

Ramkumar Vs. Union of India (Uoi)

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Court : Madhya Pradesh

Decided On : Sep-14-1989

Reported in : 1990CriLJ546

Judge : V.D. Gyani and ;A.G. Qureshi, JJ.

Acts : [Conservation of Foreign Exchange And Prevention of Smuggling Activities Act, 1974](#) - Sections 3, 3(1) and 5; [Constitution of India](#) - Articles 21, 22, 22(5), 22(6) and 226; National Security Act - Sections 3; Prevention Detention Order; Customs Act - Sections 108

Appeal No. : M.P. No. 829 of 1989

Appellant : Ramkumar

Respondent : Union of India (Uoi)

Advocate for Def. : B.G. Neema, Standing Counsel

Advocate for Pet/Ap. : J.P. Gupta, Adv.

Disposition : Petition allowed

Judgement :

V.D. Gyani, J.

1. By this petition under Article 226 of the [Constitution of India](#), the petitioner prays for issuance of a writ of Habeas Corpus and for setting aside the Preventive Petition Order dated 17-6-1989 (served on the petitioner on 31-5-1989) passed by respondent No. 2, in exercise of powers conferred under Section 3(1)(iii) of the [Conservation of Foreign Exchange And Prevention of Smuggling Activities Act, 1974](#) (for short, the Act).

2. Respondent No. 3 herein is the sponsoring authority, while respondent No. 4 is the in charge of Central Jail, Indore.

3. Respondent claimed having prior information and a constant vigil being kept near Rajani building near Mahatma Gandhi Road, Indore, where, according to the information, a sizable quantity of foreign-mark gold was likely to be carried by the petitioner for further delivery, and a Maruti Car bearing Registration No. CIF-1529, carrying foreign-mark gold biscuits, was intercepted in New Palasia, Indore. The petitioner was found to be occupying the same.

4. The petitioner was arrested by an Inspector of Central Excise on 3-4-1989, around 11.30 hrs. and was ordered to be released on bail by the Sessions Judge, vide order dated 6-4-1989. This release order was initially made operative till 10-4-1989 and again when the petitioner's bail petition was fixed for final hearing, on 10-4-1989, the petitioner was ordered to be released on bail on the same terms and conditions as were imposed by order dated 6-4-1989. After his release on bail, the Preventive Detention Order, filed as Annexure-1 by the petitioner, came to be passed. It is this order, which is under challenge in this petition.

5. There is a material difference in the case as put-forth by the petitioner and the respondents on the point as to the circumstances leading to the petitioner's interception and what subsequently transpired after the petitioner's interception. Without going into the controversial facts, the fact remains that the petitioner was arrested for carrying 52 foreign-mark gold biscuits, weighing 10 tolas each.

6. I propose to defer for the present, the array of arguments advanced by Shri Gupta, learned counsel for the petitioner, in the utmost intensity of subjective passion, with full consciousness of the iron frame of law and pick those points

which do not admit of much elaboration, without making the concept and abstractions more important, than what is actual and particular.

7. The first point in this category is the petitioner's knowledge of English language in which admittedly the grounds of detention whatever they be, were actually supplied, to the detenu, whose grievance is that for want of knowledge of the English language, he was deprived of an opportunity of making an effective representation against his preventive detention.

This ground has been specifically raised in paragraph 6(z-3) and (z-4) of the petition. It reads as follows:

'The detention order has observed in para 11 'A copy of these grounds and copies of Panchanama, statements and documents in Hindi language known to you are enclosed.' The order of detention, the grounds of detention and copies of various documents had not been given to the petitioner in Hindi. Despite the fact that petitioner, through his letter dated 18-4-1989 has brought it to the notice of excise authorities that Shri Kasbekar, Shri Daveshe, Shri Parmanand Sisodia and Shri Shailendra Dwivedi, Advocate, Indore, are material witnesses, but they have not been examined by the sponsoring authority or any Central Excise Officer under him. No copies of statements had been supplied to detaining authority. Hence this vital and relevant material has not been placed before detaining authority for his consideration. The petitioner attracted the attention of the detaining authority through his letter dated 10-6-1989, copy whereof is annexed hereto and marked Annexure-(18), that as per detention order, the petitioner was to be supplied copies of documents in Hindi as petitioner knows. Hindi, but the same has not been done. Despite request petitioner has not been supplied with copies of these documents in Hindi. It is relevant here to mention that petitioner's knowledge of English language is very limited and elementary and non-supply of documents in Hindi has seriously prejudiced the petitioner.'

8. The respondents in their return in response to this ground aver as follows:

'The petitioner in his own deposition before the Superintendent (Prev) had stated that he has a good knowledge of English and can read, write and understand the

language. Moreover, his letter dated 17-4-1989, speaks itself of the petitioner's knowledge of English (petitioner's letter dated 17-4-1989, is marked as Annexure-R/5.)

The petitioner's letter dated 18-4-1989 was placed before the detaining authority and the same has been examined. As far as material witnesses are concerned, the 52 F.M. Gold Biscuits have been found in the Car-CIF-1529, which was in possession, custody, and control of Shri Ramkumar Agarwal and registered in the name of Shri Ram Kumar. The process of search and seizure have been witnessed by two independent witnesses. Moreover, the story constructions vide the petitioner's letter dated 18-4-1989 is a concocted story, basically to escape the clutches of law. As far as supplying the documents in English is concerned, the petitioner has deposed voluntarily that he can read, write and understand English language.

