order of detention passed under S. 3 is mala fide or constitutes an abuse of power on the part of the State Government or an officer of the State Government specially empowered in that behalf, it may "at any time" revoke the order of detention. The detenu has, therefore, the right to approach the Central Government by a representation for revocation of his order of detention under S. 11(1)(b) and when such a representation is made, the State Government has the corresponding duty to forward it to the Central Government for necessary action."

41. It is not in dispute that in the instant case the grounds of detention served upon the detenu were based on certain documents; some of them being : (1) the statement of Shri Anodiyil Mammu purported to be made under S. 108 of the Customs Act, 1962; (2) the statement of the detenu before the Senior Intelligence Officer on 24-12-2000; (3) the statement of Shri Mujeeb V. alias Mujeeb Rahman purported to be made under S. 108 of the Customs Act on 25-12-2000; (4) the statement of Shri Rafeeq K. yet made under S. 108 of the Customs Act on 25-12-2000.

42. All those documents were in Malyalam script. The representation of the petitioner was also in Malyalam. The purported retraction of the confession made by the detenu in his bail application was also in Malyalam. Anodiyil Mammu also at a later stage claimed the ownership of foreign currency in his representation dated 15-1-2001 retracting from his earlier statement.

43. It is not in dispute that the authorities of the Central Government empowered to deal with the representation of the detenu did not have any knowledge in Malyalam and no assistance had been obtained from any Malyalam knowing person.

44. In paragraph 18 of the order of detention not only the statements of the witnesses were relied upon but also the alleged confession of the detenu had been.

45. Such purported confession has been retracted in the bail application filed by the detenu which was also in Malyalam. It is not dispute that the correct translated copies of such documents were not available before the authorities.

46. The question which arises for consideration is whether non-availability of the translated copies of the basic documents would vitiate the order of detention?

47. In Amir Shad Khan etc. v. L. Hmingliana and others ((1991) 4 SCC 39), a three-Judge Bench of this Court while referring to the decision of this Court Razia Umar Bakshi (Smt.) v. Union of India and others ((1980) Supp SCC 195) and distinguishing Smt. Gracy v. State of Kerala and another ((1991) 2 SCC 1) observed that a request made by the detenu to the State Government to forward his representation to the Central Government cannot be refused as such a right emanates from Art. 22(5) of the Constitution of India read with S. 11 of the Act. The said decision is, therefore, an authority for the proposition that a right of making representation for revocation of the order of detention in terms of S. 11 of the Act is a constitutional right under Cl. (5) of Art. 22 of the Constitution of India. AIR 1991 SC 1983 : (1991 AIR SCW 2214 : 1991 Cri LJ 2713

(AIR 1980 SC 1751) AIR 1991 SC 1090 : (1991 AIR SCW 559

48. The said decision has been affirmed by a Constitution Bench in Kamleshkumar Ishwardas Patel etc. etc. v. Union of India and others ((1995) 4 SCC 51) stating :

"38. Having regard to the provisions of Art. 22(5) of the Constitution and the provisions of the COFEPOSA Act and the PIT NDPS Act the question posed is thus answered : Where the detention order has been made under S. 3 of the COFEPOSA Act and the PIT NDPS Act by an officer specially empowered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person detained to make a representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an officer specially authorised by a State Government and to the Central Government where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation."

49. This Court in John Martin v. State of West Bengal ((1975) 3 SCC 836) observed : AIR 1975 SC

"3. The first contention urged by Mr. R. K. Jain on behalf of the petitioner was that the representation of the petitioner ought to have been considered by an impartial Tribunal constituted by the State Government and it was not sufficient compliance with the requirement of Art. 22, Clause (5) that it should have been considered only by the State Government. This contention was sought to be supported by reference to certain observations of Fazl Ali, J., and Mahajan, J., in A. K. Gopalan v. State of Madras (1950) SCR 88 : AIR 1950 SC 27 : 51 Cri LJ 1383). Now it is true that Fazl Ali, J. observed in this case that :

the right to make a representation which has been granted under the Constitution must carry with it the right to the representation being properly considered by an impartial person or persons. . . . . the Constitution of an Advisory Board for the purpose of reporting whether a person should be detained for more than three months or not is a very different thing from constituting a Board for the purpose of reporting whether a man should be detained for a single day.

and Mahajan, J. also said :

the right has been conferred to enable a detained person to prove his innocence and to secure justice, and no justice can be said to be secured unless the representation is considered by some impartial person. . . . . it follows that no justice can be held secured to him unless an unbiased person considers the merits of his representation and gives his opinion on the guilt of innocence of the person detained. In my opinion the right cannot be defeated or made elusive by presuming that the detaining authority itself will consider the representation with an unbiased mind and will render justice. That would in a way make the prosecutor a Judge in the case and such a procedure is repugnant to all notions of justice.