9. Shri Neema, learned counsel for the respondents, submitted that a mere glance at Annexure-R/5, would show that the detenu had in fact sufficient knowledge of English, as it was he who had submitted the above letter, Countering this argument, petitioner's counsel submitted that mere fact that a detenu submits an application in English, drafted by his counsel, would not necessarily mean that the person was conversant with English. Pointing out that this application has been signed by the detenu in Hindi, he added that it is a matter of common knowledge that typed petitions, applications and appeals drafted by counsel in English are invariably signed at times thumb-marked by accused or litigating parties, but that would not mean that they all know English.

10. The law requires that grounds of detention must be furnished to the detenu in a language which he understands. There is no communication of grounds of detention if they are in a foreign language, which the detenu swears on oath that he does not know. Except for placing on record Annexure-R/5, an application submitted by the detenu, and relying upon the same, the respondents have placed no other material, so as to dislodge the averments made on oath by the petitioner, suffice it to note at this stage, that the order of the detaining authority (Annexure-1) itself shows that it was necessary to supply him the documents in Hindi and the

authority was satisfied about it. This ground will again be considered in some more detail, while dealing with the question of supply of documents to the detenu.

11. There is a counter-affidavit by the respondents examining it carefully, how can it be said that the detenu knows English? Except for Annexure-R/5, there is no other material so as to enable the Court to reach a conclusion that the detenu knows English. It is not the respondents case that he had sufficient schooling or education. Their sole basis is Annexure-R/5. How can knowledge of English be imputed to the detenu on this basis? Shri Neema referring to the representation, Annexure-R/5, argued that considering the points raised by the detenu in his representation, it must be presumed that he had fully understood the grounds of detention in English. In any case, there was no prejudice caused to him.

12. The detenu at the very outset of his representation made it clear that although he was submitting a representation on the basis of whatever he could follow or make out of the grounds, he still maintained that he was not conversant with the English language and was thus seriously hampered in making an effective representation. This qualifying statement made at the very outset of the representation cannot be ignored.

13. As for prejudice, suffice it to say, that it is not so, much of a question of any prejudice being caused to the detenu than the question of compliance of a mandatory provision of law. The detention order is liable to be set aside on this short ground alone and is accordingly set aside.

14. The detenu by his letter dated 10-6-1989, addressed to the detaining authority asked for certain material documents. The return says that this letter was not received. The fact that it was handed over to the Jail Superintendent is amply borne out by the acknowledgement made by the Jail authorities, vide letter Annexure-18, which is on record. Not only this, the stand taken by the respondents, that the said letter was not received, again stands belied by the endorsement by the Jail authorities, stating that the said letter dated 10-6-1989 was in fact sent to the detaining authority. This is a clear case of depriving a detenu of an opportunity of making an effective representation. Non-supply of documents in spite of demand by the detenu, is a serious matter. Even assuming

for the sake of argument that the demand letter was not received (although the documents on record indicate otherwise), how can the detenu be penalised for that? The fact that he did ask for documents is amply established.

15. In fact, notwithstanding the denial made by the respondents, it is apparent from the order dated 17-7-1989, rejecting petitioner's representation. It is also evident from the Annexure appended to the rejection order, particularly paras 3(a), (b), (c), (d), (e) and (f) thereof, that the documents sought by the detenu vide his letter dated 10-6-1989 and not supplied to him were in fact made use of by the Detaining Authority.

16. Even on this ground, as well, the Detention Order deserves to be quashed and is accordingly quashed.

17. This is a case where the Detaining Authority has not come out with an affidavit in support of the order passed by him. Shri Gupta, learned counsel enumerated the following grounds, which made it incumbent upon the Detaining Authority to swear a counter-affidavit:

(1) -- There is a direct allegation that Shri Batabyal, that Detaining Authority does not know Hindi.

(2) -- Allegation that there has been no application of mind in passing the impugned order;

(3) -- Allegation that letter dated 10-6-1989, sent by the detenu through Jail authorities, not received by the detaining authority--required his affidavit;

(4) -- An allegation made in the petition that non-disclosure of information on the plea of 'public interest' was a colourable exercise of power by the detaining authority;

18. It cannot be gainsaid that all the above points require the affidavit of the detaining authority, if the allegations as made by the petitioner, are to be rebutted.

19. It may also be noted that there is not a word by way of explanation, as to why Shri Butabyal, the detaining authority, could not himself file a counter-affidavit.

20. Since it is a question of subjective satisfaction of and application of mind by the detaining authority, it is necessary that he should, as a general rule, come forward with an affidavit. It is only in exceptional circumstances that the filing of affidavit by the detaining authority may be dispensed with, but for such a course some justification or explanation must be placed before the Court. Unfortunately, there is none, in this case. It may also be noted that the affidavit filed by the Officer-in-charge is of no help to the respondents. He has not, at any stage, handled or processed the case. The affidavit is solely based on record. How can he say, and what can he say about the colourable exercise of power by the detaining authority? It is for him and him alone the detaining authority to explain and rebut the allegation. It is not the respondents' case that the detaining authority is not available in the real sense, that no affidavit could be sworn and filed by him. A host of authorities were cited by. Shri Gupta on this point, and they are mentioned below, but to my mind, it is not necessary to deal with them, as the propositions laid down therein have not been disputed or distinguished. The authorities cited are; Shaik Hanif v. State of W. B., AIR 1974 SC 679 : (1974 Cri LJ 606), Jagdishprasad v. State of Bihar; AIR 1974 SC 911: (1974 Cri LJ 764): (AIR 1974 SC 2305): (1974 Cri LJ 1534), Ranjit Dam v. State of W.B. AIR 1972 SC 1763, Devi Lal Mahto v. State of Bihar, AIR 1982 SC 1548 : (1982 Cri LJ 2363) and Mohinuddin v. Distt. Magistrate Beed, AIR 1987 SC 1977.

21. In the result, the detention order cannot be sustained and is liable to be quashed.

22. Shri Gupta also raised the point that there was undue delay in disposal of petitioner's representation dated 14-6-1989, which was rejected on 17-7-1989, and communicated to the petitioner on 23-7-1989. Shri Neema, on the other hand submitted that no time limit has been fixed by law for deciding a representation, hence it could not be contended that there was undue delay.

23. Where there is no time limit prescribed reasonable time can fairly be presumed. It took one month and three days for the respondents to decide the representation submitted by the petitioner. Now, how can this delay be justified. Although there is nothing in the return or the affidavit on this point, respondents'

counsel submitted that there is no delay, therefore, no explanation.

24. Article 22(5) of the Constitution given a right to the detenu to have his representation considered by appropriate Government or authority and this right is two-fold--(1) consideration of the representation by the Government as soon as it is received, (2) such consideration of the representation not to be postponed till its consideration by the Advisory Board, as the consideration of representation by the appropriate Government is independent of the Advisory Board. The Government is bound to consider the representation as soon as it is received and if it is satisfied in the light of the representation made and on consideration that it is not necessary to detain the detenu, to release the detenu immediately. The Supreme Court in *Sk. Sekawat v. State of W.B.*, AIR 1975 SC 64 : (1974 Cri LJ 33) has held (para 3):

'The requirement of Article 22(5) of the Constitution that the authority making the order of detention should afford the detenu the earliest opportunity of making a representation against the order of detention would become illusory if there were no corresponding obligation on the State Government to consider the representation of the detenu as early as possible. It is not enough for the State Government to forward the representation to the Advisory Board while seeking its opinion as to whether there is sufficient cause for the detention of the detenu. The State Government must itself consider the representation of the detenu and come to its own conclusion whether it is necessary to detain the detenu. If the State Government takes the view, on considering the representation of the detenu, that it is not necessary to detain him it would be wholly unnecessary for it to place the case of the detenu before the Advisory Board. The requirement of obtaining the opinion of the Advisory Board is an additional safeguard for the detenu over and above the safeguard afforded to him of making a representation against the order of detention. The opinion of the Advisory Board, on a consideration of the representation, is no substitute for the consideration of the representation by the State Government.'

In *Vimal Chand v. Pradhan*, AIR 1979 SC 1501: (1979 Cri LJ 1131), going a step further the Supreme Court held : (para 4)

'There are thus two distinct safeguards provided to a detenu : one is that his case must be referred to an Advisory Board for its opinion if it is sought to detain him for a longer period than three months and the other is he should be afforded the earliest opportunity of making a representation against the order of detention and such representation should be considered by the detaining authority as early as possible before any order is made confirming the detention. Neither safeguard is dependent on the other and both have to be observed by the detaining authority. It is no answer for the detaining authority to say that the representation of the detenu was sent by it to the Advisory Board and the Advisory Board has considered the representation and then made a report expressing itself in favour of the detention. Even if the Advisory Board has made a report stating that in its opinion there is a sufficient cause for the detention, the State Government is not bound by such opinion and it may still on considering the representation of the detenu or otherwise, decline to confirm the order of detention and release the detenu. The detaining authority is, therefore, bound to consider the representation of the detenu on its own and keeping in view all the facts and circumstances relating to the case, come to its own decision whether to confirm the order of detention or to release the detenue.'

25. Where Government fails in its obligation to consider the representation immediately, the order of detention becomes invalid. It must not be forgotten that a person detained without trial is entitled to expeditious disposal of his representation. It is in this context, that an unexplained delay of one month and three days on the part of the Government to consider the detenu's representation, assumes importance. The Supreme Court in a series of cases has struck down detention on the ground of unexplained delay in consideration and disposal of representation. In *Tara Chand v. State of Rajasthan*, (1980) 2 SCC 321 : (1980 Cri LJ 1015), the Supreme Court has held that the Government is duty bound to consider the representation and deprecated the undue delay on the part of the Government in considering and deciding the representation of the detenu. In *Yusuf Abbas v. Union of India*, AIR 1982 SC 1170 : (1982 Cri LJ 1396), a delay of 29 days in disposal of representation was held to be fatal to the detention. A delay of 17 and 20 days in considering the representation resulted, in detention order being struck down in *Narendrasingh Suri v. Union of India*, (1980) 2 SCC 357 : (1980 Cri

LJ 683) and Francis v. W. C. Khambra, 1980 (2) SCC 275 : (1980 Cri LJ 548). In Prabhakar Dhoru v. S. G. Pradhan (1971) (3) SCC 896) a delay of 16 days in disposing of the detenu's representation, resulted in quashing of detention and in an order of release of the detenu.

26. Let us now see, as to what justification, if any, the respondents have to offer, for belated disposal of detenu's representation. The petitioner on 26-7-1989 moved an application (although it is dated 22-7-1989), stating that although he had sent a representation on 14-6-1989, to the concerned authority against the detention order, but despite a lapse of forty days, the same had not been considered and disposed of. The respondents filed their return on 29-7-1989, but there is absolutely no mention about the delay in disposal of the representation, either in the return or in the affidavit, despite being supplied with a copy of the aforesaid application (dated 22-7-1989). On 31-7-1989 the petitioner filed a photostat copy of the rejection order dated 17th July, 1989, received by him on 23-7-1989. This order also does not disclose any reason as to why consideration and decision on petitioner's representation was delayed. It is not, that they were not knowing about the grievance made by the petitioner. In absence of any explanation whatsoever, the delay of full one month and three days in disposing of the petitioner's representation against his detention must be held to be uncondonable and wholly unjustified. Petitioner's detention is, therefore, liable to be quashed on this ground as well.