But we do not think that these observations made by two out of six learned Judges can be regarded as laying down the law on the point. Since A. K. Gopalan's case there has been a long catena of decisions of this Court where the view has consistently been taken that the representation of the detenu must be considered by the State Government. Article 22, Cl. (5) provides inter alia that the authority making the order of detention shall afford the detenu the earliest opportunity of making a representation against the order of detention. It does not say as to which is the authority to which the representation shall be made or which authority shall consider it. But S. 8, sub-section (1) of the Act lays down in the clearest terms which admit of no doubt that the opportunity which is to be afforded to the detenu is to make a representation against the order of detention to the appropriate Government. Therefore, it is indisputable on a plain reading of S. 8, sub-section (1) that the representation that may be made by the detenu is to the appropriate Government and it is the appropriate Government which has to consider the representation."

It was observed :

"It may be pointed out that both the decisions in Jayanarayan Sukul's case and Haradhan Saha's case were decisions rendered by a Bench of five-Judges. We must, therefore, hold that under S. 8(1) of the Act, it is the appropriate Government that is required to consider the representation of the detenu. This, however, does not mean that the appropriate Government can reject the representation of the detenu in a casual or mechanical manner. The appropriate Government must bring to bear on the consideration of the representation an unbiased mind. There should be, as pointed out by this Court in Haradhan Saha's case, a "real and proper consideration" of the representation by the appropriate Government. We cannot over-emphasise the need for the closest and most zealous scrutiny of the representation for the purpose of deciding whether the detention of the petitioner is justified."

50. Yet again in Kundanbhai Dulabhai Shaikh etc. v. Distt. Magistrate, Ahmedabad and others etc. ((1996) 3 SCC 194), this Court held : AIR 1996 SC 2998 : (1996 AIR SCW 1281 : 1996 Cri LJ 1981

"13. Apart from the above, Section 14 of the Act provides that order of detention may be revoked either by the State Government or by the Central Government. The Central Government can revoke even those orders which have been made by the State Government. The Act also provides that within seven days of the making of an order of detention, copy of the order as also the grounds on which the order was passed shall be sent to the Central Government."

51. It is, therefore, trite that all facts which are relevant for the purpose of giving relief to the detenu are required to be considered. In that view of the matter, the quality of an order passed by the Central Government in terms of S. 11(1)(b) of the Act cannot be different from that of the authority which had passed the order.

52. In Kamleshkumar Ishwardas Patel (supra), this Court held :

"7. The learned Additional Solicitor General has urged that the representation envisaged by Art. 22(5) has to be made to the Advisory Board referred to in Art. 22(4) since the only right that has been conferred on the person detained is to have the matter of his detention considered by the Advisory Board. The learned Additional Solicitor General drew support from the words "making a representation against the order" in Art. 22(5) for this submission and contended that the use of the word 'a' in singular indicates that only one representation is to be made and that representation has to be made to the Advisory Board because that is the only authority contemplated under the Constitution which is required to consider such representation. We are unable to give such a

restricted meaning to the words "making a representation against the order" in Art. 22(5) which is in the nature of a fundamental right affording protection to the person detained. As stated earlier, the object underlying the right to make a representation that is envisaged by Art. 22(5) is to enable the person detained to obtain immediate relief. If the construction placed by the learned Additional Solicitor General is accepted relief may not be available to the detenu till the matter is considered by the Advisory Board and that would depend upon the time taken by the appropriate Government in referring the matter to the Advisory Board. Moreover, reference is required to be made to the Advisory Board only in cases where the period of detention is going to be longer than three months and it is not obligatory to make a reference to the Advisory Board if the period of detention is less than three months. In such a case the right to make a representation under Cl. (5) of Art. 22 would be rendered nugatory. A construction which leads to such a result must be eschewed."

53. In deducing the aforementioned principles, it is not necessary to expand the meaning of Cl. (5) of Art. 22 of the Constitution of India but what is necessary is to grant the benefit to which a detenu is entitled to under the law. The statute confers power upon the statutory authorities to consider representations for the purpose of grant of relief and as such there cannot be any justification for placing any limitation thereupon. It, therefore, must be held that while exercising such a power the Central Government must have before it the basic, primary and material documents which are necessary for the purpose of grant of relief to the detenu.

54. I may, however, hasten to add that the documents which are not material need not be considered. (See Abdul Sathar Ibrahim Manik etc. v. Union of India and others,AIR 1991 SC 2261). 1991 AIR SCW 2603 : 1991 Cri LJ 3291

55. While considering a representation of the detenu, the Central Government obtains parawise comments of the sponsoring authority. The order of detention and the grounds in support thereof may not be sufficient to consider the issues raised in the representation. The Central Government in its affidavit itself stated that if situation so warrants, the assistance of an official/person conversant with the language of the representation is obtained in order to get any point of doubt, if any, clarified vis-a-vis the plea raised in the representation.

56. The contention that the jurisdiction of an authority dealing with liberty of a citizen and the jurisdiction of an authority in administrative matter would be on the same footing may not be correct. Liberty of a citizen must be protected with deeper consideration than an administrative order. Any order passed without application of mind would be a nullity.

57. In my opinion, thus, the Central Government must be possessed of correct translated copies of the basic documents at the time of disposal of a representation under the said Act.