27. The next point, which deserves consideration is the solitary incident, imputed against the petitioner. Shri Neema, learned Standing Counsel for the Union of India, submitted that a preventive detention order can be based on a solitary incident as well. Admittedly, except for this solitary instance, there is no other act or indulgence attributed to the petitioner. Shri Gupta, while not disputing the above submission as a proposition of law, however, added that it would depend on facts of each case. The proposition cannot be so generalised as to be of universal application. In a given case, depending on its facts, an inference based on a single act unmistakably pointing to repetitive tendency, may be drawn, but it must proceed and be based on a reasonable prognosis of future behaviour of a person, based on his past conduct. It is not merely necessary, but also highly essential

that this reasonable prognosis is of future behaviour is borne out from the grounds of detention, the reason being, that the order of detention is preventive in nature and not punitive.

28. Shri Gupta stressed that unlike Section 3 of the National Security Act, the language employed in Section. 3 of Conservation of Foreign Exchange Act and particularly the use of the words 'engaging, dealing, smuggling' is clearly indicative of a greater degree of involvement and participation than merely 'acting' as used in Section 3 of the National Security Act. 'Engaging' presupposes a higher degree of involvement in contrast with a single act. The Supreme Court in *Ramveer Jatav v. State of U.P.*, AIR 1987 SC 63 : (1987 Cri LJ 321) has held as follows:

'There are cases where one ground may be regarded as sufficient if the activity alleged is of such a nature that the detaining authority could reasonably infer that the detenu must be habitually engaged in such activity or there may be other circumstances set out in the grounds of detention from which the detaining authority could reasonably be satisfied even on the basis of one ground that unless the detenu is detailed, he might indulge in such activity in future.'

29. There is absolutely no indication in the grounds of detention about any likelihood of future indulgence on the part of the petitioner.

30. In the instant case there is a positive assertion that the petitioner did not indulge in any such activity in the past -- (See Annexures 9 and 19 petitioner's statements dated 3-4-1989, and 5-5-1989 recorded under Section 108 of the Custom Act) The detaining authority has also relied on these statements made by the petitioner, as is evident from para 3 of the grounds of detention, filed along with the detention order, Annexure-1. The petitioner, in para 3 of his petition, has specifically referred to these statements and averred that he had never indulged in any such activity in the past, which has not been controverted by the respondents in their return. All that has been said in reply to paragraph 3 of the petition is 'No comments.'

31. It is clear from the uncontroverted fact that there are no such past antecedents of gold smuggling activity attributable to the petitioner, either

apprehended or expressed in the grounds of detention, the detention order cannot be sustained in the light of the decision of the Supreme Court in *Fazal Ghosi v. State of U.P.*, 1987 SC 1877 : (1987 Cri LJ 1910) which holds: (Para 3)

'There is no doubt that preventive detention is not intended as a punitive measure, as a curtailment of liberty by way of punishment for an offence already committed. Section 3 of the Act clearly indicates that the power to detain thereunder can be exercised only with a view to preventing a person from acting in a manner which may prejudice any of the considerations set forth in the petition. In the present case, we are unable to discover any material to show that the detenus would act in the future to the prejudice of the maintenance of public order. Even if it is accepted that they did address the assembly of persons and incited them to lawlessness, there is no material to warrant the inference that they would repeat the misconduct or do anything else which would be prejudicial to the maintenance of public order. The District Magistrate, it is true has stated that the detention of the detenus was effected because he was satisfied that it was necessary to prevent them from acting prejudicially to the maintenance of public order, but there is no reference to any material in support of that satisfaction. We are aware that the satisfaction of the District Magistrate is subjective in nature, but even subjective satisfaction must be based upon some pertinent material. We are concerned here not with the sufficiency of that material, but with the existence of any relevant material at all.

Although, it was a case under the National Security Act, but the principle as regards future indulgence and its likelihood necessitating a detention order remains the same.

32. Shri Gupta, learned counsel for the petitioner, distinguished the of-cited case of *Saraswathi Seshagiri v. Estate of Kerala*, AIR 1982 SC 11-65 : (1982 Cri LJ 1251), for sustaining a detention order based on solitary act. The facts as noted by the Supreme Court are : The petitioner husband was bound for Abadhabi by Air India Flight. He was required by the Customs Officer to give a complete declaration of the contents of the baggages with specific reference to silver, gold, gold ornaments and foreign and Indian Currency. He declared that the baggages contained clothes, personal files, vegetables and fruits and categorically denied

having any Indian or Foreign Currency inside the baggages. But on examination, Indian. Currency to the tune of Rs. 2,88,900/- was recovered in bundles of 50 rupees and 100 from the leather-folder kept in brief-case, the plastic bag, shoes and under vegetables; in the card-board carton. It was this meticulous care taken for concealing the Indian Currency and taking it out of country, which led the Court to infer repetitive tendency on the part of the detenu, upholding his detention.

33. Next point urged by the petitioner's counsel is about non-supply of material documents to the detenu. This point has been argued in its various facets, but it would be sufficient for disposal of this petition to note; the most glaring fact, as placed on record by the petitioner, which has remained uncontroverted and really speaking, could not have been controverted.

34. The petitioner by his application dated 22-7-1989 has placed on record photostat copies of the entire set of documents supplied to him in Hindi along with letter dated 18-7-1989. That these documents were in fact demanded even before making a representation, is not in dispute. The fact that these documents were subsequently supplied in Hindi on 19-7-1989 itself goes to show the necessity of such supply and communication of grounds. The order of detention was passed on 17-5-1989. As is evident from the letter dated 18-7-1989, the grounds of detention were supplied in Hindi on 19-7-1989, two months and two days after the passing of the detention order. It is a case of clear violation of Section 3(3) of the Act and also contravenes Article 22(5) of the [Constitution of India](#). Communication of grounds of detention, which would mean and include all basic facts, which have gone into the process, culminating in the detention order, in a language understood by the detenu, is a point, which is no longer res-integra.

35. Shri Neema however, submitted that the detenu was in no way prejudiced because of non-supply of grounds of detention and documents in Hindi, as he had in fact made very elaborate representation, touching almost every point.

36. The object of communication of grounds of detention, in a language and script understood by the detenu is to enable him to make an 'effective' representation against his detention. This effectiveness of representation is not a matter of satisfaction of the authority to whom it is made or submitted, but of the person who

has been detained. Even the Court cannot substitute its own satisfaction about the effectiveness of any representation on any objective assessment, in a petition for a writ of Habeas Corpus, what the court has to see is whether the inbuilt procedural safeguards provided to the detenu have been followed or not and the procedural safeguards as regards communication of grounds is to be found in Section 3(3) of the Act. Affording the detenu the earliest opportunity of making a representation, as contemplated by Section 3(3) of the Act, by communicating the grounds of detention strictly within the time limit prescribed, would be rendered meaningless, if it were permitted to be argued, that despite delayed or non-communication of grounds, the detenu had in fact made an 'effective' representation'.

37. The communication of grounds has a salient purpose behind it to afford earliest opportunity to the detenu of making a representation against the order of detention. Therefore, so long as the grounds of detention are not served upon the detenu and communicated to him within five days, as contemplated by Section 3(3) of the Act, in exceptional circumstances, for reasons to be recorded in writing by the detaining authority, not later than 10 days from the date of detention, there is flagrant violation of Article 22(5) of the Constitution. No reason whatsoever, has been placed on record for belated supply of grounds and documents constituting basic facts, in Hindi for two months and two days, after passing the order of detention. The Supreme Court in *Ibrahim v. State of Gujarat*, AIR 1982 SC 1500 has emphasised that exceptional circumstances of delay, which can in no case be more than ten days, must be informed to the detenu. The detaining authority has to record its reason in writing. Nothing of the sort, has been done in the instant case. The order of detention, therefore, is liable to be quashed as it is in breach of Section 3(3) of the Act and violates Article 22(5) of the [Constitution of India](#).

38. It may also be noted at this stage itself that the letter dated : 13-6-1989, submitted by the detenu very clearly stated at the beginning, that he (the detenu) though not conversant with the English language, was submitting the letter as representation, on the basis of whatever little he could understand and make out. The fact that the detenu was a person conversant with Hindi was also within the knowledge of the detaining authority. The detaining authority knew it too well to be told that the person he was proceeding against, was conversant with Hindi, as is

evident from paragraph 11 of the grounds of detention, Annexed to the order of detention (Annexure 1), which reads as follows:

'I have relied on the materials contained in the Panchanama, statements, and documents mentioned in the enclosed list, a copy of these grounds and copies of Panchanama, statements and documents in Hindi, a language known to you, are enclosed.'

It is also an admitted position that all these documents in English referred to in para 11 of the grounds of detention, were supplied to the detenu in Hindi on 19th July, 1989, forty-nine days after the grounds of detention were served on him.

39. Shri J. P. Gupta, learned counsel for the petitioner emphasised the point that the documents should have been supplied 'pari-passu' along with the grounds of detention. The Supreme Court in *Sunil Dutt v. Union of India*, AIR 1982 SC 53 : (1982 Cri LJ 193), has held as follows (para 6):

'It is true that under Sub-section (3) of Section 3 of the Act it is provided that for the purpose of Article 22(5) of the Constitution, the communication to a person detained in pursuance of the detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen, days, from the date of detention. But, this provision under which five days' period in normal circumstances and fifteen days' period in exceptional circumstances has been provided relates to the supply or communication of the grounds on which the order of detention has been made to the detenu. It has no reference to the documents and material on the basis of which the detention order has been made.'

40. Learned counsel for the petitioner submitted that the following documents, which were material, were never supplied to the detenu. These documents have been referred to in the grounds of detention and as is evident from the above quoted extract of para 11 of the grounds of detention, they were very much relied upon by the detaining authority in passing the impugned order. The first in the series is a document, which related to a search Panchanama of Dhanyakumar

Jain's house, which figures at Item No. 4 of grounds of detention. A copy of the Panchanama was supplied to the detent, but not the documents mentioned therein. The petitioner made an application dated 10-6-1989, filed as Annexure 18, to the petition. In this application, he has enumerated the documents, which were not supplied to him. He also made it clear in this application, that he was conversant with Hindi and could not follow English to such an extent as to enable him to understand the true import of documents and reply to them. This application was forwarded through the Jail authorities. The respondents in their return have come out with a blatant denial, that this document was not received in the office of the detaining authority. The petitioner has placed on record a letter dated 22-7-1989, written by the Jail Superintendent, which clearly states that the applications dated 10-6-1989 and 13-6-1989 were forwarded to the Joint Secretary, Finance (Revenue) Department, New Delhi on 17-6-1989 and 19-6-1989. The falsity of this denial is further exposed by the order dated 17th July, 1989, rejecting the petitioner's prayer made in letter dated 13-6-1989. Paragraph 2 thereof reads of follows:

'As regards non-supply of documents the matter was looked into. The position regarding supply of various documents mentioned at para 3 of his representation is indicated in Annexures. The Collector of Customs and C. Excise, Indore is however being requested to supply Hindi translation of the documents required by him direct to him.'