58. How to ascertain as to whether the order of the Central Government suffers from the vice of non-application of mind is the next question.

59. The order dated 25-7-2002 has been placed before us. The note sheet shows that the representation of the petitioner was received on 13-7-2002. The parawise comments were called for on 18-7-2002 which were received on 25-7-2002. The D. S. Shri Vijay K. Sharma on the same day prepared a note stating briefly the main points raised by the representationist stating :

"The main points raised by the representationist are as under :

(i) that the detenu does not know English but the grounds of detention were not given to him to the language known to him i.e. Malyalam;

(ii) that the detenu was made to write statement dictated by the Customs Officials;

(iii) that at the relevant time the detenu was not in Trivandrum when Shri Anodiyil Mammu, the other co-accused was intercepted;

(iv) that the order dated 16-5-2002 of the Customs Department consisting of 19 pages was given to the detenu which was in English language; and

(v) that the reasons for detention in the detention order and in the grounds of detention are different."

60. Thereafter, the parawise comments of the sponsoring authority were noted which are in the following terms :

"(i) The Sponsoring Authority have clarified that Malyalam translation of grounds of detention and all the documents generated by/from the Department as also other correspondence in connection with the case has been served on the detenu.

(ii) The detenu gave his statement in his own handwriting and in his own free will. Moreover, the Sponsoring Authority have further clarified that the statements of other co-accused corroborate the statement of the detenu. Further neither of the two employees of the detenu have retracted their statement.

(iii) The Sponsoring Authority have clarified that there is no relevance to the contention of the representationist that the detenu was not present at Trivandrum at the time of interception of Shri Anodiyil Mammu as the detention of the detenu is for his activities prior to the smuggling of foreign currencies like arranging the carrier passenger, giving foreign currencies for concealing and smuggling the same out of India.

(iv) The Sponsoring Authority have clarified that the order dated 16-5-2002 is an adjudication order in original of the Commissioner of Central Excise and Customs, Cochin Commissionerate in the seizure of foreign currencies in which the detenu is one of the accused. Since the order has been issued at a later date i.e., after the passing of the detention order, a copy of the same was not served on the detenu.

(v) The Sponsoring Authority have clarified that both the grounds of detention and the detention order make it explicitly clear that the detenu is detained under S. 3(1)(i), 3(1)(ii), 3(1)(iii) and 3(1)(v) of the COFEPOSA Act, 1974."

Shri Sharma observed :

"In view of the above, it is seen that the points raised by the representationist, are baseless. Her representation, therefore, deserves to be rejected."

61. The Joint Secretary, COFEPOSA who was competent to pass the order on behalf of the Central Government by a non-speaking order agreed therewith stating :

"I agree with D.S. (C)'s analysis above. There is no merit in the representation and the same merits rejection. Considered. May be rejected."

62. It, therefore, does not appear that the appropriate authorities of the Central Government considered the representation and the documents referred to therein as also the necessity of such documents requiring regional language to be translated and the effect thereof. The said authority evidently had not considered the fact that the purported statements made by the witnesses under S.

108 of the Customs Act and the alleged confession of the detenu had been retracted as well as the effect thereof.

63. The grounds of detention may contain the summary of the statements of the witnesses or the detenu; but despite the same entire statements are required to be supplied to the detenu. In the representation made by the detenu or on his behalf, it may be pointed out that the statements made by any person linking him with the alleged violation are factually incorrect or such statements have been misconstrued or misapplied by the detaining authority. A plea is also possible to be raised that the statement of a witness was misread by the detaining authority. The statements extracted in the ground of detention may contain some other lacuna and thus it would be no answer to the procedural safeguards contained in Art. 22(5) of the Constitution.

64. If such a factor is taken into consideration, we would be bringing in indirectly the "prejudice doctrine" in a preventive detention matter. Even such a contention has not been raised by the learned counsel appearing on behalf of the Central Government or the State of Kerala.

65. In a matter of this nature only one question is required to be asked i.e. 'whether translated copies of the primary documents were before the Central Government, and if the answer is in the negative; the order of detention must be quashed. The Court exercising its power of judicial review would not embark into any other question nor would it itself examine the matter for the purpose of ascertaining as to whether there has been substantial compliance of constitutional requirements.

66. A judicial review of a matter dealing with liberty of a citizen must receive stricter consideration keeping in view the human right aspect in mind. (See International Transport Roth GmbH v. Secretary of State for the Home Department, 2002 (3) WLR 344).

67. The contention raised that by calling for the translation documents relied on by the detenu, a delay would be caused is of no moment. Such delay, if reasonable, is always condoned by the Courts while exercising their jurisdiction of judicial review.

68. For the reasons aforementioned, I respectfully dissent with the opinion of P. V. Reddi, J. and I am of the opinion that the opinion of Rajendra Babu, J. laid down the law correctly in the facts and circumstances of the present case.

69. In view of the majority opinion delivered by Hon'ble Mr. Justice P. Venkatarama Reddi, on behalf of himself, and Hon'ble the Chief Justice, the criminal appeal and writ petition are dismissed.

Appeal/petition dismissed.