If the petitioner in his letter dated 13-6-89 did make a grievance about non-supply of documents, he also referred to his application dated 10-6-1989 (Annexure 18), in the very first line, Annexure 19. If the petitioner's complaint about non-supply of documents was not received, as stated in the return, where was the question of looking into the grievance made by him It does not stand to reason, what purpose would be served by supplying documents in the language understood by the detent, after having rejected his representation. Obviously, the very object of communicating the grounds of detention stands defeated, even if every document is supplied after rejecting the representation.

41. A host of authorities, bearing on this point were cited at the Bar by Shri J. P. Gupta, but the facts being glaringly clear and undisputed, and the falsity of stand taken by the respondents exposed, to my mind it is not necessary to deal with all these authorities cited by the learned counsel, they are merely noted below for reference, if needed AIR 1975 SC 550 : (1975 Cri LJ 446) (paras 5-6); AIR 1980 SC 1744 : (1980 Cri LJ 1263) (para 16); AIR 1980 SC 1983 (paras 6, 7); AIR 1981 SC 431 : (1980 Cri LJ 1487) (para 7); AIR 1981 SC 814:(1981 Cri LJ 353) (para 6); AIR 1982 SC 53 : (1982 Cri LJ 193); AIR 1982 SC 696 : (1982 Cri LJ 611) and 1988 SCC (Cri) 193.

42. A copy of the retracted confession, of Dhanyakumar Jain was admittedly not given to the detenu, although his confessional statement has been referred to in the grounds of detention. The stand taken by the respondents in their return, once again, is highly inconsistent. The law on the point is well settled. Whenever a confessional statement is used and relied upon for passing an order of detention, if there be any retraction of such confession, the retracted statement must also be placed before the detaining authority, so that both sides of the coin may be before him.

43. The petitioner has categorically averred in para 11 of his petition that the retracted confession of 'Dhanyakumar Jain, a copy of which had in fact been obtained by the sponsoring authority, was not placed before the detaining authority. The petitioner has placed on record the confessional statement, Annexure 14, and the letter dated 6-4-1989, retracting the confession as Annexure 15, making allegation about third degree methods being adopted for obtaining confession. The sponsoring authority had in fact applied for certified copy of the above application on 9-5-1989. It has also been filed as Annexure 16. It cannot be disputed that the retraction of confession was a relevant and vital material, which could have influenced the mind of the detaining authority either way. The petitioner has not been supplied with a copy of the retracted confession, despite his demand, either it is a case of non-application of mind by the detaining authority or non-supply of material documents to the detenu.

44. The inconsistent stand taken by the respondents in their return is evident from what has been stated in paras 11, 12 and 13 of the return and what is argued in the Court. They are reproduced hereunder:

' 11. As far as retraction of the statement of Dhanya Kumar Jain is concerned. All copies relevant to the above case were placed before the detaining authority. A separate order of detention under COFEPOSA was passed for Dhanraj Jain vide P. No. 573/328/89-Cus-VIII (is enclosed as Annexure R/6).

12. As far as retraction application of Shri Ram Kumar Agrawal is concerned, the same has been placed before the detaining authority and the same has been supplied to the petitioner.

13. All vital material has been placed before the detaining authority.'

45. Item No. 4 in the 'list of Annexures' as supplied to the detenu along with the grounds of detention, not merely refers to the statement of Dhanyakumar Jain, recorded under Section 108 of the Customs Act, but specifically relied upon as well, by the detaining authority, as is evident from the extract of para 11 of the grounds of detention, as already quoted above. This 'List of Annexures' has been filed as Annexure 17 to the petition.

46. To say that placing of retracted confession was not relevant, is wholly irrelevant when a confessional statement is relied upon for basing an order of detention as in the instant case. It becomes the bounden duty of the sponsoring authority to place retracted statement as well before the detaining authority. The Supreme Court in *Sita Ram Somani v. State of Rajasthan*, AIR 1986 SC 1072 : (1986 Cri LJ 860), reversing the judgment of the Rajasthan High Court has held that since the relevant material was not placed before the detaining authority, it was not considered by him. Thus, there was non-application of mind by him of the relevant material and, therefore, the detention was illegal.

47. The petitioner has come out with his own case admittedly brought to the notice of the authorities by letter dated 18-4-89, a month before passing the detention order dt. 17-5-89 that he had been to the Chartered Accountant, by name Shri

Kasbekar, he has given out the name of his clerk, one Shri Darse, and an Advocate Shri Sailendrakumar Dwivedi was also present, one contractor Shri Parmanand Sisodia was also available, but their statements had not been recorded and placed before the detaining authority. Shri Neema argued that the petitioner cannot be permitted to build up his own defence in this petition, as it is not a criminal trial. Certainly, this petition cannot be converted into a criminal trial, but the material which could have affected the subjective satisfaction of the detaining authority, ought to have been placed before the authority concerned, as has been propounded by the Supreme Court in Sita Ram Somani's case (supra). Merely placing the letter dated 18-4-89 is of no consequence.

48. The case noted above and the following three other cases have been cited by the learned counsel on the point AIR 1974 SC 2353 : (1975 Cri LJ 12) (para 3); Ashadevi v. K. Shivraj, AIR 1979 SC 447 : (1979 Cri LJ 203) and Md. Shakeel Wahid Ahmed v. State of Maharashtra, AIR 1983 SC 541 : (1983 Cri LJ 967), in support of his contention, propounding the same view as in the latest decision of the Supreme Court.

49. It has been contended on behalf of the petitioner that the statements of the driver Gopal, Mukesh Agrawal, Sagar T. Jain, Sanjay Dave (Inspector), four constables, have not been supplied to him. It is not the respondent's pleaded case that their statements were not recorded. In fact what has been pleaded in the return is 'public interest' for non-supply of the statement of these persons. Reply to para (z-2) may be seen. Shri Gupta argued that this is a colourable exercise of power, which is not permissible.

50. It is open to the detaining authority not to disclose the facts which the detaining authority considers against 'public interest' while making an order of detention, but nondisclosure has got to be justified on the ground of 'public interest'. If it is not justified, the order of detention is rendered illegal.

51. The petitioner has in para (z-2) of grounds of his petition has categorically averred that he had not been supplied with copies of statements of the above named persons,-- Gopal driver, Mukesh Agrawal, Sagar T. Jain, Sanjay Dave, four constables and other Excise Officers, although he had applied for those copies of

their statements. Para 2 of the grounds of detention very clearly states 'in pursuance of information received' and this information, which is said to have been received, has been withheld. Admittedly, the information has not been furnished to the detenu. The respondents in their return in reply to para (z-2) say 'supply of information is against public interest, hence not disclosed'. The Supreme Court has in *Ganga v. Govt. of Maharashtra*, AIR 1980 SC 1744 : (1980 Cri LJ 1263), while dealing with the question of Constitutional imperatives, held (paras 16, 17):

'It is well settled that 'the constitutional imperatives enacted in Article 22(5) of the Constitution are twofold : (1) the detaining authority must, as soon as may be, that is, as soon as practicable after the detention, communicate to the detenu the grounds on which the order has been made and (ii) the detaining authority must afford the detenu the earliest opportunity of making a representation against the detention order. In the context, 'grounds' does not merely mean a recital or reproduction of a ground of satisfaction of the authority in the language of Section 3, nor is its connotation restricted to a bare statement of conclusion of fact. 'Nothing less than all the basic facts and materials which influenced the detaining authority in making the order of detention must be communicated to the detenu.'

This is the ratio of the decision in *Khudiram Das v. State of West Bengal*, (1975) 2 SCR 832; AIR 1975 SC 550 : (1975 Cri LJ 446), to which one of us (Sarkaria, J.) was a party. This principle was enunciated after an exhaustive survey of the authorities by Bhagwati, J., who delivered the opinion of the Court. It is, therefore, not necessary to burden this judgment by noticing all the other decisions which were examined in that case. The mere fact that the grounds of detention served on the detenu are elaborate, does not absolve the detaining authority from its constitutional responsibility to supply all the basic facts and materials relied upon in the grounds to the detenu. In the instant case, the grounds contain only the substance of the statements, while the detenu had asked for copies of the full text of those statements. It is, therefore, submitted by the learned counsel for the petitioner that in the absence of full texts of these statements which had been referred to and relied upon in the 'grounds of detention', the detenus could not make an effective representation and there is disobedience of the second constitutional imperative pointed out in *Khudiram's* case. There is merit in this

submission.

The second reason for non-supply of the copies given by Shri Salvi, it may be recalled, is that the Collector had said that the supply of the copies at that stage would be detrimental to the investigation and public interest. This 'so-called' reason also was unsustainable in law. Shri Salvi does not appear to have applied his mind to the question whether or not the supply of these copies would be injurious to public interest. He appears to have mechanically endorsed what had been written to him by the Collector in his letter, dated February 27, 1980. The detenu had asked for copies of three kinds of documents (a) His own statements which, according to the grounds of detention were inconsistent and contradictory to each other, (b) copies of the statements of his father, who is the detenu in writ petition No. 435/80. These statements, also, according to the grounds of detention, were mutually inconsistent, (c) The full texts of the statements made by the four persons, whose names, particulars and substance of their statements were mentioned in the grounds of detention.'

It is not in dispute that the petitioner had in fact asked for copies of these statements.

52. The right under Article 22(5) to be furnished particulars is subject to the limitation under Article 22(6), whereby disclosure of facts considered to be against public interest cannot be required. But when the State takes recourse to Clause (6) of Article 22 of the Constitution, it has to prove that the authority concerned was satisfied that it was not in the public interest to disclose facts upon which the grounds of detention were based. What facts are against public interest is left to the satisfaction of the detaining authority. The obligation under Clause (5) of Article 22, to communicate grounds and the discretion under Clause (6) of Article 22, vest in the detaining authority who must by swearing an affidavit to satisfy the Court, that the decision to withhold facts, information, documents statements etc., from the detenu, was reached on proper application of mind, and due consideration of relevant facts and aspects of the matter.

53. Although the question of 'public interest' is not justiciable, and it is left to the discretion and decision of the authority to choose and decide what material

particulars should be withheld, it must also be emphasised that it is not a matter of mere ipse dixit of the detaining authority. Once he (the detaining authority) discloses what considerations weighed with him in withholding the material information and documents, the Court can examine, if there was any rational nexus between the public interest and the consideration which weighed with the authority. The tragedy of this case, is that the detaining authority has filed no affidavit at all, that too; in face of a categorical allegation by the petitioner, that it was a colourable exercise of power in withholding the 'information', and there is mere bold assertion in the return as has been noted above, that it was not in 'public interest', nothing more. In the circumstance, particularly in absence of an affidavit sworn by the detaining authority the withholding of 'information' must be held to be a colourable exercise of power vitiating the detention order. The justification for withholding material facts must come from the detaining authority, which there is none in the instant case.

54. Before concluding, two more points raised by the petitioner's counsel Shri Gupta, remain to be considered. Learned counsel is right when he contends that the parents, wife, or other relations available must be informed whenever a person is taken into custody. The Supreme Court in A. K. Roy's case, AIR 1982 SC 710: (1982 Cri LJ 340), held as follows (para 75):--

'Since Section 5 of the Act provides for, as shown by its marginal note, the power to regulate the place and conditions of detention, there is one more observation which we would like to make and which we consider as of great importance in matters of preventive detention. In order that the procedure attendant upon detentions should conform to the mandate of Article 21 in the matter of fairness, justness and reasonableness, we consider it imperative that immediately after a person is taken in custody in pursuance of an order of detention, the members of his household, preferably the parent, the child or the spouse, must be informed in writing of the passing of the order of detention and of the fact that the detenu has been taken in custody. Intimation must also be given as to the place of detention, including the place where the detenu is transferred from time to time. This Court has stated time and again that the person who is taken in custody does not forfeit, by reason of his arrest, all and every one of his fundamental rights. It is, therefore,

necessary to treat the detenu consistently with human dignity and civilized norms of behaviour.

55. It is binding on the authorities. It is not the law of the land to whisk away a person and not inform his kith and kin about the custody a person proceeded against.

56. The other point is about supplying legible copies of the document. Now, legibility is a relative term what appears to be illegible to one, may appear legible to another. The object of supplying documents is primarily to apprise the detenu of the grounds' and material on which the detention order is based and this object can only be served by supplying legible copies. The grievance made by the petitioner pertains to a photostat copy of a bail order filed as Annexure 16A to the petition. Suffice it to note, that the authorities must see to it that copies of documents supplied are legible.

57. It was urged by Shri Neema, learned standing counsel for the Union of India, that the object of the Act should be kept in view while considering, such cases. We are not oblivious of the object of the Act, at the same time, we can also not afford to be unmindful of the fact that a preventive detention, which restricts personal liberty of a citizen, must be construed strictly. The safeguards provided under Article 22 of the Constitution can not be ignored or overlooked. As pointed out by the Supreme Court in *Shekh Hanif v. State of West Bengal*, AIR 1974 SC 679 : (1974 Cri LJ 606), the provisions of the Act have to be applied with watchful care and circumspection. Again in *Sk. Salim v. State of W. B.*, AIR 1975 SC 602: (1975 Cri LJ 581), the Supreme Court propounded strict interpretation of statutes relating to preventive detention in the following words (para 6):--

'It is an established rule of construction that unless the language of the statute is ambiguous, the words used by the legislature ought to be given their plain literal meaning. But it is equally important that by no rule of construction may the words of a statute be so interpreted as to bring about absurd situations in practice'.

58. Greatest concern and solicitude in upholding and safeguarding the fundamental right of liberty of a citizen must be shown by the Courts, who should

also not forget the felt necessity in enacting the Act.

59. The writ of habeas corpus which Blackstone describes as 'the most celebrated writ in the English Law' must also become the most effective writ, for its immense value cannot be over-estimated in matters relating detention without trial. This writ occupies a place of pride in our constitution as well.

60. Shri Neema has relied upon the following three decisions of the Supreme Court, Ramchandra A. Kamat v. Union of India, AIR 1980 SC 765; Kamla Kanhaiyalal Khushalani v. State of Maharashtra, AIR 1981 SC 814 : (1981 Cri LJ 353) and Mst. L. M. S. Ummu Saleema v. B. B. Gujral, AIR 1981 SC 1191: (1981 Cri LJ 889):

61. Ramchandra A. Kamat's case (AIR 1980 SC 765) (supra) lays down two propositions (at p. 767):--

'(1) On request for copies of documents referred to in para 4 of the grounds of detention have been made by the detenu the copies must be supplied expeditiously and what is reasonably expeditious will depend on the facts of each case;

(2) If there is undue delay in furnishing documents referred to in the grounds of detention, the right to make for its representation is denied and the detention cannot be said to be according to the procedure prescribed by law.'

62. This case relied upon by the learned counsel for the respondents does not help them at all. On the other hand, it supports contention advanced on behalf of the petitioner.

63. The second case relied upon by the learned counsel for the respondents is that of Kamla Kanhaiyalal Khushalani's case (1981 Cri LJ 353 (SC)) (supra). It is substantially on the same lines, as has been just noted above. This again supports the contention advanced by Shri Gupta, that the documents and material relied upon in the order of detention form integral part of the grounds of detention and must be supplied to the detenu *pari passu* grounds of detention.

64. Last case relied upon by the learned counsel is that of Mst. L. M. S. Ummu Saleema's case (1981 Cri LJ 889) (SC) (supra). This was a case under the COFEPOSA Act. No doubt, it holds the view that every failure to furnish copies of documents to which reference is made in the grounds of detention is not an infringement of Article 22(5) of the Constitution and is not fatal to the order of detention but the facts of the case are materially different. The documents sought, yet not supplied to the petitioner in the instant case, are those which specifically stated to have been relied upon by the detaining authority, as is evident from para 11 of the grounds of detention, while in Mst. L. M. S. Ummu Saleema's case (supra), the documents which were not supplied were those documents to which a mere casual reference was made in the grounds of detention. The difference lies in making a casual reference and specifically relying upon, a particular document. This case, therefore, does not help the respondents.

65. For the foregoing reasons this petition deserves to be allowed on each of the grounds. The detention is liable to be quashed and is accordingly quashed. The impugned order is set aside. Petition allowed with costs. Counsel's fee Rs. 1,000/-, if certified. The petitioner be released forthwith.